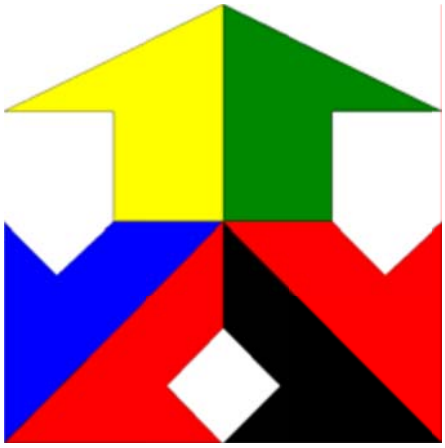
SOUTH AFRICAN LAW REFORM COMMISSION



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PROJECT 100D

FAMILY DISPUTE RESOLUTION: CARE OF AND CONTACT WITH CHILDREN

Closing date for comments:
30 June 2016

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Introduction

The South African Law Reform Commission was established by the South African Law Reform Commission Act, 1973 (Act 19 of 1973).

The members of the South African Law Reform Commission are –

The Honourable Madam Justice Mandisa Lindelwa Maya (Chairperson)
The Honourable Mr Justice Narandran (Jodie) Kollapen (Vice Chairperson)
Professor Marita Carnelley
Professor Vinodh Jaichand
Mr Irvin Lawrence
Professor Anette Oguttu
Advocate Mahlape Sello
Ms Thina Siwendu

The Secretary is Mr Tshisamphiri Matibe. The Commission's offices are situated at 2007 Lenchen Avenue South, Centurion, Pretoria.

The members of the Advisory Committee are as follows:

The Honourable Mr Justice Deon Van Zyl (Chairperson)
Advocate Mahlape Sello
Professor Elsje Bonthuys (until November 2015)
Advocate Francis Bosman
Ms Neliswa Cekiso (from 16 December 2015)
Professor Madeleen de Jong (from 16 December 2015)
Professor Wesahl Domingo (from 16 December 2015)
Professor IP Maithufi
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Prof Maithufi sadly passed away on 15 May 2015.

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Preface

This issue paper serves to -

- announce the investigation;
- clarify the aim and extent of the investigation; and
- suggest broad possible options available for solving existing problems.

The purpose of the paper is also to initiate and stimulate debate, to seek proposals for reform, and to serve as a basis for further deliberation.

The issues raised need to be debated thoroughly. The comments of all parties who are interested in these issues are of vital importance to the Commission. The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to the relevant respondents. Respondents who prefer to remain anonymous should mark their representations “Confidential”. In any event, respondents should be aware that the Commission may be required under the Promotion of Access to Information Act, 2000 (Act 2 of 2000) to release information contained in the representations.

Respondents are requested to respond as comprehensively as possible, and are invited to raise additional issues which are not covered in the questions, should they wish to do so.

Following the issue paper, the Commission will publish a discussion paper setting out preliminary proposals and draft legislation, if necessary. The discussion paper will take the public response on the issue paper into account and will test public opinion on solutions identified by the Commission. On the strength of these responses, a report will be prepared which will present the Commission’s final recommendations. The report (with draft legislation attached, if necessary) will be submitted to the Minister of Social Development and the Minister of Justice and Constitutional Development, for their consideration.

Respondents are requested to submit written comment, representations or requests to the Commission by **30 June 2016** at the address appearing on the previous page. Any request for information and administrative enquiries should be addressed to the Secretary of the Commission or the researcher allocated to this project, **Ananda Louw**.

This document is also available on the Internet at: http://salawreform.justice.gov.za.

EXECUTIVE SUMMARY

Project 100D involves the development of an integrated approach to the resolution of family law disputes. Specific reference is made to disputes relating to the care of and contact with children after the relationship breakdown of the parents.

Although South Africa has a no-fault divorce law, divorce proceedings still occur - in increasing volumes - in the various courts, and in accordance with mostly adversarial court procedures.

Long court battles often cause harm to children and their relationships with their parents. Cases that are especially problematic are those where there are claims of violence or abuse, cases which have care and contact or care and protection issues, or cases that involve voluminous files or recurring litigation.

It has been argued that South African society fails to manage divorce effectively and that there is no coherent procedural family law system in place. As a result, a patchwork of piecemeal measures in response to short-term demands and resource crises is applied. The result is an unstructured dual and fragmented court system that is confusing and burdensome to users, expensive to operate and fails to satisfy many people.

Therefore, a proper evaluation of the family dispute resolution processes is called for. The need has been identified to assist families with procedural issues arising out of separation, divorce and child welfare.

In the past, there was widespread acceptance that the courts were best suited to decide questions of custodial rights and access to children, and to decide family disputes in general. However, in recent years, this assumption has been questioned. South African judges have noted that the coldness of a courtroom and an ensuing court order are neither the best venue nor the best vehicle to resolve matters affecting children, who are often relegated to being innocent bystanders between two warring factions. The limitations associated with adversarial litigation have become firmly acknowledged and mediation seems to have become a preferred procedure as an effective dispute resolution mechanism.

The current challenges in the family law system can be summarised as follows:

a) An unfortunate hierarchy of courts exists;

b) There is a multiplicity of forums (courts) with a concomitant duplication of resources and costs;
c) There is a lack of an adequate alternative dispute resolution machinery for family disputes; and
d) Some substantive issues of law also need to be addressed.

The terms of reference of this investigation are, therefore, to develop recommendations regarding the further development of a family justice system, that is orientated to the needs of children and families. This system must foster early resolution of disputes, thereby minimising family conflict.

As part of accomplishing this goal, this issue paper presents the result of research, analysis and consultation focused on:

a) A review, where necessary, of the current **policies** that provide support to parents, children and extended family structures during the resolution of family disputes (Chapter 2);

b) Cost-effective, accessible, efficient and integrated **processes** to support the policies as set out in family law legislation (Chapter 3); and

c) Appropriate **structures** necessary to accommodate these policies and processes, with reference to personnel, technological and facility requirements (Chapter 4).

Appropriate policies, processes and structures would ensure a well-structured and cohesive family law legislative framework that can assist families to resolve their disputes both collaboratively (outside the court room) and by adjudication (in the court room). Parties should have the freedom to tailor the procedure they follow to meet the needs of their particular dispute.

Chapter 1 of this paper provides an introduction to the investigation and its scope. In Chapter 2, specific issues are discussed, including an evaluation of existing terminology (par 2.1); hearing the child's voice in both private and public family law disputes (par 2.2); the development of a fair system for relocation of families and the impact of such a system on cases involving the abduction of children (par 2.3); ideas on how adult dependent children should be dealt with (par 2.4); the position of unmarried fathers now that the Natural Fathers of Children Born Out of Wedlock Act has been replaced by sections in the Children's Act (par 2.5); the impact of domestic violence or sexual abuse on the resolution of family law disputes (par 2.6); professional or expert reports (par 2.7); child-headed households (par 2.8); children in need of care who are being cared for by family members (par 2.9); and the implications of artificial insemination in unmarried couples for parental responsibilities and rights (par 2.10).

Chapter 3 interrogates the processes needed to address family law disputes both in and outside the court system, and from both a private and public family law perspective. Specific issues include the simplification of court procedures, and processes, and the implementation of an effective case management system (para 3.3--3.4); the implementation of information technology initiatives for the civil justice system (par 3.5); the optimal use of various alternative dispute resolution processes (including mediation, arbitration, African dispute resolution, court-annexed mediation, collaborative dispute resolution and facilitation or case management (parent coordination) to enhance access to justice (para 3.6--3.13); the importance of parenting information and education (par 3.14); and the enforcement of rights (par 3.15).

Specific issues relating to the structures necessary to deal with family dispute resolution are discussed in Chapter 4. These are the effectiveness of the courts, their jurisdiction and capacity to deal with civil (family) disputes (para 4.2 and 4.9); the problems encountered by the Office of the Family Advocate (par 4.3); the position of traditional courts (par 4.4); community dispute resolution forums (par 4.5); private mediators (par 4.6); informal community involvement (par 4.7), and Legal Aid South Africa (par 4.8). Chapter 4 also addresses the possible unification of the South African family justice system (par 4.9, especially 4.9.78--4.9.81).

The challenge for the future does not seem to require a choice between mediation and litigation, but a plan to integrate the two. One needs to ensure a judicial system that is both more efficient in resolving family disputes and more likely to serve therapeutic justice. The therapeutic justice process should empower families through skills development and should assist families to resolve their own disputes; it should also provide access to appropriate services, and offer a variety of dispute resolution forums within a unified system, so that the family can resolve problems without additional emotional trauma.

The ultimate object of this investigation is to ensure access to justice for the most vulnerable people in our community, namely, children.

To facilitate a focused debate, respondents are requested to formulate crisp, but comprehensive, submissions to the list of questions set out in the text of the paper. The questions are repeated in Annexure A for ease of reference. Respondents are welcome to respond only to those questions that are of interest to them. They are also welcome to add any additional issues that might need to be considered.

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CHAPTER 1

INTRODUCTION

1.1 The need for reform: Why a debate now?

1.1.1 The South African Law Reform Commission (SALRC) is currently involved in an investigation entitled "Care of and contact with children" (Project 100D).[1] The family mediation sub-project (Project 94) has been incorporated in this investigation.

1.1.2 The object of Project 100D was originally to develop an integrated approach to the implementation of family law in South Africa, with specific reference to disputes relating to children after the relationship breakdown of their parents. This project originated in concerns about children who were affected by the adversarial nature of the divorce and/or separation proceedings of their parents. One of its aims was to propose structures and processes to deal with the exercise of parental responsibilities and rights in relation to children in a cost-effective manner that reduces conflict and resolves issues expeditiously. With the incorporation of the family mediation investigation (Project 94), the project was extended to include the development of proposals for alternative dispute resolution (ADR) for all family disputes relating to children, including both private and public law disputes.[2] The interests of all children, including children from customary marriages and children living in rural areas have to be considered.

1.1.3 The impetus behind the decision to include this investigation in the SALRC's programme lies, firstly, in the SALRC's 2002 investigation into the Review of the Child Care Act, Project 110.[3]

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1 See discussion in Chapter 2 on the correct use of the terms "care" and "contact" versus "custody" and "access".

2 Zaal FN "Children's Courts and Alternative Dispute Resolution in Care and Protection Cases: An Assessment of the Legislation" 2010 73 ***THRHR*** 353 at 354 stated that in many systems ADR is increasingly used as an adjunct to court litigation involving children. This has extended from private law disputes, such as those between parents, to public law cases such as welfare-initiated child care and protection matters.

3 South African Law Reform Commission ***Review of the Child Care Act*** Report Project 110 2002 including a Draft Children's Bill (hereafter "SALRC Project 110 Report").

1.1.4 The Project 110 Report provided the basis for the enactment of the Children's Act in 2005,[4] which came into operation in June 2007. Consisting of 22 chapters and 315 sections, the Act deals with various aspects of childhood in South Africa.

1.1.5 The SALRC report also recommended that over and above the investigation into the review of the Child Care Act, a further investigation providing for new divorce legislation should be introduced.[5] This additional investigation should deal with the protection of children affected by the adversarial nature of divorce or separation proceedings.[6]

1.1.6 The SALRC had highlighted the plight of children affected by the divorce or separation of their parents in the discussion paper[7] that preceded the Project 110 report. In Chapter 14 of the discussion paper the SALRC made several proposals regarding the protection of such children.[8] These proposals primarily involved amendments to the Divorce Act 70 of 1979 and not the Child Care Act 74 of 1983, and were, therefore, not included in the report.[9]

1.1.7 Some of the problems discussed in Discussion Paper 103 were the following:[10]

- reducing conflict (the negative impact that adversarial, protracted court proceedings have on children);
- the limited capacity of the Office of the Family Advocate (established in accordance with the Mediation in Certain Divorce Matters Act of 1987);
- parenting education;

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4 Children's Act 38 of 2005.

5 SALRC Project 110 Report para 13.5 at 202. It stated at the time that such an investigation would have to go beyond the confines of the Divorce Act and also consider the General Law Further Amendment Act, the Matrimonial Affairs Act and the Mediation in Certain Divorce Matters Act.

6 The South African Law Reform Commission in its ***Review of the Child Care Act*** Discussion Paper 103 Project 110 February 2002 (hereafter referred to as "SALRC Project 110 Discussion Paper") at 642 with reference to Burman S, Derman L and Swanepoel L "Only For the Wealthy? Assessing the Future for Children of Divorce" 2000 16 ***SAJHR*** 535 stated as follows:

> Divorce or separation is invariably traumatic for all concerned, but especially for the children of such a marriage or relationship.

7 SALRC Project 110 Discussion Paper.

8 See discussion in par 1.1.7 below.

9 South African Law Reform Commission ***Functioning of the Commission: Children Affected by the Divorce or Separation of their Parents: Inclusion of Investigation in Commission's Programme*** Committee Paper 1012 26 November 2002.

10 SALRC Project 110 Discussion Paper, Chapter 14 at 642 and further.

- hearing children's voices;
- enforcement of court orders;
- process to be followed where allegations of child abuse surfaces in a divorce case; and
- maternal preference or the "tender years" rule.

1.1.8 Secondly, the SALRC recommendation for the inclusion of this investigation also took into consideration a separate request for an investigation regarding the problems experienced with regard to access to children after divorce. The request had been received from the Bloemfontein Office of the Family Advocate.[11]

1.1.9 Finally, in 2010, Cabinet endorsed an initiative by the Minister of Justice and Constitutional Development to undertake a comprehensive review of the civil justice system. The Civil Justice Review Project (CJRP), inter alia, proposes the optimal use of ADR to enhance access to justice. This new development changed the tone of the discussion around all aspects of ADR. It also identified the following aspects of the civil justice system as being problematic:[12]

(a) Access to courts by persons particularly in rural communities;

(b) Family law disputes, including divorce and matrimonial disputes, which are prolonged by the fragmented court system; and

(c) The optimal use of Alternative Dispute Resolution (ADR) to enhance access to justice.

1.1.10 The need has, therefore, been identified to assist families with procedural issues arising out of separation or divorce, and child welfare. In this regard the recommended strategies and envisaged actions identified by the Department of Social Development (DSD) should be noted.[13] Processes should be considered that will

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11 EM Venter in a letter dated 7 June 2002.

12 In terms of the CJRP the SALRC forms part of the research team responsible for the investigation of these issues.

13 Department of Social Development ***White Paper on Families in South Africa*** June 2013 (hereafter "DSD ***White Paper on Families*** 2013") identified the following strategies and actions (at 39):

1. Affirm the importance of the family.
2. Respect the diverse family types and values in the country.
3. Foster stable marital unions.
4. Promote intergenerational solidarity.

encourage parties, and their lawyers, to resolve problems in a collaborative manner. Examples of such possible processes include mediation, collaborative law, judicial case conferences, facilitation, and arbitration.

1.1.11 Robert Mnookin and Lewis Kornhauser[14] refer to "an alternate way of thinking of the role of the law at the time of divorce". They state that:

> We see the primary function of contemporary divorce law not as imposing order from above, but rather as providing a framework within which divorcing couples can themselves determine their post-dissolution rights and responsibilities.

1.1.12 The Minister appointed an Advisory Committee, at the request of the SALRC, to deal with this investigation. The following persons were appointed to this Committee:

- Judge Deon Van Zyl (Chairperson)
- Professor Elsje Bonthuys (until November 2015)
- Adv Francis Bosman SC
- Professor Ignatius Maithufi (until his passing in 2015)
- Professor Tshepo Mosikatsana

Adv Mahlape Sello, a member of the SALRC, has been designated by the SALRC as a member and project leader of the Advisory Committee.

1.1.13 On 16 December 2015 the Minister appointed the following additional members to the Committee:

- Ms Neliswa Cekiso
- Professor Madeleen de Jong
- Professor Wesahl Domingo

1.1.14 The Committee brings together experts from various constituencies. The choice of members reflects an appreciation of the importance of involving all stakeholders in the process of drafting legislation.

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5. Promote positive values and moral regeneration.
6. Promote gender equality.
7. Encourage fathers' involvement in their children's upbringing.
8. Encourage responsible co-parenting by both mothers and fathers.

[14] BC Justice Review Task Force ***Family Justice Reform Working Group*** 2002-2007 **http://www.bcjusticereview.org/working_groups_family_justice/** accessed at 4/3/2013 with reference to Mnookin R & Kornhauser L **"**Bargaining in the Shadow of the Law: A Case of Divorce" 1979 88 ***Yale Law Journal*** 950.

1.2 Terms of Reference

1.2.1 The terms of reference for this investigation are to develop recommendations for the further development of the family justice system, orientated to the needs of children and families, to foster early resolution of disputes and thereby minimise family conflict.

1.2.2 To accomplish this goal, the SALRC's research, analysis and consultation will focus on -

a) a review, where necessary, of the current **policies** that provide support to parents, children and the extended family structures during and after relationship breakdown;

b) cost-effective, accessible, efficient and integrated **processes** to support the policies (as reviewed) as set out in the Children's Act, 2005 and other family law legislation; and

c) appropriate **structures** necessary to accommodate these policies and processes, with reference to personnel, technological and facility requirements.

1.2.3 Appropriate policies, processes and structures will ensure a coherent family law legislative framework that will assist families to resolve their disputes, both collaboratively (outside the court room) and by adjudication (in the court room).

1.2.4 Specific issues that will be dealt with include:[15]

a) The effectiveness of the courts,[16] their jurisdiction, and capacity to deal with civil (family) disputes. This issue includes the simplification of court procedures and processes as well as the implementation of an effective case management system. It has been suggested that court delays could be prevented if judicial officers, rather than the parties, are mandated to dictate the pace of litigation.

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15 See also the Terms of Reference for the Civil Justice Review Project (CJRP) at 2.

16 See discussion on courts in Chapter 4.

b) The optimal use of ADR to enhance access to justice.

c) Hearing the child's voice.

d) Relocation of families.

e) Adult dependants.

f) Unmarried fathers.

g) Domestic violence and sexual molestation accusations.

h) The implementation of information technology initiatives for the civil justice system. Such initiatives would include the electronic filing of court documents and electronic service of court processes (by fax, email, etc).

i) Parental education.

j) Access to the legal system, particularly in rural communities. Equal protection of the law must be provided to all persons, which includes proportionate and fair distribution and provision of legal services to citizens for whom legal services have until now been unaffordable.

k) Affordability and cost effectiveness. This assessment will include the role and mandate of Legal Aid South Africa in relation to civil adjudication.

l) Avoiding delays in family matters involving children.

1.3 Social and political context of investigation

1.3.1 Families should not be viewed in isolation. The family should be considered in the context of the country's history and its contemporary political, economic and social forces.[17]

1.3.2 Religious and cultural values are equally important. They provide individual and communal worldviews through which children's rights are defined and realized, and through which conceptions such as "childhood" and processes of childrearing are understood.[18]

1.3.3 The children's rights movement recognises that although children's rights are universal, such rights are not separated from social, political, religious and cultural

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17 DSD ***White Paper on Families in South Africa*** 2013 at 37.

18 Moyo PT "The Relevance of Culture and Religion to the Understanding of Children's Rights in South Africa" LLM (Human Rights) University of Cape Town 2014 (hereafter "Moyo thesis") at 4.

contexts.[19] The universality of children's rights should not be mistakenly construed as uniformity. "Organically" developed strategies, which take account of religious and cultural values but without blindly succumbing to such values, are the best way to facilitate a truly universal children's rights discourse, in South Africa and globally.[20]

1.3.4 In its White Paper on Families in South Africa,[21] the DSD defines a "family" as a societal group that is related by blood (kinship), adoption, foster care, or the ties of marriage (civil, customary or religious), civil union or cohabitation, and goes beyond a particular physical residence.[22]

1.3.5 The development of family policy in South Africa can be traced back to the institutionalised segregation of population groups that prevailed during the apartheid era.[23]

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19 Moyo thesis at 5. Moyo thesis at 10 refers to Baderin MA ***International Human Rights and Islamic Law*** Oxford University Press 2003. Baderin provides an insightful and useful definition of the term "universalism". This term, he argues, is often used interchangeably to refer to two different aspects of the universalisation of human rights. The two interrelated but distinct concepts are the concepts of "universality of" human rights and "universality in" human rights. The former refers to the universal quality or global acceptance of the human rights idea, and the latter relates to the actual interpretation and application of the human rights idea. However, the recognition and acceptance of the universality of rights does not deny the relevance of culture or religion in defining the scope and ambit of rights. The preamble of the Convention on the Rights of the Child,1989 (hereafter "CRC") notes the importance of "traditions and cultural values" and the Vienna Declaration mentions the significance of "cultural and religious particularities". In addition, the African Charter on the Rights and Welfare of the Child,1990 (hereafter "African Children's Charter") is said to reflect African conceptions of children's rights. It may be argued that the influence of culture and religious values is most apparent from an analysis of the number and nature of reservations in the CRC entered by states upon ratification. It is evident that while there may be consensus about the universal applicability of the rights of the child and the abstract principles enshrined in the Convention, considerable disagreement continues to exist when it comes to the more concrete issue of scope and ambit of these rights and principles. Moyo at 14 states that it is through the family that moral or cultural values are transmitted from one generation to the next.

20 Moyo at 6.

21 DSD ***White Paper on Families in South Africa*** 2013 at 3 and 11.

22 DSD ***White Paper on Families in South Africa*** 2013 at 11 and the references made therein stated that it is, however, important to note that household and family are not necessarily synonymous. According to the United Nations (1989), a household comprises either: (i) a single person who makes provision for their food and other essentials for living or (ii) a group of at least two people living together who make common provision for foods and other essentials. "This means that a household can contain a family, but that household members do not necessarily have to be a family…The household performs the functions of providing a place of dwelling and of sharing resources, these functions can be performed among people who are related by blood and people without any such relationship".

23 DSD ***White Paper on Families in South Africa*** 2013 at 7 with reference to Amoateng and Richter, 2007 and Harvey 1994 states that "The system gave rise to a dualistic family policy whereby a strong differentiation was made between White families and those of Africans, Coloureds and Indians and where the Western core family was adopted as the model of family life in the country".

1.3.6 After the end of apartheid and the establishment of a new democratic dispensation in 1994, the post-apartheid Government instituted various policy and legislative reforms. These were aimed at, among other things, realignment of the country's institutions in order to transform South African society.

1.3.7 The family unit is not, however, explicitly addressed in many of these policies. Rather its existence is usually inferred, and, as a result, most socio-economic benefits indirectly filter down to the family. The focus has always been on specific individuals, namely older persons, people with disabilities, and children. However, the needs of such individuals are not always congruent with the needs of the family unit. Also, services to families are provided by different government departments and non-governmental organisations, and are hence multi-sectoral in nature.

1.3.8 The following statistics about families in South Africa are important to note:[24]

a) Non-marital childbearing[25] is prevalent. Accounting for 58 percent of all births in the country, this figure ranks among the highest in the world.

b) The majority of divorces in South Africa involve children. In 2010, 54.4 percent of divorces granted involved children younger than 18 years.

c) The nuclear family is the most common type of family unit. A nuclear family consists of a parent or parents with his, her or their biological or adoptive children only.

d) Only 34.3 percent of children were living with both biological parents in 2007, a decrease from the 37.8 percent reported in 2002.

e) Most single-parent households are headed by women. In essence, "the inequalities that afflict women in society are magnified among female-headed households, where dependency and vulnerability combined with sexist societal attitudes ensure that these households are typically poorer than their male counterparts". Thus, a gender dimension is evident with regard to poverty in families. Women continue to be marginalised compared with men in terms of socio-economic opportunities, such as employment.

f) In 2010, 7.6 percent of all children lived in skip-generation households.[26] Skip-generation households are particularly prevalent in African

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24 Extracts from DSD ***White Paper on Families in South Africa*** 2013 at 13 and references made therein.

25 That is, babies born to unmarried mothers.

26 "Skipped generation households" refers to families in which grandparents raise children and parents are absent from the household.

communities. This scenario is exacerbated by the high prevalence of HIV and AIDS, but is also the result of the fragmentation of African families, associated with labour migration.

g) The trend of absent living fathers is another common and increasing phenomenon affecting families in contemporary South Africa. African families have the lowest proportion (31.1 percent) of fathers who live with their children, and Indian families have the highest (83 percent), with White families following closely (80.8 percent). For Coloured families the proportion is 53 percent.

h) Gender-based violence (GBV) is broadly defined as physical, sexual and psychological violence that targets individuals or groups (mostly women) on the basis of their gender. At present, the prevalence and other characteristics of GBV cannot be estimated with precision. The lack of data stems from under-reporting, due to fear or shame, and in the lack of adequate services for victims. However, the problem is known to be prevalent, and is a cause for public concern as it permeates every level of society.

i) Despite having an exemplary child rights environment, South Africa also has some of the highest numbers of reported cases, worldwide, of child abuse, neglect and maltreatment. The abuse takes many forms, including physical and mental abuse, sexual abuse, and exploitative work.

1.3.9 An established body of research evidence from various parts of the world has shown that stable and supportive families are associated with several positive outcomes. These include higher levels of self-esteem; lower levels of anti-social behaviour such as crime, violence and substance abuse; higher levels of work productivity; lower levels of stress; and greater self-efficacy in dealing with socio-economic hardships.[27] Stable families, irrespective of how they are constituted, demonstrate high levels of social capital and resilience, and contribute to the smooth functioning of society and, hence, to social cohesion.[28]

1.3.10 Overall the family, through its instrumental and emotional roles, has the potential to enhance the socio-economic well-being of individuals and society.[29]

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27 DSD ***White Paper on Families in South Africa*** 2013 at 5 with reference to Amoateng, 2004.

28 DSD ***White Paper on Families in South Africa*** 2013 at 5 with reference to Ziehl, 2003.

29 DSD ***White Paper on Families in South Africa*** 2013 at 6.

1.4 Legislative framework

1.4.1 South Africa has a number of global commitments.[30] Section 39(1) of the Constitution[31] provides that when interpreting the Bill of Rights, a court, tribunal or forum *must* consider international law, and *may* consider foreign law. Section 233 of the Constitution[32] provides that any reasonable interpretation of legislation that is consistent with international law must be preferred over any alternative interpretation that is inconsistent with international law.

1.4.2 There are also other international instruments that have relevance for the family.[33] Further, at the regional and national level, the recognition of the family as a critical player in sustainable socio-economic development is highlighted in various documents[34] and national policies [35] respectively.

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30 Universal Declaration of Human Rights, 1948 (Article 16, 3); International Convention on Civil and Political Rights, 1966 (Article 23, 1); International Covenant on Economic, Social and Cultural Rights, 1966; Convention on the Rights of the Child, 1990; The International Conference on Population and Development (ICPD) Plan of Action, 1994; World Summit for Social Development, Copenhagen, Denmark, March 1995; Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996.

31 Section 39 of the Constitution, 1996 provides as follows:
39. Interpretation of Bill of Rights
(1) When interpreting the Bill of Rights, a court, tribunal or forum-
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.

32 Section 233 of the Constitution, 1996 provides as follows:
233. Application of international law
When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

33 The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979; the Malta Statement of the NGO Forum, 1994 - which launched the International Year of the Family and called on governments to formulate family-sensitive polices that promote self-reliance and participation of families, taking into consideration the aspirations and expectations of families themselves.

34 Dakar/Ngor Declaration on Population, Family and Sustainable Development (1992); Social Policy Framework for Africa (2008); Plan of Action on the Family in Africa, (2004); African Charter on Human and People's Rights (1981); African Charter on the Rights and Welfare of the Child (1990); African Youth Charter (2006); Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003); SADC Protocol on Gender Development (2008). Sub-article (1) of article 8 of the SADC Protocol provides "that women and men enjoy equal rights in marriage and are regarded as equal partners in marriage"; and sub-article (4) puts measures in place "to ensure that parents honour their duty of care towards their children, and maintenance orders are enforced.

35 The applicable national policies are the White Paper for Social Welfare, 1997; the National Family Policy (final draft Version—July 2005); and the National Development Plan 2013, supported by other relevant policies in the country: Draft National Policy Framework For Families (2001); The Policy on Gender Equality (2002); The Integrated Youth Development Strategy (2005); The National Policy Framework and Strategic Plan for the Prevention and Management of Child

1.4.3 The overarching institutional framework that guides the implementation of South Africa's policies and legislation is the Constitution of the Republic of South Africa, 1996. Section 28 of the Constitution is especially relevant to this investigation.

1.4.4 Family law disputes are civil disputes, as they do not involve the State. The horizontal application of the Bill of Rights in the Constitution has "constitutionalised" private law. Family law is treated as a specialised form of civil law. Divorce, care and contact, adoptions, and maintenance are all elements of family law that affect vulnerable members of society in particular, and need to be treated with expediency and sensitivity.

1.4.5 Section 28(1)(b) of the Constitution states that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.[36]

1.4.6 The rights in section 28, as a whole, impose obligations on both the State and families to provide for children. For example, the primary obligation to provide shelter lies with the family, and only alternatively with the State where parents cannot provide for their children. However, the State also needs to fulfill its additional obligations towards children by passing laws and creating enforcement mechanisms for the maintenance of children; their protection from maltreatment, abuse, neglect or degradation; and the prevention of other forms of abuse.[37]

1.4.7 There is also an obligation on the State to create the necessary environment for parents to care for their children.[38]

1.4.8 The fundamental principle consistently applied by South African courts in care and contact disputes, as indeed in all matters concerning children, is now entrenched

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Abuse, Neglect and Exploitation (2005); The South African Millennium Developmental Goals (2005); and the Department of Social Development Framework of Positive Values (2009).

36 Section 28 (1)(b) of the Constitution of South Africa 1996; The Constitution clear recognizes that families come in many shapes and sizes. The definition of "family" also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of others.

37 ***Government of the RSA v Grootboom*** 2001 (1) SA 46 (CC).

38 ***Bannatyne v Bannatyne (Commission of Gender Equality as Amicus Curiae)*** 2003 (2) SA 363 (CC) par [24].

in section 28(2) of the Constitution. This section provides that "a child's best interests are of paramount importance in every matter concerning the child".[39]

1.4.9 A non-exhaustive but comprehensive "checklist" of criteria relevant to the application of the best interests standard was originally set out in ***McCall v McCall***[40] along the lines of the checklist of relevant factors recommended by the English Law Commission in its ***Review of Child Law, Guardianship and Custody*** **Law.**[41]

1.4.10 These criteria have since been encapsulated in section 7(1) of the Children's Act 38 of 2005,[42] which was signed into law by the President on 8 June 2006. The

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39 ***P v P*** [2007] 3 All SA 9 (SCA); 2007(5)SA 94 (SCA) and the references therein to ***Jackson v Jackson*** 2002 (2) SA 303 (SCA) at 307I-308A, ***F v F*** 2006 (3) SA 42 (SCA) para 8 and ***Lubbe v Du Plessis*** 2001 (4) SA 57 (C) at 66B-67G.

40 ***Mc Call v Mc Call*** 1994 (3) SA 201 (C).

41 Law Commission (England & Wales) ***Review of Child Law, Guardianship and Custody*** **Law** Com No 172 (1988) paras 3.17 et seq.

42 Section 7(1) of the Children's Act 38 of 2005 reads as follows:
7. Best interests of child standard
(1) 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—
(a) the nature of the personal relationship between—
(i) the child and the parents, or any specific parent; and
(ii) the child and any other care-giver or person relevant in those circumstances;
(b) the attitude of the parents, or any specific parent, towards—
(i) the child; and
(ii) the exercise of parental responsibilities and rights in respect of the child;
(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from—
(i) both or either of the parents; or
(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
(f) the need for the child—
(i) to remain in the care of his or her parent, family and extended family; and
(ii) to maintain a connection with his or her family, extended family, culture or tradition;
(g) the child's—
(i) age, maturity and stage of development;
(ii) gender;
(iii) background; and
(iv) any other relevant characteristics of the child;
(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
(i) any disability that a child may have;
(j) any chronic illness from which a child may suffer;

Children's Act also sets out other principles relating to the care of, contact with, and protection of children, and defines parental responsibilities and rights. (See discussion below).

1.4.11 Determining what type of care and contact arrangement will serve the best interests of the child, in any particular case, involves the court making a value judgment based on its findings of fact. For the High Court, this includes the court's exercise of its inherent jurisdiction as the upper guardian of minor children, and for the Regional and Children's courts, their statutory jurisdiction in terms of the applicable legislation.[43]

1.4.12 Factors that have been taken into account in the past by the Supreme Court of Appeal in determining care and contact arrangements are the following:[44]

a) The children had lived with the person all their lives;
b) The children had suffered no harm in that person's care;
c) Children were doing very well at school;
d) Person dearly loved the children and the love was reciprocated;
e) Children expressed a desire to live with one person.

1.4.13 In determining what care and contact arrangement will best serve the child's interests, a court does not look for the "perfect parent" – doubtless there is no such person. The court's quest is to find what has been called "the least detrimental available alternative for safeguarding the child's growth and development".[45]

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
(l) the need to protect the child from any physical or psychological harm that may be caused by—
(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
(m) any family violence involving the child or a family member of the child; and
(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

43 ***P v P*** supra par 14.

44 ***P v P*** supra par 20.

45 ***P v P*** supra par 24 and the references therein *to Goldstein J, Freud A & Solnit AJ* ***Beyond the Best Interests of the Child*** *(1973) at 53, as cited in Van Heerden B, Cockrell A & Keightley R (eds)* ***Boberg's Law of Persons and the Family*** *2ed Juta Kenwyn 1999 at 528-529 n 117.*

1.4.14 In addition to the Constitution and the Children's Act, a number of Acts are relevant to the family in general and to specific family members and issues affecting them.[46]

1.4.15 In terms of section 6(1) of the Divorce Act 70 of 1979, a decree of divorce may not be granted until the court is satisfied that the provisions made or contemplated for the welfare of any minor or dependent child of the marriage are satisfied, or are at least the best possible in the circumstances - and then also only if the Family Advocate has made an enquiry in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 and the court has considered the report and recommendations of the Family Advocate.

1.4.16 To enable the court to assess the arrangements regarding the children, the court may, in terms of Section 6(2) of the Divorce Act 70 of 1979, cause any investigation which it deems necessary to be carried out; may order any person to appear before the court; and may order the parties, or any one of them, to pay the costs of the investigation and appearance. In addition, if necessary to enable the court to determine what is in the best interests of the child in a particular case, the court may use expert evidence (such as that of psychologists or psychiatrists), or evidence from other persons (such as school teachers, family members, and other care-givers), who are familiar with the family's circumstances and are cognisant of the needs of the parents and children.

1.4.17 Section 6(4) of the Divorce Act 70 of 1979 provides further that the court may appoint a legal practitioner to represent a child in divorce proceedings, and may order the parties or any one of them to pay the costs of this representation.

1.4.18 As far as procedural matters and, especially ADR, are concerned, the Constitutional Court[47] interpreted section 34 of the Constitution[48] with reference to

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46 Marriage Act 25 of 1961; Reciprocal Enforcement of Maintenance Orders Act 80 of 1963; Divorce Act 70 of 1979; Matrimonial Property Act 88 of 1984; Mediation in Certain Divorce Matters Act 24 of 1987; Social Assistance Act 13 of 2004; Housing Act 107 of 1997; Domestic Violence Act 116 of 1998; Recognition of Customary Marriages Act 120 of 1998; Civil Union Act 17 of 2006; Maintenance Act 99 of 1998; Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989; Domicile Act 3 of 1992; and Refugee Act 130 of 1998 (as amended).

47 ***Lufuno Mphaphuli & Associates (Pty) Ltd vs Andrews*** 2009 (4) SA 529 (CC) (hereafter "***Lufuno***").

48 Section 34 of the Constitution,1996 provides as follows:
Access to courts
34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

private arbitration. O'Regan ADCJ, writing for the majority, held that section 34 of the Constitution does not apply directly to private arbitrations,[49] and that persons who choose arbitration do not waive their constitutional rights under section 34 but choose rather not to exercise such rights; they instead choose to participate in a private process which must be fairly conducted. Despite the choice not to proceed before a court or statutory tribunal, the private dispute resolution proceedings will still be regulated by law and by the Constitution. Fairness is one of the core values of our constitutional order.[50] This reasoning can be applied to any private dispute mechanisms established by parties by consent.

1.4.19 To what extent the principles set out in Lufuno[51] are applicable to ADR in family matters needs to be investigated.[52] However, it is clear from the ***Lufuno*** case that ADR is regarded as a completely separate process from the process referred to in section 34.

1.4.20 An interesting point has been raised in Europe. Article 6 of the European Convention on Human Rights reads as follows:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The question here is whether compulsory mediation in the determination of civil rights and obligations would, in fact, fall foul of the requirement for a "hearing within a reasonable time" because it introduces an avoidable delay into the process.[53]

1.5 Broad developments in family law reform in South Africa[54]

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49 ***Lufuno*** at par [214]: "…The section must be interpreted on its own language and with integrity, and I cannot conclude, given the general lack of fit between private arbitration and the language of the section, that the section has direct application to private arbitration."

50 ***Lufuno*** at par [221].

51 ***Lufuno*** at par [217]: The court stated firstly that the process must be consensual – no party may be compelled into private arbitration. Secondly, that the proceedings need not be in public at all. Thirdly, that the identity of the arbitrator and the manner of the proceedings will ordinarily be determined by agreement between the parties.

52 See for example the discussion on family arbitration below.

53 See Dingwall R "Divorce Mediation: Should we Change our Mind?" 2010 32 ***Journal of Social Welfare & Family Law*** 107 (hereafter "Dingwall") at 111.

54 For a full discussion of these developments, see Chapter 4 below.

1.5.1 To provide the context of the current investigation, it is important to take account of major developments that have shaped family law in the past forty years.

1.5.2 The Divorce Act 70 of 1979 introduced the no-fault divorce. This development brought South Africa's substantive divorce law in line with modern realities.[55] The South African Law Commission (as it then was), on whose report this Act was based, argued that if irretrievable marriage breakdown was to be accepted as a ground for divorce and if the emphasis was no longer placed on the fault of a spouse, this would mitigate the conflict and emotion with which divorce proceedings are frequently fraught.[56]

1.5.3 After the introduction of the 1979 Act, the divorce rate rose dramatically. Although fault as a ground for divorce had been removed, it remained a fact in the ancillary issues and continued to cause "bitterness, distress and humiliation" in divorce cases.[57]

1.5.4 In 1979, the State President appointed a Commission of Inquiry with The Honourable Mr Justice GG Hoexter as Chairperson ("First Hoexter Commission"). The Commission investigated the structure and functioning of the courts, including the desirability of establishing a family court. In 1983, the Commission published its report ("1983 Hoexter Report").[58] One of the main findings was a general dissatisfaction with the manner in which divorce actions were dispatched in the Supreme Court, and particularly the fact that the circumstances and true interests of minor children were not properly investigated.

1.5.5 The First Hoexter Commission recommended the establishment of a specialised Family Court at the level of a Regional Court. The recommendation was

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55 SALC ***Report on the Law of Divorce and Matters Incidental Thereto*** RP 57/1978 1978.

56 At par 8.3.

57 Goldblatt B "A Feminist Perspective on the Law Reform Process: An Evaluation of Attempts to Establish a Family Court in South Africa" 1997 13 ***SAJHR*** 373 at 381; Hetherington EM & Kelly J ***For Better or for Worse: Divorce Reconsidered*** WW Norton and Company, 2002 as quoted by CS Bruch in Freeman M "International Family Mobility: Relocation and Abduction: Links and Lessons" 2013 ***IFL*** 41 at 42, who stated that: "The only childhood stress greater than having two married parents who fight all the time is having two divorced parents who fight all the time."

58 ***Commission of Inquiry into the Structure and Functioning of the Courts*** Fifth and Final Report 1983 RP 78/1983 (First Hoexter Commission Report).

not endorsed by Cabinet, partly because of its implications for the court structure and costs.[59]

1.5.6 Even though the 1983 Hoexter Report was not fully implemented, it did result in the Mediation in Certain Divorce Matters Act, 1987.[60] The new Act made provision for the appointment of Family Counselors to assist Family Advocates.

1.5.7 In 1995, the President appointed a Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court. The Chairperson was again Judge Hoexter ("Second Hoexter Commission"). It published its report in 1997 ("1997 Hoexter Report").[61]

1.5.8 The Second Hoexter Commission recommended, inter alia, that a specialised Family Court be set up at High Court level. Once again the recommendations regarding a Family Court and family counseling services were not implemented. However, in 1998, an interim system of Family Courts (initially in six pilot project areas) saw the Justice system building on the Office of the Family Advocate to provide social work services where children were involved in divorce cases.

1.5.9 The Family Court pilot sites were established at Regional Court level. The lack of legislative framework and governance have since been identified as some of the obstacles that thwarted the objectives and benefits of the pilot projects. In 2008, during a briefing to Parliament on the extension of civil jurisdiction to Regional Courts (see discussion below), the DOJCD indicated that extending civil jurisdiction to Regional Courts might help to remove some of the obstacles experienced by the pilot projects.[62]

1.5.10 In 1997, the Divorce Courts Amendment Act 1997 removed the racial exclusivity of the Black Divorce Courts by de-racialising those courts. The presiding

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59 Department of Justice and Constitutional Development ***Brief Overview of the Extension of Civil Jurisdiction to the Regional Courts Bill*** Briefing to the Justice Portfolio Committee 6 February 2008.

60 Mediation in Certain Divorce Matters Act 24 of 1987.

61 ***Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court*** Third and Final Report RP 200/1997 9 December 1997 (Second Hoexter Report).

62 Department of Justice and Constitutional Development ***Brief Overview of the Extension of Civil Jurisdiction to the Regional Courts Bill*** Briefing to the Justice Portfolio Committee 6 February 2008.

officers, appointed by the Minister of Justice and Constitutional Development were deemed to be magistrates of a Regional division as contemplated in Act 32 of 1944.

1.5.11 In 2008 the Jurisdiction of Regional Courts Amendment Act[63] was enacted. This Act amended the Magistrate's Court Act[64] to establish civil jurisdiction for Regional Courts, including jurisdiction to deal with matters being dealt with by the Divorce Courts. The Divorce Courts hence merged with the Regional Courts. The purpose of this exercise was to enhance the accessibility of the lower courts; to provide magistrates with additional knowledge, specifically in civil matters and family related law; generally to improve the efficiency and effectiveness of the lower courts; and to address the discrepancies in the Divorce Courts that had originated in apartheid legislation.

1.5.12 In 2005 the new Children's Act[65] was enacted. The Children's Act sets out principles relating to the care, contact and protection of children; defines parental responsibilities and rights; and makes provision for matters such as children's courts, parenting plans, adoption, child abduction, and surrogate motherhood. The principles call for the best interest of the child to be prioritized in all matters. The Act introduced a new discourse regarding parental rights and responsibilities and the way care and contact arrangements are constituted and determined.

1.5.13 The Act, to some degree, shifted the focus from an adversarial inquiry or investigation to mediation and agreement between parties. Traditionally, disputes concerning children were decided in a state-sanctioned adversarial legal system. The legislative encouragement of the use of mediation proceedings marks a fundamental policy shift with regard to how the interests of children might best be protected.[66] This shift is in line with the recommendations of the Report of the South African Law Reform Commission in its Review of the Child Care Act, published in 2002.

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63 Jurisdiction of Regional Courts Amendment Act 31 of 2008.

64 Magistrate's Court Act 32 of 1944.

65 Children's Act 38 of 2005.

66 Paleker M "Mediation in South Africa's New Children's Act: A Pyrrhic Victory" Paper presented at the Asia-Pacific Mediation Forum Conference, 2008 (hereafter "Paleker presentation") at 2. The House of Commons Justice Committee ***Operation of the Family Courts*** Sixth Report of session 2010-12 14 July 2011 at 3, however, refers to evidence from Australia, which indicates that the idea of shared parenting not only confused parties about how the "best interest of the child" test should operate, but may also encourage a more litigious approach by parents in private law cases.

1.5.14 Although the mediation principles were set out in the Children's Act, the procedural prescripts in the Act can largely be accredited to input made during the legislation drafting process, when the Bill was discussed in Parliament. There is no discussion or evaluation of ADR mechanisms per se in the Act or the accompanying memorandum.[67] Mediation as a concept and as a method of dispute resolution is mentioned in the Children's Act, but no detail is provided. The manner in which the mediation provisions have to be implemented, most notably through the Office of the Family Advocate, actually discards certain core values of mediation.[68]

1.5.15 In a parallel development, the Rules Board for the Courts of Law has published rules[69] that provide the procedure for voluntary submission of civil disputes to mediation at selected Magistrates' Courts. The rules apply to voluntary submission by parties to the mediation of their disputes, prior to commencement of litigation; and to disputes in litigation which has already commenced, and as contemplated in Rules 78 and 79. Court-annexed mediation in terms of the Rules became available as part of a pilot project at specified sites on 1 December 2014. These interim arrangements have not been specifically tailored to family dispute resolution.[70]

1.5.16 To determine the way forward, it appears that a proper evaluation of the family dispute resolution processes is needed. A relatively routine family-law case can be quite complex from both a legal and logistical point of view. The case might involve property, spousal support, and parenting issues, and these issues may be intertwined. There might be significant issues involving complex financial, business, and commercial considerations, and matters concerning pensions, estate planning, and taxes.[71] There might also be significant inter-jurisdictional issues to consider in the short, medium and long term. Although many family lawyers are equipped to deal with

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67 Paleker presentation at 4.

68 Paleker presentation at 28.

69 Department of Justice and Constitutional Development ***Rules Board for Courts of Law Act, 1985 (Act No 107 of 1985) Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa*** R 183 Government Gazette 37448 18 March 2014.

70 See discussion in Chapter 3.

71 See Diemont JA ***Stock v Stock*** 1981 (3) SCA 1280 (A) at 1286 where he stated as follows: "This is a worrying case, as are all cases in which the care and custody of children are in dispute".

such issues, most are not trained as ADR practitioners.[72] At the same time, the proper training of mediators should also be considered.

1.5.17 Furthermore, an important point to note is the difference between commercial disputes and divorce. The relational issues in many commercial disputes, particularly those involving long-standing business relationships, are transactional in nature. By contrast, although most family law disputes include important financial and transactional issues, the conflicts are essentially relational rather than transactional. Decisions that need to be made by divorcing couples are not the same as those in deteriorating commercial partnerships, which were originally "inspired by a consensus view born of mutual self-interest."[73] There is more at stake than a commercial arrangement gone wrong. According to an American analyst:[74]

> Society's treatment of divorcing people as a legal entity... is merely an artificial way of measuring emotional loss in financial terms. Whereas money is the real object of disputes between merchants, it is a mistaken symbol for divorcing spouses, manifesting their pain, humiliation, anger, and latent psychological conflicts.

1.5.18 Complex emotional and economic interdependencies in families create power dynamics that can be more complex, and more subject to the abuse of power, than the dynamics between commercial disputants.[75] Intimate partner violence is also likely to escalate at the time of divorce and may make certain forms of adjudication, or certain elements in the adjudicative process, dangerous for the victims of such violence.[76]

1.5.19 It has been argued that, in sum, the failure to manage divorce effectively is due to the fact there is no coherent vision of State and family - nor is such a vision being sought. As a result, a patchwork of piecemeal measures, in response to short-term

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72 Morris C "Arbitration of Family Law Disputes in British Columbia" Paper prepared for the Ministry of Attorney General of British Columbia 7 July 2004 (hereafter "Morris") at 9.

73 Morris at 9.

74 Thomas E Carbonneau "A Consideration of Alternatives to Divorce Litigation" 1986 4 ***University of Illinois Review*** 1119 at 1155 as referred to in Morris at 9.

75 Morris at 9.

76 See discussion on the impact of domestic violence and sexual abuse on family disputes in Chapter 2 below. See also Bonthuys E "Chapter 11: Domestic Violence" in Heaton J (ed) ***The Law of Divorce and Dissolution of Life Partnerships in South Africa*** Juta Cape Town 2014 at 475 and further.

demands and resource crises, is applied. The result is an incoherent system that is burdensome to users, expensive to operate, and fails to satisfy anyone.[77]

1.5.20 Emeritus Professor HJ Erasmus[78] stated that in common law jurisdictions, it is today generally recognised that policy decisions for the improvement of civil justice should be underpinned by careful research and analysis, based on sound empirical data. He refers to Professor Robert Black of Edinburgh University, who has said the following in this regard:

> ..procedural reforms achieve nothing if they are simply conjured out of thin air (or out of the - perhaps atypical - experiences and prejudices of particular judges and practitioners).

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77 Dingwall at 114.

78 Erasmus HJ "Forum: Rules Board" 1999 12 ***Consultus*** 29 accessed at http://www.sabar.co.za/law-journals/1999/march/1999-march-vol012-no1-pp29-30.pdf on 23 June 2013.

CHAPTER 2

SPECIFIC ISSUES IDENTIFIED FOR DISCUSSION: POLICY

As stated in Chapter 1, one leg of this investigation will be dedicated to a review, where necessary, of the current policies that provide support to parents, children, and extended family structures during and after the breakdown of a relationship.

2.1 Terminology

2.1.1 The following terms will be discussed: "care and contact", "divorce court", "mediation", "suitably qualified person", "child", and "primary residence".

a) "care" and "contact"

2.1.2 "Care" [1] and contact"[2] are relatively new concepts, which were introduced into the South African legal system by the Children's Act 38 of 2005. Section 1(2) of the

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[1] Section 1 of the Children's Act 38 of 2005 defines "care" as follows:
"care", in relation to a child, includes, where appropriate-
(a) within available means, providing the child with-
(i) a suitable place to live;
(ii) living conditions that are conducive to the child's health, well-being and development; and
(iii) the necessary financial support;
(b) safeguarding and promoting the well-being of the child;
(c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
(d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
(e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
(f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
(g) guiding the behaviour of the child in a humane manner;
(h) maintaining a sound relationship with the child;
(i) accommodating any special needs that the child may have; and
(j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;

[2] Section 1 of the Children's Act 38 of 2005 defines "contact" as follows:
"contact", in relation to a child, means-
(a) maintaining a personal relationship with the child; and
(b) if the child lives with someone else-
(i) communication on a regular basis with the child in person, including-
(aa) visiting the child; or

Children's Act also assigned the meaning of "care" and "contact" to the meaning of "custody" and "access" in current legislation.[3]

2.1.3 The Act followed the SALRC's ***Report on the Review of the Child Care Act***[4] in which the SALRC recommended that the terms "custody" and "access" be replaced with the terms "care" and "contact" in the Divorce Act and other law related thereto.

2.1.4 However, the Children's Act has not specifically amended the provisions of statutes such as the Divorce Act 70 of 1979,[5] which deals with custody and access;[6]

(bb) being visited by the child; or
(ii) communication on a regular basis with the child in any other manner, including-
(aa) through the post; or
(bb) by telephone or any other form of electronic communication;

3 Section 1(2) Children's Act 38 of 2005 reads as follows:
(2) In addition to the meaning assigned to the terms '**custody**" and '**access**' in any law, and the common law, the terms **'custody'** and '**access'** in any law must be construed to also mean '**care'** and '**contact'** as defined in this Act.

4 South African Law Reform Commission ***Review of the Child Care Act*** Report Project 110 December 2002 (hereafter "***SALRC Project 110 Report***") at par 13.2.2 on 195.

5 Sections 1, 6(3) and 8(1).

6 See para (a) of the definition of "divorce action" in the Divorce Act 70 of 1979:
'**divorce action'** means 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) ….

Section 6(3) of the Divorce Act 70 of 1979 provides as follows:
6. Safeguarding of interests of dependent and minor children
(1)-(2)…..
(3) A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.

Section 8(1) of the Divorce Act 70 of 1979 provides as follows:
8. Rescission, suspension or variation of orders
(1) A maintenance order or an order in regard to the custody or guardianship of, or access to , a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4(1)(b) or 2(b) of the Mediation in Certain Divorce Matters Act, 1987, such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not be suspended before the report and recommendations referred to in the said section 4(1) have been considered by the court.
(2)-(3)……

To be effected in consequential amendments in this investigation.

the Matrimonial Affairs Act 37 of 1953,[7] which deals with those concepts and guardianship; and the Mediation in Certain Divorce Matters Act 24 of 1987,[8] which deals with all three of those concepts. This position needs to be addressed.

2.1.5 In fact, the words "care" and "contact" should replace the words "custody" and "access" wherever the latter occur in legislation. This is especially important where new legislation is enacted. A problematic example is the Superior Courts Act 10 of 2013, which still refers to "custody" and "access", eight years after the enactment of the Children's Act.[9]

2.1.6 However, one should not make the mistake of assuming that the concepts of "care" and "contact" automatically fit the mould of "custody" and "access". The new terms represent different and broader concepts which allow for greater flexibility and fairness.[10]

2.1.7 Despite the difference in meaning, the words "custody" and "access" on the one hand, and the words "care" and "contact" on the other, are used interchangeably in this issue paper. This was necessary because many authors referred to in the paper still use or used the term "custody" and "access" instead of "care" and "contact". Thus, the word chosen in each instance is intended to facilitate fluency and clear reference.

2.1.8 Para (g) below provides a discussion of "primary or principal residence", where this term's interaction with the terms "care" and "contact" is explained.

b) "divorce court"

2.1.9 Since the enactment of the Children's Act, divorce courts have fallen away and have been substituted by Regional Courts with civil jurisdiction. The definition of

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7 Section 5.

8 Section 4.

9 Section 16.

10 In ***WW v EW*** 2011 (6) SA 53 (KZP) the court considered the relationship between the common law concept of "custody" and "access" and the statutory concepts of "care " and "contact". It found that the statutory concepts are wider than their common-law counterparts in that paragraphs (h) and (i) of the definition of care and paragraph (a) of the definition of contact are not traditionally components of custody and access, respectively.

"divorce court"[11] should therefore be deleted and sections 22(4)(b), 23(1), 28(1), 29(1), 45(3), 135(1) and 305(1)(q) be amended accordingly.

c) "mediation"[12]

2.1.10 Even though the word "mediation" is used in the Children's Act,[13] the Act contains no definition of mediation. Neither does the Mediation in Certain Divorce Matters Act 24 of 1987.

2.1.11 Paleker[14] states that mediation, as a concept, can be defined in more than one way. The core values of mediation can be expressed in more than one manner. He recommends that the definition adopted by the Australian government's advisory body on alternative dispute resolution, the National Alternative Dispute Advisory Council (NADRAC),[15] should be used. The definition is as follows:

> Mediation is the process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach agreement. *The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution*, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.[16]

2.1.12 While some may wonder whether it is worth the effort to ponder a definition of "mediation", Paleker states that this endeavour is important for several reasons:[17]

a) As alternative dispute resolution (ADR), especially mediation, becomes more institutionalised, it is important to distinguish between ADR

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11 **"divorce court"** means the divorce court established in terms of section 10 of the Administration Amendment Act 9 of 1929.

12 See also discussion on "assistance", "conciliation" and "consultation" below in Chapter 3.

13 See sections 21(3), 33(5)(b), 34 (3)(b)(ii)(bb), 49 and 71.

14 At 21.

15 NADRAC was an independent non-statutory body established in October 1995 that provided expert policy advice to the Attorney-General on the development of ADR and promoted the use of alternative dispute resolution. NADRAC concluded in late 2013 following the whole-of-government decision to simplify and streamline the business of government. NADRAC publications are still available on the Attorney-General's website.

16 NADRAC ***Alternative Dispute Resolution Definitions*** 1997 5; NADRAC ***ADR Terminology – A Discussion Paper*** 2002 at 17-20. The italicized part of the definition is subject to qualification. It is said that it is not inimical for the mediator to play a 'determinative role' provided that he or she remains neutral throughout and does not breach confidentiality. A determinative role means that he or she can steer outcomes but not decide outcomes. A determinative role also excludes an inquisitorial role for the mediator. See in this regard L Boulle below.

17 Paleker at 21.

concepts, such as mediation, and general litigation processes. Definitions help people to understand the core elements of ADR processes so that the line is not blurred between ADR and ordinary litigation.

b) If one wants to instil public confidence in mediation, it is necessary to clarify the nature of the intervention to potential users of this process.

c) For participants involved in mediation, adhering to a definition assists in carving out their respective roles so that expectations are appreciated and can be met.

d) Persons who refer parties for mediation need to have a clear idea of what mediation entails, so it can be separated from other forms of ADR (such as facilitation, conciliation, and arbitration). By distinguishing between the concepts, a proper referral can be made, having regard to the circumstances of a particular case. It is therefore important to define not only mediation but also other ADR concepts such as conciliation and arbitration.

e) For the purposes of drafting codes of conduct and ethical standards for mediators, and in relation to statutory provisions and contractual terms that provide mediators with immunity or protecting the confidentiality of proceedings, definitions are necessary.

2.1.13 The following definitions for “alternative dispute resolution” and “mediation”, respectively, are provided in Chapter 2 of the ***Rules Regulating the Conduct of Proceedings of the Magistrates’ Courts of South Africa***:[18]

a) “alternative dispute resolution” means a process, in which an independent and impartial person assists parties to attempt to resolve the dispute between them, either before or after commencement of litigation;[19]

b) “mediation” means the process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute;

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18 Department of Justice and Constitutional Development ***Rules Board for Courts of Law Act, 1985 (Act 107 of 1985): Rules Regulating the Conduct of Proceedings of the Magistrates’ Courts of South Africa*** Government Notice No R 740 of 23 August 2010 as amended.

19 Commencement of litigation could be either by notice of motion of or by the issuing of a summons.

c) "mediator" means a person selected by the parties or by the clerk of the court or registrar of the court from the schedule referred to in rule 86(2),[20] to mediate a dispute between the parties.

2.1.14 The SALRC is currently developing an Alternative Dispute Resolution Act,[21] which will also contain a definition of mediation. A coordinated approach in respect of the various pieces of legislation that deal with ADR will be needed with regard to the definition of mediation. The ADR Act will ultimately provide the basis for all mediation processes. Inputs received for Project 100 will also be considered in Project 94 and vice versa.

d) "suitably qualified person"

2.1.15 The Act contains no definition of "suitably qualified person" in relation to a person who may perform a mediation in terms of section 21(3)(a).

2.1.16 The question is raised whether a definition of "suitably qualified person" should be included in section 1. It should be noted that there are other places in the Act[22] where the term is used, other than in relation to mediation. A new term should perhaps be considered.

2.1.17 As is the case with "mediation", the definition will have to be drafted in coordination with the proposed Mediation Act as well as the Rules, both referred to in par (c) above.

e) "child"

2.1.18 In ***WW v EW,***[23] the court noted that because the Children's Act defines a child as someone under 18 years of age, it is no longer necessary to use the terms "minor

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20 Rule 86(2) of the Rules provides as follows:
(2) A schedule of accredited mediators, from which mediators for the purposes of this Chapter must be selected, will be published by the Minister.

21 South African Law Reform Commission ***Alternative Dispute Resolution*** Project 94.

22 See sections 62 and 63 of the Children's Act 38 of 2005 dealing with professional reports.

23 ***WW v EW*** 2011 (6) SA 53 (KZP) at par [31].

child" or "minor children" in legislation. The use of the words "child" or "children" is sufficient, and in fact more accurate.[24]

2.1.19 The Divorce Act, the Matrimonial Affairs Act, and the Mediation in Certain Divorce Matters Act, all refer to "minor" children.

2.1.20 A further problem that has been identified is that social workers and presiding officers sometimes fail to recognise that foreign children fall within the ambit of the Children's Act. If a child is suspected of being in need of care and protection then the process set out in sections 150 to 155 should be followed, irrespective of whether the child is a South African citizen or not.

2.1.21 This problem may be resolved by defining "child" to include all children in the Republic, including children who are not South African citizens.

f) "primary or principal residence"

2.1.22 The classic way in which the courts in many countries resolve the residence of children is to order that a child will mainly live with one parent and see the other parent every other weekend (usually including both weekend days and an overnight stay), as well as for extended periods during the holidays.[25]

2.1.23 It is also possible for a court to provide for the child to spend equal time with both parents, for example, one week with the mother and one week with the father.[26]

2.1.24 Prior to the implementation of the Children's Act, 2005 the terms to describe the situation referred to in para 1.1, where the parents shared residence on an unequal basis, would have been "custody" and "access". The situation as set out in par 1.2, where the parents shared equal residency, would have been referred to as "joint custody".

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24 See also the discussion on "adult dependant" below.

25 Kruger T ***International Child Abduction: The Inadequacies of the Law*** Bloomsburg Publishing Oxford 2011 at 21.

26 Ibid.

2.1.25 The traditional notion of "custody" involved one parent's right to exercise all aspects of parental authority to the exclusion of the other parent, except in extraordinary circumstances where joint custody was awarded.

2.1.26 As set out above, the Children's Act changed the term "custody" to "care" and the term "access" to "contact". However, the term "care" has a much wider ambit than the term "custody" as previously used.[27] "Care" includes providing the child with a suitable place to live.[28] This responsibility is shouldered by both parents when the child is in their care, be it during the week or during the school holidays. It is, therefore, now part of the parental responsibilities and rights[29] that both parents share equally in most circumstances.[30]

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27 The term "care" includes providing for the child's daily needs such as a safe home, food, education and love. It also includes promoting the well-being of the child maintaining a sound relationship with the child and also attending to the best interests of the child.

28 Section 1 of the Children's Act 38 of 2005.

29 Section 18 of the Children's Act 38 of 2005 reads as follows:

Parental responsibilities and rights
18. (1) A person may have either full or specific parental responsibilities and rights in respect of a child.
(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right -
(a) to care for the child;
(b) to maintain contact with the child;
(c) to act as guardian of the child; and
(d) to contribute to the maintenance of the child.
(3) Subject to subsections (4) and *(5),* a parent or other person who acts as guardian of a child must -
(a) administer and safeguard the child's property and property interests;
(b) assist or represent the child in administrative, contractual and other legal matters; or
(c) give or refuse any consent required by law in respect of the child, including -
(i) consent to the child's marriage;
(ii) consent to the child's adoption;
(iii) consent to the child's departure or removal from the Republic;
(iv) consent to the child's application for a passport; and
(v) consent to the alienation or encumbrance of any immovable property of the child.
(4) Whenever more than one person has guardianship of a child, each one of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or responsibility arising from such guardianship.
(5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(c).

30 Section 19 of the Children's Act 38 of 2005 reads as follows:
Parental responsibilities and rights of mothers
19.(1) The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child.
(2) If –
(a) the biological mother of a child is an unmarried child who does not have guardianship in respect of the child; and
(b) the biological father of the child does not have guardianship in respect of the the child,

2.1.27 Thus, the residence of the child does not affect the joint exercise of parental responsibilities and rights by co-holders of these rights.

2.1.28 In practice, two problems can be identified in this regard:

a) Even though the content of the parental rights exercised by the parents have changed with the implementation of the Children's Act, the practical reality is that the position as set out in para 1 above is unaltered: the child will still in most cases spend most of his or her time with one parent and less time with the other. The Children's Act has, however, not made provision for terms needed to describe this position. The courts have taken the initiative to use the term "primary residence" to describe the place where the child spends most of his or her time. However, since the Children's Act does not refer to this term, nor contain a definition of this term, the courts use the term inconsistently, and sometimes, unfortunately, even use it as a synonym for the term "custody" as previously used.[31]

b) A second problem that has been identified[32] is that the current definition of "care" and the interpretation of sections 18 to 20 leads some lawyers to argue that care is equal, and therefore the child should spend half of his or her time with each parent. This leads to the assumption that (joint)

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the guardian of the child's biological mother is also the guardian of the child.
(3) This section does not apply in respect of a child who is the subject of a surrogacy agreement.

Section 20 of the Children's Act 38 of 2005 reads as follows:
Parental responsibilities and rights of married fathers
20. The biological father of a child has full parental responsibilities and rights in respect of the child-
(a) if he is married to the child's mother; or
(b) if he was married to the child's mother at-
(i) the time of the child's conception;
(ii) the time of the child's birth; or
(iii) any time between the child's conception and birth.

31 Some examples are the following: In ***ANF v CPR*** Case no 2013/24018 South Gauteng High Court (Johannesburg) 26 July 2013 the court awarded "interim primary residence" to the applicant and "interim rights to contact" to the respondent; In ***V v T*** (325/2015) [2015] ZAFSHC (9 April 2015) the court ordered that "primary residence and care" be awarded to one party and "contact rights" to the other; In ***R v T*** (89753/14) [2015] ZAPPHC 21 (22 January 2015) the court's decision was that the "access" of the applicant could not be changed to "primary residence".

32 Department of Social Development ***Report on Recommendations Made in Respect of Final Draft*** Children's Act:Third Amendment Bill Final Draft, 29 November 2013 (hereafter "DSD ***Recommendations in Respect of Final Draft***, 2013") at 18.

"care" equals "joint custody" of the child and the child must be shuttled around equally.

2.1.29 The position may have to be clarified in legislation, as follows:

a) greater clarity should be provided on the way in which residence could be determined;[33]

b) terminology such as "primary or principal residence" and "alternative residence"[34] with definitions to ensure that the terms are properly used, could be developed.

2.1.30 It is interesting to note that the term "habitual residence" of the child, used in order to determine the application of the Hague Convention,[35] is referred to in the Convention, but not defined. This has been a matter of deliberate policy.[36] The aim was to leave the notion free from technical rules which can produce rigidity and inconsistencies between different legal systems.[37] In similar vein one may ask whether "primary residence" should be a factual, rather than a legal concept.

Questions:

1. Comment is invited on the following points:

   a) Inclusion of the definitions of "mediation" and "alternative dispute resolution" in the Children's Act;
   b) Replacement of the words "custody" with "care" and "access" with "contact", in all legislation;
   c) Deletion of the word "divorce court";
   d) Clarification regarding the words "child" and "suitably qualified person" in the Children's Act; and
   e) Whether the issue of "primary or principal residence" should be addressed in legislation, and if so, how?

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33 The ***DSD Recommendations in Respect of Final Draft***, 2013 at 18 and 37 suggests that a new section should be included under Part 3 of the Act dealing with the exercise of parental responsibilities and rights. If parents are living separately as a result of divorce or separation, a primary place of residence must be determined by the parents themselves or through court intervention.

34 In cases where the residence is shared equally.

35 Article 3 (a) of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

36 Vivatvaraphol T "Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention" 77 ***Fordham Law Review*** 2009 3325 at 3338.

37 In the case of ***SR (A Child: Habitual Residence)*** [2015] EWHC 742 (Fam) at par 16 it was emphasized that "habitutal residence" is not a legal concept to be equated with domicile, but rather a factual exercise identifying the degree of integration by the child into his environment, whatever that environment may be.

2.2 Hearing the child's voice

2.2.1 The recognition and protection of the family unit in law has traditionally implied the non-intervention of the State into the private affairs of the family, save in exceptional circumstances.[38] The family was also traditionally accorded considerable protection from the State. [39]

2.2.2 Some commentators have argued that, because of this protection, the family unit has developed a strong capacity to construct a buffer around itself, resisting State interventions that are intended to open it up for the protection of its weakest members, namely women and children.[40] Placing the child under the jurisdiction of the family has further contributed to the general invisibility of children.[41]

2.2.3 Historically, the courts have respected the rights of parents to exercise discretion and control relating to the activities, welfare, and destiny of their minor children. Children were deemed incompetent to make decisions about their own best interest. Such incapacity has been attributed to children's intellectual and emotional immaturity, their lack of experience, and a diminished capacity to exercise free will.[42]

2.2.4 In 1989, the United Nations Convention on the Rights of the Child (UNROC) declared that, pursuant to Article 12,[43] a child who is capable of forming his or her own

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38 Moyo at 14 with reference to Van Bueren G ***The International Rights of the Child*** Marthinus Nijhoff Dordrecht 1995 op cit note 5 at 67.

39 Moyo at 14 referring to 'The African Cultural Fingerprint? The Changing Concept of Childhood" in Ncube W (ed) ***Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*** 1998 11 op cit note 2 at 13.

40 Ibid.

41 Moyo at 14 with reference to Van Bueren G ***The International Rights of the Child*** Marthinus Nijhoff Dordrecht 1995 op cit note 5 at 67..

42 Mahlobogwane M "Determining the Best Interests of the Child in Custody Battles: Should a Child's Voice be Considered?" 2010 ***Obiter*** 232 (hereafter "Mahlobogwane") at 234 and the references made therein.

43 Article 12 of the UNROC provides as follows:

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
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

views is assured the right to express those views freely in all matters affecting him or herself. In particular, the child shall be given the opportunity to be heard in any judicial and administrative proceedings affecting him or her, either directly or through a representative.[44] It should be noted that no specific age was specified.[45]

2.2.5 Mahlobogwane[46] refers to Michael Freeman who explained the new development as follows:

> The liberationist movement challenged those who claimed the status of children should be advanced by conferring on children increased protection. The emphasis shifted from protection to autonomy, from nurturance to self-determination, from welfare to justice.

2.2.6 The guiding principle in matters involving children is that the interests of children are paramount. This is entrenched in the Constitution,[47] section 28, which provides that "a child's best interests are of paramount importance in every matter concerning a child".

2.2.7 The Children's Act[48] was promulgated to give effect to this constitutional imperative. Section 9 of the Children's Act echoes the constitutional standard, and section 8 supplements the list of children's rights set out in the Bill of Rights.[49] The best interests of the child standard is given content in section 7 of the Children's Act.[50]

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representative or an appropriate body, in a manner consistent with the procedural rules of the national law.

44 Article 12 does not outline how a child's voice should be heard in proceedings that affect him or her.

45 See also in this regard article 8 of the European Convention on Human Rights and the court decisions of the European Court of Human Rights pursuant to this article, and Article 24 of the Constitution of the European Union, 29 October 2004. Re ***Sahin v Germany***, Decision No 30943/96 of the Grand Chamber dated 8 July 2003. Section 39(1)(b) of the Constitution of South Africa states that a South African court "must consider international law" when interpreting the Bill of Rights. Section 233 of the Constitution states that the court must "prefer any reasonable interpretation of legislation that is consistent with international a law over any alterative interpretation that is inconsistent with international law".

46 Mahlobogwane at 234 with reference to Michael Freeman ***The Ideologies of Children's Rights*** 1992 at 3.

47 The Constitution of the Republic of South Africa,1996.

48 Children's Act 38 of 2005.

49 Section 8(1) of Children's Act 38 of 2005.

50 Section 7 of the Children's Act 38 of 2005 reads as follows:

> **7. Best interests of child standard.**—(1) 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—
>
> (a) the nature of the personal relationship between—
>
> (i) the child and the parents, or any specific parent; and

Section 6(2)(a) of the Children's Act further provides that all proceedings, actions or decisions in a matter concerning a child must, subject to any lawful limitation, respect, protect, promote and fulfil the child's rights as set out in the Bill of Rights; the "best interests of the child" standard set out in section 7; and the rights and principles set out in the Act.

2.2.8 The Children's Act has brought about a fundamental shift in the parent/child relationship from that which prevailed in the pre-constitutional era. The Act not only vests a child with certain rights, but moreover gives a child the opportunity to participate in any decision-making affecting him or her. The courts have also stated that, when determining the best interests of a child, one of the factors that must be

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(ii) the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards—

(i) the child; and

(ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from—

(i) both or either of the parents; or

(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child—

(i) to remain in the care of his or her parent, family and extended family; and

(ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child's—

(i) age, maturity and stage of development;

(ii) gender;

(iii) background; and

(iv) any other relevant characteristics of the child;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(i) any disability that a child may have;

(j) any chronic illness from which a child may suffer;

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) the need to protect the child from any physical or psychological harm that may be caused by—

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;

(m) any family violence involving the child or a family member of the child; and

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

(2) In this section "parent" includes any person who has parental responsibilities and rights in respect of a child.

taken into consideration, is the child's wishes.[51] The Children's Act has vastly extended the right to be heard, as previously contemplated in other legislation such as the Divorce Act and the Mediation in Certain Divorce Matters Act.[52]

2.2.9 Section 10 of the Children's Act[53] provides that, where a child is of such an age, maturity and stage of development as to be able to participate in any matter concerning him or her, the child has the right to do so in an appropriate way. The child's expressed views must be given due consideration.

2.2.10 Section 10 also reflects the test set out by King J in ***McCall v McCall***:[54]

> [I]f the Court is satisfied that the child has the necessary intellectual and emotional maturity to give in his expression of a preference a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words to make an informed and intelligent judgment, weight should be given to this expressed preference.

2.2.11 There is some overlap between section 10 of the Children's Act and section 28(1)(h) of the Bill of Rights, which entitles a child to legal representation at State expense in "civil proceedings affecting the child".[55] However, the two sections appear to serve distinct functions. Participation in terms of section 10 "in an appropriate way" suggests the possibility of various means of allowing the child to be heard. By contrast,

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51 See Bonniface AE "Resolving Disputes with Regards to Child Participation in Divorce Mediation" 2013 1 ***Speculum Juris*** 130 at 132 with reference to ***French v French*** 1971 (4) SA 928 (W); ***Manning v Manning*** 1975 (4) SA 659 (T) and ***McCall v McCall*** 1994 (3) SA 201(C).

52 See discussion below.

53 Section 10 of the Children's Act 38 of 2005 provides as follows:

10. Child participation

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.

54 ***McCall v McCall*** 1994 (3) SA 201 (C) at 207, endorsed by the Supreme Court of Appeal in ***F v F*** [2006] 1 All SA 571 (SCA); 2006 (3) SA 42 (SCA).

55 Section 28(1)(h) of the Constitution, 1996 reads as follows:
Children
28. (1) Every child has the right –
(a)-(g)….
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
(i)..

legal representation, referred to in section 28 effectively makes the child a party to the proceedings.[56]

2.2.12 The question of how to assess if a child "is of such an age, maturity and stage of development" to be able to express his or her views and wishes, and how to decide the weight to be given to the expressed views and wishes of the child, does not yet have a satisfactory answer.[57] It is also unclear who must conduct this assessment.

2.2.13 Participation by the child may take different forms at different times, both in and outside the court.[58]

2.2.14 Participation may be about *informing* the child of what is happening rather than leaving matters to the imagination of the child.

2.2.15 Section 6(5) of the Children's Act[59] provides that a child should be informed of any action or decision taken in a matter that significantly affects that child. Regulation 11(2)[60] similarly provides that, when a parenting plan has been agreed on – and, bearing in mind the child's age, maturity and stage of development – the child must be informed of the contents of the parenting plan by the Family Advocate, a social worker, social service professional, psychologist, suitably qualified person or the child's legal representative.

Question:

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56 Schafer L ***Family Law Service*** at 15. See discussion on legal representation below at par 2.2.31 on wider application of section 28 since it does not require the "age, maturity or stage of development" restriction.

57 Mahlobogwane at 242.

58 Parkinson P & Cashmore J ***The Voice of a Child in Family Law Disputes*** Oxford University Press 2008 (hereafter "Parkinson & Cashmore") at 19.

59 Section 6(5) of the Children's Act 38 of 2005 provides that –

(5) A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

60 Regulation 11(2) reads as follows:

(2) When a parenting plan has been agreed the child must, bearing in mind the child's age, maturity and stage of development, be informed of the contents of the parenting plan by the Family Advocate, a social worker, social service professional, psychologist suitably qualified person or the child's legal representative.

2. Should a parent also be allowed to inform the child about actions and decisions taken and the contents of a parenting plan?[61]

2.2.16 Being *listened* to is another form of participation. Children can be asked about their views or may provide them spontaneously. Section 31(1)(a) of the Children's Act[62] provides that a person who holds parental responsibilities and rights in respect of a child must give consideration to the views and wishes expressed by the child, when taking any decision about the child.

2.2.17 It has been argued that section 31 should include legal recourse in the event of non-compliance with sections 31(1)(a) and 31(2)(a) where the views and wishes of the child and/or co-holder of parental responsibilities and rights have not been ascertained and given due consideration.

Question:

3. Who or what institution should be approached for assistance in order to enforce children's rights under section 31?

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61 Vallabh S "Child-Inclusive Mediation Strategies – An Inclusive Approach which Involves Children, the Parents and a Multi-disciplinary Team" Paper presented at SAAM Mediation Conference 30 – 31 July 2014 (hereafter "Vallabh presentation").

62 Section 31(1) of the Children's Act 38 of 2005 provides as follows:

> **31 Major decisions involving child**
>
> (1) *(a)* Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph *(b)* involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.
>
> *(b)* A decision referred to in paragraph *(a)* is any decision-
>
> (i) in connection with a matter listed in section 18 (3) *(c)*;
>
> (ii) affecting contact between the child and a co-holder of parental responsibilities and rights;
>
> (iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or
>
> (iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.
>
> (2)……..

2.2.18 Regulation 8(3) and (4)[63] confirms that a child's view should be considered when an agreement on parental responsibilities and rights is developed, bearing in mind the child's (or children's) age, maturity, and stage of development. The child must be informed of the content of the agreement. If the child does not agree with the content, the matter must be referred for mediation.

Questions:

4. Who is responsible to ensure that consideration should be given to the child's views?[64] Is there a duty on the mediator to include the child in the mediation?
5. Do the child's views have to be actively canvassed in terms of Regulation 8 even if there is no dispute where the child has not expressed a view?[65]
6. Will children become a party to the mediation? May only children from a certain age participate in mediation?

2.2.19 Section 22 of the Children's Act, which deals with parental responsibilities and rights agreements, is silent on child participation. Regulation 7[66] and 8 might, therefore, very well be *ultra vires.* It has been argued that[67] –

a) A separate section after section 22(2) should be included to state that parties to a parental responsibilities and rights agreement must allow a child who is the subject of the agreement, to participate in the process if the child chooses to participate and is of such an age, maturity and stage of development that he or she is able to do so. The Office of the Family Advocate and the courts act in an oversight capacity and

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63 Regulation 8(3) and (4) reads as follows:
8. Mediation and participation of child concerning parental responsibilities and rights
(1)-(2)…..
(3) *(a)* Due consideration must be given to the views and wishes of the child or children in the development of any parental responsibilities and rights agreement, bearing in mind the child's or children's age, maturity and stage of development.

(b) Bearing in mind the child's or children's age, maturity and stage of development, such child or children must be informed of the contents of the parental responsibilities and rights agreement by the family advocate, the children's court, the High Court, a social worker, social service professional, psychologist or the child's or children's legal representative.
(4) Where a child or children referred to in sub-regulation (3) in respect of whom a parental responsibilities and rights agreement is concluded is or are not in agreement with the contents of the agreement, this should be recorded on the agreement, and the matter referred for mediation by a family advocate, social worker, social service professional or other suitably qualified person.

64 Vallabh presentation.

65 Vallabh presentation.

66 Regulation 7(6) with reference to Form 5.

67 DSD ***Recommendations in Respect of Final Draft*** 2013 at 27.

including a specific provision would place those authorities in a better position to evaluate whether the child did participate.

b) The child's participation, or reasons why he or she did not participate, must be recorded and this material provided to the court or Office of the Family Advocate in the prescribed manner. This provision would make it clear that the Office of the Family Advocate or the court concerned should be satisfied that the child's views and wishes have been ascertained by a social worker or psychologist and given due consideration.

c) Space should be provided on Form 4 to set out the child participation aspect.

2.2.20 Regulation 11(1)[68] also provides that a child must be consulted during the development of a parenting plan, and must be given an opportunity to express his or her views - which must be accorded due consideration. The child's age, maturity and state of development should always be taken into consideration.[69] The question

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[68] Regulation 11(1) reads as follows:
Participation of the child in preparation of parenting plans

11.(1) Bearing in mind the child's age, maturity and stage of development, such child must be consulted during the development of a parenting plan, and granted an opportunity to express his or her views, which must be accorded due consideration.

[69] In ***HG v CG***' 2010 (3) SA 352 (ECP) Judge Chetty in the High Court (PE) gave preference to the views of the four children as gauged from reports written by experts, despite the fact that the experts recommended that the children's views should not be followed. He stated as follows:

> [23] I am enjoined by the Act to give due consideration to the views of the children. It appears from all the reports that they are of an age and level of maturity to make an informed decision. In my judgment I do not consider it to be in their best interests to order a change to the present parenting plan.

The experts had said the following (par [15]:

> Above all the children should be relieved of the responsibility of having to choose which parent they want to live with. This creates feelings of guilt and anxiety. They are all concerned about hurting either parent, and they are deeply attached to both. They are made more anxious by having the "case" for going to their mother put to them by various well-meaning but misguided adults.

The Judge stated as follows:

> [17] It will be gleaned from the aforegoing that ***Rauch and Wessels***, contrary to the express provisions of sections 10 and 31 of 18 the Act which recognises a child's right to be heard in any major decisions involving him/her, advocate that their voices not be heard. I find this astonishing. By all accounts the children are of an age and maturity to fully comprehend the situation and their voices cannot be stifled but must be heard. The children's point of view is in direct conflict with their recommendations and this no doubt

posed is whose responsibility it is to engage in the consultation envisaged in Regulation 11?[70]

Question:

7. Are Regulations 7 and 8 ultra vires. If so, how should this problem be addressed?

2.2.21 Children may also *suggest options* for discussions or bargaining processes. At another level, children and adolescents may be asked to participate or may involve themselves directly in the decision-making process.[71]

2.2.22 As reflected in section 22(6)(a) of the Children's Act,[72] under certain circumstances the child has a right to apply for an amendment or termination of a parental responsibilities and rights agreement.

2.2.23 Section 53 of the Children's Act similarly provides that a child who is affected by or involved in the matter to be adjudicated may bring to the clerk of the court a matter which falls within the jurisdiction of the children's court, for referral to the children's court.

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actuated them to suggest that they be relieved of the responsibility of deciding with which parent to live.

70 Vallabh presentation.

71 Parkinson & Cashmore at 19.

72 Section 22(6)(a) of the Children's Act 38 of 2005 provides as follows:

22. Parental responsibilities and rights agreements

(1)-(5)…….

(6)(a) A parental responsibilities and rights agreement registered by the family advocate may be amended or terminated by the family advocate on application—

(i) by a person having parental responsibilities and rights in respect of the child;

(ii) by the child, acting with leave of the court; or

(iii) in the child's interest by any other person, acting with leave of the court.

(b) A parental responsibilities and rights agreement that was made an order of court may only be amended or terminated on application—

(i) by a person having parental responsibilities and rights in respect of the child;

(ii) by the child, acting with leave of the court; or

(iii) in the child's interest by any other person, acting with leave of the court.

(7)……..

2.2.24 ***Re T (Abduction: Child's Objection to Return)***[73] was a case in the United Kingdom that was brought under the Hague Convention on the Civil Aspects of International Child Abduction. The Court of Appeal gave guidance on the weight to be accorded to a child's wishes:

> It seems to me [said Thorpe LJ] that the matters to establish are: (1) Whether the child objects [to a particular course of conduct]. (2) The age and degree of maturity of the child. Is the child more mature or less mature than or as mature as her chronological age? ... (3) … the strength and the validity of those views [need to be ascertained] which will call for an examination of the following matters among others: (a) What is the child's own perspective of what is in her interest, short, medium and long-term? Self-perception is important because it is her views which have to be judged appropriate. (b) To what extent, if at all, are the reasons for objection rooted in reality or might reasonably appear to the child to be so grounded? (c) To what extent have those views been shaped or even coloured by undue influence and pressure, directly or indirectly exerted by the abducting party? (d) To what extent will the objections be mollified on return and, where it is the case on removal from any pernicious influence from the abducting parent?"

2.2.25 A hierarchy of the possible involvement of child participation in family law proceedings can be identified, as follows: [74]

a) children's views are not made known to the court;

b) children's views' are conveyed in a family assessment report;

c) children can be heard in the mediation process at certain intervals;

d) children are interviewed by a judge;

e) children are given separate legal representation;

f) children are witnesses in court; and

g) children litigate on their own behalf and may initiate the proceedings themselves.

2.2.26 Studies have shown that children do not generally want to make the decision where a dispute arises, but they do want their views to be heard and taken seriously.[75] This is in accordance with the distinction between "voice" (control of the process) and "choice" (control over the decision).[76] Being heard is one of the main determinants of

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73 ***Re T (Abduction: Child's Objection to Return)*** [2002] 2 Fam. LR 192 per Ward LJ 203 as referred to in Mahlobongwane at 243.

74 Fortin J ***Children's Rights and the Developing Law*** Lexis Nexis 2003 2nd ed at 212 as referred to in Parkinson & Cashmore at 39. Para (c) added to this list.

75 Canadian Special Joint Committee on Child and Access ***For the Sake of the Children*** Report 1998.

76 Ibid.

the perception that the decision-making process is fair, even if the outcome is not what one had wanted.[77]

2.2.27 The pitfalls of listening to children have been identified as follows:[78]

a) children may be placed at the centre of their parents' conflicts;
b) there is a risk of undue influence;
c) children may be given the decision-making authority that the parents need to exercise;
d) children's voices may provide an excuse for adults to avoid hard decisions;
e) there is a risk that children's voices may be used to facilitate irresponsible decisions by adults.

2.2.28 The fact that the rights of children are enshrined in various Acts is meaningless if the exercising of those rights remains elusive.[79] It seems that a child's undeniable right to be heard, in both contested and uncontested matters, is not supported by the procedural mechanisms currently in place in the South African legal system.[80]

2.2.29 The following is a discussion of child participation, with specific reference to the way in which such participation could be effected and problems that have been identified in his regard.

a) Children's views are conveyed in a family assessment report

2.2.30 The most common way in which children's voices are heard in custody proceedings is through the involvement of a professional trained in the social sciences. General practice in South Africa is to involve the Office of the Family Advocate in disputes regarding custody.[81] Independent expert evidence may also be provided.

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77 Parkinson & Cashmore at 20.

78 Parkinson & Cashmore at 13-18.

79 De Bruin DW ***Child Participation and Representation in Legal Matters*** LLD Thesis University of Pretoria 2010 (hereafter "De Bruin thesis") at 517.

80 Botha K ***Ascertaining the Voice of the Child in South African Divorce law*** LLM thesis University of South Africa November 2015.

81 Mahlobongwane at 238.

2.2.31 The recommendations of the Family Advocate or other experts' reports do not bind the court. However, in some cases the value of the reports may be such as to adjudicate the matter effectively. The question of the legal representation of children, firstly, and, secondly, expert reports, are discussed under respective subheadings later in this chapter.

2.2.32 In terms of section 4 of the Mediation in Certain Divorce Matters Act, 1987,[82] one of the key functions of the Family Advocate is to institute an enquiry to enable the advocate to furnish the court with a report and recommendations about the child's welfare. The Family Advocate may also, under certain conditions, appear at the trial of any divorce action to relate evidence and to cross-examine witnesses. However, the Act does not specifically require the Family Advocate or the Family Counsellor to listen to the views of the child.[83]

2.2.33 The prescribed questionnaire used by the Family Advocate, an Annexure to the Regulations, is parent- orientated rather than child-orientated. It includes no questions to probe or record the wishes of the child and his or her views with regard to the proposed arrangements. An amendment to make provision for the canvassing and recording of children's views, where appropriate and if the child is old enough and so chooses, may be considered.

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82 Mediation in Certain Divorce Matters Act 24 of 1987. See also the discussion above on family reports in terms of the Children's Act.

83 Section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 provides

> **4. Powers and duties of Family Advocates.**—(1) The Family Advocate shall—
>
> (*a*) after the institution of a divorce action; or
>
> (*b*) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act No. 70 of 1979),
>
> if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him by the court.
>
> (2) A Family Advocate may—
>
> (*a*) after the institution of a divorce action; or
>
> (*b*) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979,
>
> if he deems it in the interest of any minor or dependent child of a marriage concerned, apply to the court concerned for an order authorizing him to institute an enquiry contemplated in subsection (1).
>
> (3) ……..

2.2.34 As far as private forensic assessments are concerned, the permission of both parents is advised. Although legislation does not require this, codes of conduct of professional bodies are more onerous and do (ethics vs law).

2.2.35 Section 62 of the Children's Act[84] provides for the circumstances in which professional reports may be ordered by the court. However, the section does not provide for the canvassing and recording of the child's views or wishes.

2.2.36 Children whose parents have never married, and children living with a relative who is not a parent, should also be considered.

Question:

8. Should the Children's Act and the Mediation in Certain Divorce Matters Act be amended to clarify the position of the child's choice? If so, how should these amendments be made? For example, should children whose parents are unmarried and children living with a relative who is not a parent, be entitled to have their voices heard with regard to major decisions? If so, by whom?

b) Interview with Judge in Chambers

2.2.37 South African legislation directs judges to give consideration to the wishes of the child. However, it does not require judges to interview children in chambers to determine those wishes.

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[84] Section 62 of the Children's Act provides as follows:

62. Professional reports ordered by court

(1) A children's court, for the purposes of deciding a matter before it or any issue in the matter, may order, if necessary, that a designated social worker, family advocate, psychologist, medical practitioner or other suitably qualified person carry out an investigation to establish the circumstances of-

(a) the child;
(b) the parents or a parent of the child;
(c) a person who has parental responsibilities and rights in respect of the child;
(d) a care-giver of the child;
(e) the person under whose control the child is; or
(f) any other relevant person.

(2) A person referred to in subsection (1) may, subject to section 63 (1) and (2)-

(a) obtain supplementary evidence or reports from other suitably qualified persons;
(b) be required by the court to present the findings of the investigation to the court by-
(i) testifying before the court; or
(ii) submitting a written report to the court.

2.2.38 In Australia, England, and most United States jurisdictions, judges regularly interview children directly in chambers. However, the indirect method of informing the court of children's views through family assessment reports is widely preferred. Three Canadian judges (Abella, Heureux-Dubé and Rothman) have indicated that they consider the practice of judicial interviewing to be undesirable.[85]

2.2.39 In Germany, judges appointed to give a decision are obliged to personally hear the parents and the children; this obligation is based on the German Basic Law (Grundgesetz) and on consistent past decisions by the German Federal Court. The law and case law provide that children, as possessors of their own basic rights in custody and access proceedings, must be given the opportunity to make their personal relationships to both parents (as the case may be) known to the court that is adjudicating the matter. To achieve a sensitive approach to children, family court judges have to undergo further training on basic educational theory and psychology and they need practical training, skills and experience to communicate effectively with children and adolescents.[86]

Question:

9. Should judges be required to interview children?

c) Children involved in the mediation process

2.2.40 With the rise of divorce mediation as an effective means of resolving divorce, care and contact disputes, a question that arises is whether a child should actively participate in the mediation process to make his or her voice heard. Some mediators favour the active involvement of children at mediation sessions while others do not feel a child has to be physically present to have his or her voice heard.[87]

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85 Mahlobongwane at 240.

86 Carl E "Giving Children their Own Voice in Family Court Proceedings: A German Perspective" Paper presented at 4th World Congress on Family Law and Children's Rights Cape Town 20-23 March 2005.

87 Schoffer MJ "Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation" 2005 43 ***Family Court Review*** 323 (hereafter "Schoffer") at 323.

2.2.41 It has been argued that the best interests of children are properly catered for in the mediation process, since this provides children with a suitable forum in which they can vent their feelings while telling their stories. This allows them to feel heard and understood. Mediation is also a suitable forum because it avoids the hostile, confrontational, formal and intricate nature of the adversarial court system.[88]

2.2.42 In a study commissioned by the Australian Attorney General,[89] child psychologist Jennifer McIntosh studied 181 families to research child-inclusive mediation. McIntosh compared the results of parents who had been randomly divided into two groups. One group was using child-inclusive mediation and the other traditional mediation. The findings showed that children in the child-inclusive mediation group were more content with their living arrangements, a year later, and were less inclined to want to change those arrangements, compared with children who had not been interviewed. Parents whose children had not been included in the mediation process were more than twice as likely to have gone back into litigation over child-related issues. The children, mothers, and fathers of the child-inclusive group all reported better relationships with each other, relative to the traditional mediation group.

2.2.43 The premise behind the mediation model lies in the belief that children are empowered and benefit most when they are provided with information that assists them in understanding their current situation and that of their parents, as well as future plans that will affect them.[90]

2.2.44 Three ways have been identified in which a child can be included in the divorce mediation process. One method is to have children present during the final mediation session; a second method is to interview children away from their parents on one or more occasions, and then reveal the children's feelings in later sessions with parents;

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88 De Jong M "Giving Children a Voice in Family Separation Issues: A Case for Mediation" 2008 ***TSAR*** 785 at 789.

89 Editorial "Bringing Children into Divorce Mediation" 2008 ***Psychotherapy Networker*** 17 17-18; See, however, Bell F, Cashmore J, Parkinson P and Single J "Outcomes Of Child-Inclusive Mediation" 2013 27 ***International Journal of Law, Policy and the Family*** 116 where it was found that child-inclusive mediation did not prove to be more beneficial in terms of improving the parental relationship or the likelihood of resolving the dispute.

90 Sanchez EA & Kibler-Sanchez S "Empowering Children in Mediation: An Intervention Model" 2004 42 ***Family Court Review*** 554 at 556.

and in the third method, children are interviewed away from their parents while still jointly participating in the parents' decision-making sessions.[91]

Question:

10. Should children be directly involved in the mediation process? If so, how?

d) Legal representation

(i) Constitution of the Republic of South Africa 1996

2.2.45 Section 28(1)(h) of the Bill of Rights in the Constitution entitles a child to legal representation, at State expense, in "civil proceedings affecting the child, if substantial injustice would otherwise result".[92] Section 28 has a broad application and would include divorce proceedings. Such representation is available to all children, and is not subject to the "age, maturity or stage of development" restriction.[93] It is also available to children irrespective of whether they are parties to proceedings and do not directly appear before the court.[94]

2.2.46 In ***R v H***[95] the court appointed a legal representative for the child in terms of section 28 (1)(h) of the Constitution. The court held that, for the sake of convenience, equity, and avoiding multiplicity in actions and costs, the legal representative be joined as second defendant in the proceedings.

2.2.47 The court may appoint a lawyer to represent a child in high-conflict parenting disputes where it is necessary to protect the child's interest. Children's lawyers can be

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91 Schoffer at 326.

92 Section 28(1)(h) of the Constitution, 1996 reads as follows:

Children

28. (1) Every child has the right –
(a)-(g)….
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
(i)..

93 See discussion on section 10 of the Children's Act 38 of 2005.

94 De Bruin thesis at 258 and references made in fn 715 therein. See par 2.2.72 above on the distinction between sections 10 and 28.

95 ***R v H*** 2005 (6) SA 535 (C). At par [8] 540 C-D.

a useful tool in highly conflictual parenting cases. They can refocus attention on the child's best interests and help ensure that decision-makers have appropriate information when parents are unwilling or unable to provide it.

2.2.48 However, it has also been argued that the use of children's lawyers might not be appropriate, as it tends to draw the child further into the conflict. It may increase the adversarial nature of the proceedings, and, therefore, may work contrary to the child's best interests. The best way to manage high-conflict families might be to get them out of court and into more interventionist approaches where they can resolve their underlying issues.

(ii) Children's Act, 2005

2.2.49 See the discussion on section 10 above.

2.2.50 Section 54 of the Children's Act[96] allows a child to appoint a legal representative at his or her own expense.

2.2.51 The Children's Act provides in section 29(6)[97] that the court may appoint a legal practitioner, subject to section 55,[98] to represent the child at court proceedings, and may order the parties to the proceedings, or any one of them, to pay the costs of such representation.

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96 Section 54 of the Children's Act 38 of 2005 reads as follows:
Legal representation
54. A person who is a party in a matter before a children's court is entitled to appoint a legal practitioner of his or her own choice and at his or her own expense.

97 Section 29(6) of the Children's Act 38 of 2005 provides as follows:
Court proceedings
29. (1)-(5)…….
(6) The court may, subject to section 55-
(a) appoint a legal practitioner to represent the child at the court proceedings; and
(b) order the parties to the proceedings, or any one of them, or the state if substantial injustice would otherwise result, to pay the costs of such representation.
(7)…

98 Section 55 of the Children's Act 38 of 2005 reads as follows:

Legal representation of children

55. (1) Where a child involved in a matter before the children's court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to the Legal Aid Board referred to in section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969).
(2) The Board must deal with a matter referred to in subsection (1) in accordance with section 3B of that Act, read with the changes required by the context.

2.2.52 Section 279 of the Children's Act[99] further provides that a legal representative must represent the child, subject to section 55, in all applications in terms of the Hague Convention on International Child Abduction.[100]

2.2.53 Section 55(1) of the Children's Act provides that if a child in a matter before the children's court is not legally represented and the court is of the opinion that it would be in the *best interests of the child* to have legal representation, then the court *must* refer the matter to Legal Aid South Africa for consideration. Section 55(2) of the Act requires Legal Aid South Africa to deal with the referral to the court in terms of subsection (1) of the Act in accordance with the provisions of section 3B of the Legal Aid South Africa Act[101] read with the changes required by the context of the section.[102]

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99 Section 279 of the Children's Act 38 of 2005 reads as follows:

Legal representation

279. A legal representative must represent the child, subject to section 55, in all applications in terms of the Hague Convention on International Child Abduction.

100 It is unclear who is responsible for the appointment of a legal representative in a Hague Abduction matter, i.e. whether the representative should be court appointed or appointed by the Central Authority. Furthermore, making the representation subject to section 55 seems to indicate that the representation must always be from Legal Aid South Africa.

101 Legal Aid South Africa Act 39 of 2014. See discussion in par 4.8 on Legal Aid South Africa.

102 S 3B of the Legal Aid South Africa Act addresses the direction for legal aid by a court in criminal matters and prescribes that:
"(1) Before a court in criminal proceedings directs that a person (child) be provided with legal representation at State expense, the court shall –
(a) take into account –
(i) the personal circumstances of the person (child) concerned;
(ii) the nature and gravity of the charge on which the person (child) is to be tried or of which he or she has been convicted, as the case may be;
(iii) whether any other legal representation at State expense is available or has been provided; and
(iv) any other factor which in the opinion of the Court should be taken into account; and
(b) refer the matter for evaluation and report by the board.
(2) *(a)* If a court refers a matter under subsection (1)(*b*), the board shall, subject to the provisions of the Legal Aid Guide, evaluate and report on the matter.
(b) The report in question shall be in writing and be submitted to the registrar or the clerk of the court, as the case may be, who shall make a copy thereof available to the court and the person (child) concerned.
(c) The report shall include-
(i) a recommendation whether the person (child) concerned qualifies for legal representation;
(ii) particulars relating to the factors referred to in subsection (1)(*a*)(i) and(ii); and
(iii) any other factor which in the opinion of the board should be taken into account."

2.2.54 In terms of section 55(1) of the Act a number of scenarios could occur in the event of a referral by the court. The Legal Aid Guide (2009) contains criteria regarding the consideration of legal representation for children, such criteria originating from various matters that affect the child.

2.2.55 Sloth-Nielsen[103] regards Legal Aid South Africa as the main role-player in providing legal representation for children in South Africa. However, in terms of par 4.18.7 of the Legal Aid Guide, the Regional Operations Executive must give prior written consent for a child to receive legal representation to intervene in divorce, custody or maintenance proceedings between the parents of the child, if legal representation is required to protect the best interests of the child and if substantial injustice would otherwise result.

2.2.56 A concern raised by Gallinetti[104] is that the decision about whether a child should be granted legal representation at the State's expense now vests with an administrative official at Legal Aid South Africa. Such a person has no guidelines to assist in making this decision, apart from Legal Aid South Africa's own prescripts and the reference in the Constitution to "substantial injustice" which would result if legal representation is not provided.

2.2.57 On the website of Legal Aid South Africa, it is stated that in criminal cases, children automatically qualify for legal aid and do not have to take the Means Test. In a civil case, however, the family of the child will need to comply with the Means Test.

2.2.58 Van Heerden[105] points out the reality that obvious emphasis on cost considerations may impede the increase in the level of children's legal representation in children's court proceedings. To which, one might add family-law proceedings.[106]

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103 Sloth-Nielsen J "Realising Children's Rights to Legal Representation and to be Heard in Judicial Proceedings: An Update" 2008 24 ***SAJHR*** 495 at 510; information dealt with by Sloth-Nielsen op cit 515-522 reflects an increase in the number of children benefitting from legal representation in children's court matters.

104 De Bruin thesis at 369 fn 765 with reference to Gallinetti ***Commentary on the Children's Act*** 4-22. He comments that it is disappointing to note that the legal representation provisions contained in the draft Bill have been reduced to what is contained in s 55 of the Children's Act 38 of 2005.

105 Van Heerden B, Cockrell A & Keightley R (eds) ***Boberg's Law of Persons and the Family*** 2ed Juta Kenwyn 1999, 621 n 413.

106 De Bruin thesis at 516.

2.2.59 It should also be noted that the Children's Act does not include a specific section providing for separate legal representation for children in general. Section 55 of the Children's Act only refers to legal representation for children who appear before the children's court. Other matters affecting children in magistrate's courts will have to be dealt with in terms of section 28 (1)(h).[107]

2.2.60 Where Legal Aid South Africa is not functional due to a shortage of suitably trained legal practitioners - or it simply does not have the capacity to supply the required services, this will negatively influence the child's right to be heard with the assistance of a legal practitioner.

2.2.61 As far as legal representation of children in terms of the Hague Convention is concerned it has been proposed[108] that section 279 should be amended to include a further subsection. This subsection should state that the Central Authority must refer an application in terms of the Hague Convention on International Child Abduction in the prescribed manner for the appointment of a legal representative for the child. The recommendations would include that the matter must be referred on the day that an application for return is launched in terms of regulation 17 of the Regulations Relating to Children's Courts and Child Abductions. The regulations should also prescribe who the matter should be referred to, that is Legal Aid South Africa, or the Law Society, or the parties may agree on a legal representative who is willing to represent the child on a *pro bono* basis.

(iii) Divorce Act, 1979

2.2.62 Section 6 (4) of the Divorce Act 1979[109] empowers a court to appoint a legal practitioner to represent a child in divorce proceedings, and to order the parties or one of them to pay the costs of such representation.

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107 De Bruin thesis at 366 with reference to Du Toit in ***Child Law in South Africa*** 106 (fn 754).

108 DSD ***Recommendations in Respect of Final Draft*** 2013 at 216.

109 Section 6(4) of the Divorce Act 70 of 1979 reads as follows:

> **6. Safeguarding of interests of dependent and minor children**
> (1)-(3)...
> (4) For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.

2.2.63 Section 6(4) of the Divorce Act is not often utilised.[110] To date, not a single case on section 6(4) of the Divorce Act has been reported.[111] The SALRC has recommended that section 6(4) should be amended to give a court the authority to appoint an interested party, such as a member of the child's (extended) family, to support a child who experiences difficulty during parental separation or divorce, in a manner determined by the court. Such support may even involve a person being allocated temporary parental responsibilities and rights in respect of the child.[112]

2.2.64 Section 6(4) also does not comply with the provisions contained in section 28 (1)(h) of the Constitution. Section 6(4) states that the court may appoint a legal representative, and order one or both of the parties to accept responsibility for payment, whereas section 28(1)(h) provides that a legal representative will be granted at the State's expense if "substantial injustice would otherwise result".

2.2.65 Where either of the divorcing parents is indigent and cannot contribute to the costs incurred for the child's legal representation, a legal representative will not be appointed. This creates the impression that only children from wealthy families stand to benefit from such an appointment.[113]

(iv) Mediation in Certain Divorce Matters Act, 1987

2.2.66 Section 4(3) of the Mediation in Certain Divorce Matters Act, 1987[114]provides for circumstances under which the Family Advocate may, if he or she deems it in the interest of any minor or dependent child of a marriage, appear at the trial of a divorce action or hearing, and may provide evidence and cross-examine witnesses.

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110 De Bruin thesis at 357 and references made therein.

111 Robinson JA "The Right of Children to be Heard at the Divorce of their Parents: Reflections on the Legal Position in South Africa" 2007 ***THRHR*** 263 at 264.

112 SALRC ***Functioning of the Commission: Children Affected by the Divorce or Separation of their Parents: Inclusion of Investigation in Commission's Programme*** Committee Paper 1012 26 November 2002.

113 Kassan D "The Voice of the Child in Family Law Proceedings" 2003 36 ***De Jure*** 164 at 169-170.

114 Section 4(3) of the Mediation in Certain Divorce Matters Act 24 of 1987 provides as follows:

> **4. Powers and duties of Family Advocates**—
> (1)..(2)
> (3) Any Family Advocate may, if he deems it in the interest of any minor or dependent child of a marriage concerned, and shall, if so requested by a court, appear at the trial of any divorce action or the hearing of any application referred to in subsections (1) (*b*) and (2) (*b*) and may adduce any available evidence relevant to the action or application and cross-examine witnesses giving evidence thereat.

2.2.67 It is, however, important to determine the position of the Family Advocate in terms of section 28(1)(h). In ***Soller v G***[115] the court explained that legal representatives do not fulfill the same role as the Office of the Family Advocate.[116] The Family Advocate is not appointed to represent any party to a dispute, but is rather required to remain neutral and assist the court by considering all the relevant facts and making a balanced recommendation. The legal practitioner does not only represent the perspective of the child. The legal practitioner should also provide adult insight into those wishes and desires which have been confided and entrusted to him or her, and should apply legal knowledge and expertise to the child's perspective. The legal practitioner may provide the child with a voice, but is not merely a mouth-piece.[117]

(v) Magistrates' Court Act, 1944

2.2.68 The difference between the appointment of a curator ad litem and a legal representative should also be considered. An application for the appointment of a curator ad litem may be brought in terms of section 33[118] of the Magistrate's Court Act,[119] thereby importing common law into the Act. There are four grounds where such an appointment will be made,[120] namely where the –

a) child is without a parent or guardian;
b) parent or guardian cannot be found or is unavailable;
c) interests of the child are in conflict with those of the parent or guardian; and
d) parent or guardian unreasonably refuses to assist the child.

2.2.69 In ***Ex parte Van Niekerk : In re Van Niekerk v Van Niekerk***,[121] the judge was in favour of appointing a legal representative rather than a curator. It was deemed

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115 ***Soller NO v G*** 2003 (5) SA 430 (W).

116 Par [20] 437B-C.

117 ***Soller*** case at par [27] and [28].

118 Section 33 of the Magistrates Court Act 32 of 1944 reads as follows:
33 Curator ad litem
The court may appoint a *curator ad litem* in any case in which such a curator is required or allowed by law for a party to any proceedings brought or to be brought before the court.

119 Magistrates Court Act 32 of 1944.

120 De Bruin thesis with reference made therein to the applicable court cases.

121 ***Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk*** [2005] JOL 14218 (T).

inappropriate to appoint a curator ad litem because the mother of the children was available and willing to assist them. The court was not willing to usurp the mother's functions and was not persuaded by the arguments of a potential conflict of interests.[122]

2.2.70 In ***Centre for Child Law v Minister of Home Affairs,***[123] the court distinguished between the roles of a curator and a legal representative appointed in terms of section 28(1)(h).

2.2.71 In ***Legal Aid Board v R,***[124] a 12-year-old girl contacted Childline and requested assistance in appointing a legal representative, so that she could be allowed to present her views to the court. A legal representative was appointed by the Legal Aid Board. The mother opposed the appointment. The court found that it is not necessary to obtain the approval of either the child's guardian or the court before granting assistance to the child under section 28(1)(h).[125]

2.2.72 Subsequent to the judgment in ***HG v CG,***[126] the children concerned instituted proceedings in their own name, with the assistance of Legal Aid South Africa to interdict their mother from moving to Pretoria. The judge hearing the matter found that the children did not have legal capacity to litigate, and a curator ad litem had to be appointed before the children could institute proceedings without the assistance of the guardian.

2.2.73 The matter was taken on appeal to the Supreme Court of Appeal by Legal Aid South Africa.[127] No order was made, as the court held that the matter before it was not an appeal but rather an application for a declaratory order under section 38 concerning the rights of the Legal Aid Board.[128] In explaining its conclusion, the court referred to the fact that South African law makes provision for the appointment of a curator ad

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122 Par [5].

123 ***Centre for Child Law v Minister of Home Affairs*** 2005 (6) SA 50 (T).

124 ***Legal Aid Board v R*** 2009 (2) SA 262 (D).

125 Par [40] 276 E-F/G.

126 ***HG v CG*** 2010 (3) SA 352 (ECP). See discussion above.

127 ***Legal Aid Board in re Four Children*** (512/10); [2011] ZASCZ 39 (29 March 2011).

128 It should be noted that the appeal was brought against the wishes of the children concerned and that at the time the trial was conducted, the matter had been resolved.

litem where the guardian needs to be substituted. It stated that a curator is a person who conducts litigation in the name and in the interests of the minor. The curator is appointed at the request of the minor or a friend or a person showing an interest in the child, where the child has no guardian and is about to institute or defend an action at law. From the time of the appointment, the action is conducted in the name of the minor, duly assisted by his or her curator. A curator may appoint a legal representative to assist him or her. The court was of the opinion that the Legal Aid Board could have employed an employee from the Board to act as curator. Where the curator is not able personally to conduct the litigation, the child is entitled to have a legal practitioner assigned. The function of the curator is to advance the case of the minor. It is not the function of the curator to adopt a so-called objective approach.[129]

2.2.74 As is clear from this exposition, numerous questions around the practicalities of obtaining legal representation for children in terms of section 28(1)(h) still exist.

2.2.75 The Centre for Child Law has prepared draft guidelines[130] for consultation with Legal Aid South Africa, which have been updated but not yet published. The Guidelines provide two models for the representation of children, namely "client directed legal representation" and "best interests legal representation". It is suggested that role confusion among legal representatives can be resolved if the representatives are clear about their own roles, and if those roles are explained to the child, other parties, and the court. According to the Guidelines, the model of legal representation which is selected depends on the capacity of the child to give instructions, rather than the type of case. Possible situations which may call for a legal representative to be appointed for a child upon divorce have been listed, as shown in the footnote below.[131]

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129 Par [21].

130 Centre for Child Law University of Pretoria ***Draft Guidelines for Legal Representatives of Children in Civil Matters*** 2010 at 4,5 and 11-14; See also Botha K "Ascertaining the Voice of the Child in South African Divorce law" LLM thesis University of South Africa November 2015 at paras 5.3.1 and 5.6.1 to 5.6.3 for a discussion on the Guidelines.

131 Guidelines at 9: Situations in which it is advisable for a child to be legally represented:

- where a child of sufficient age and maturity is strongly expressing a view and a desire to participate;
- there are allegations of physical, sexual or psychological abuse;
- there is an apparently intractable conflict between the parents;
- there are real issues that relate to cultural or religious differences that are affecting the child;
- there are issues relating to the sexual orientation of either or both of the parents (or other person having significant contact with the child) that are likely to deepen the conflict;
- there are issues of significant physical or mental health problems in relation to either party or a child or other person having significant contact with the children;

(e) Children as witnesses in court

2.2.76 Children can be witnesses in either civil or criminal proceedings. In civil proceedings, issues such as (for example) contact and care may be in dispute. Criminal proceedings in the context of this investigation will take place where, for example, allegations of sexual molestation have been made against one of the parents.

2.2.77 In respect of civil proceedings, it is often considered unfair that children should be dragged into the arena as witnesses and asked to choose between two parents, both of whom they love. This is the reason why children are often excluded. Another area of concern has been expressed regarding the inadvertently adversarial nature of the proceedings, where children could be subjected to the rigours of cross-examination and the intimidating atmosphere of the courtroom. (See, however, the relevant sections of the Children's Act discussed below.)

2.2.78 Huddart and Ensminger support the view that children should be called regularly as witnesses in family law cases. They argue that, if children's views are expressed in the courtroom then the parents will be forced to listen to, if not hear, their child. The child will know that his or her views are being stated as clearly as he or she can formulate them, in language he or she chooses as appropriate, to be heard by the parents, without any danger of being misstated by a well-meaning adult.[132]

2.2.79 Courts are provided with the flexibility to admit children's evidence that might not otherwise be allowed by the rules of evidence. Children are allowed to participate in proceedings that affect them. This often results in better outcomes for children, without forcing them to engage fully in the entire proceedings.

- a child of mature years is expressing strong views, and giving effect to those views which would mean changing a long standing care arrangement or denying a parent (or other significant person) contact completely;
- one of the parties proposes removing the child permanently from the court's jurisdiction;
- it is proposed that siblings will be separated;
- any matters in respect of Chapter 17 of the Children's Act, Child Abduction;
- where there is a dispute between the wishes of the child and the recommendations of the Family Advocate or an expert;
- where the child is the subject of a maintenance dispute and can testify about disputed facts;
- if a third party mentions concerns during an adoption matter;
- the reasons why the child wants to participate must be realistic and have merit i.e. cannot ask that his parents should not divorce;...

[132] Mahlobongwane at 241.

2.2.80 Sections 42(8),[133] 52(2),[134] 60[135] and 61[136] of the Children's Act provides for the participation of children in civil court proceedings, and the manner in which children's court proceedings should be conducted.

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133 Section 42(8) of the Children's Act 38 of 2005 provides as follows:
42. Children's Court and presiding officers
(1)-(7)….
(8) The children's court hearings must, as far as is practicable, be held in a room which-
(a) is furnished and designed in a manner aimed at putting children at ease;
(b) is conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court;
(c) is not ordinarily used for the adjudication of criminal trials; and
(d) is accessible to disabled persons and persons with special needs.
(9)-(10)……

134 Section 52(2) of the Children's Act 38 of 2005 provides as follows:
52. Rules and court proceedings
(2) Rules made in terms of subsection (1) must be designed to avoid adversarial procedures and include rules concerning-
(a) appropriate questioning techniques for-
(i) children in general;
(ii) children with intellectual or psychiatric difficulties or with hearing or other physical disabilities which complicate communication;
(iii) traumatised children; and
(iv) very young children; and
(b) the use of suitably qualified or trained interpreters

135 Section 60 of the Children's Act 38 of 2005 provides as follows:
60 Conduct of proceedings
(1) The presiding officer in a matter before a children's court controls the conduct of the proceedings, and may-
(a) call any person to give evidence or to produce a book, document or other written instrument;
(b) question or cross-examine that person; or
(c) to the extent necessary to resolve any factual dispute which is directly relevant in the matter, allow that person to be questioned or cross-examined by-
(i) the child involved in the matter;
(ii) the parent of the child;
(iii) a person who has parental responsibilities and rights in respect of the child;
(iv) a care-giver of the child;
(v) a person whose rights may be affected by an order that may be made by the court in those proceedings; or
(vi) the legal representative of a person who is entitled to a legal representative in those proceedings.
(2) If a child is present at the proceedings, the court may order any person present in the room where the proceedings take place to leave the room if such order would be in the best interests of that child.
(3) Children's court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation of everyone involved in the proceedings.

136 Section 61 of the Children's Act 38 of 2005 provides as follows:
61 Participation of children
(1) The presiding officer in a matter before a children's court must-
(a) allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child's age, maturity and stage of development and any special needs that the child may have, is able to participate in the proceedings and the child chooses to do so;
(b) record the reasons if the court finds that the child is unable to participate in the proceedings or is unwilling to express a view or preference in the matter; and

2.2.81 It is clear from these sections that the intention of the Children's Act is that civil proceedings should be conducted in an informal manner, and, as far as possible, in a relaxed and non-adversarial atmosphere that is conducive to attaining the co-operation of everyone involved in the proceedings. It is not clear whether this objective is being met at present.

2.2.82 Section 61(2) makes provision for the appointment of an intermediary in civil proceedings, on the same basis as provided for in section 170A of the Criminal Procedure Act in respect of criminal proceedings; see also the discussion below of the Constitutional Court interpretation of section 170A in this regard.[137] It is not clear how the process in the criminal court should be transposed to civil courts, especially with regard to the appointments of intermediaries and the costs incurred.[138]

2.2.83 As far as criminal proceedings are concerned, the Constitutional Court[139] has considered the position of child victims and child witnesses in sexual offence cases. The Court was requested - but refused to confirm - a judgment by the High Court[140] that declared certain provisions of the Criminal Procedure Act[141] to be unconstitutional. The argument for unconstitutionality was that the protection provided to child

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(c) intervene in the questioning or cross-examination of a child if the court finds that this would be in the best interests of the child.

(2) A child who is a party or a witness in a matter before a children's court must be questioned through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977 (Act 51 of 1977) if the court finds that this would be in the best interests of that child.

(3) The court-

(a) may, at the outset or at any time during the proceedings, order that the matter, or any issue in the matter, be disposed of separately and in the absence of the child, if it is in the best interests of the child; and

(b) must record the reasons for any order in terms of paragraph *(a)*.

137 Matthias C and Zaal FN "Intermediaries for Child Witnesses: Old Problems, New Solutions and Judicial Differences in South Africa" 2011 19 ***InternationalJournal of Childrens Rights*** 251 (hereafter "Matthias & Zaal") at 267 states that the allowance of intermediaries in section 61(2) of the Children's Act via a cross reference to section 170A of the Criminal Procedure Act was perhaps convenient from a drafting viewpoint. However, it showed little appreciation of the long established shortcomings of the latter section. It is well foreseeable that the unconstrained discretion conferred by s 170A on magistrates, the difficulties in interpreting the 'undue mental stress or suffering' ground, and further difficulties in deciding how precisely that ground should be read with the best interests ground in s 61(2) itself, will all impact negatively on employment of intermediaries in the children's courts.

138 The question has been raised regarding the value of these provisions are whether they are ever used.

139 ***Director of Public Prosecutions v Minister of Justice and Constitutional Development*** [2009] ZACC 8; 2009 (4) SA 222 (CC).

140 ***S v Mokoena; Sv Phaswane*** 2008(2) SACR 216 (T).

141 Criminal Procedure Act 51 of 1977.

complainants in criminal proceedings involving sexual offences was not consistent with section 28 of the Constitution.[142]

2.2.84 Although the court did not confirm the unconstitutionality of the sections, it indicated its concern about the lack of court facilities for child witnesses and victims, and the unavailability of intermediaries. The court acknowledged that the inadequacies of court services have a serious effect on the best interests of children.

2.2.85 In the court's opinion, inadequacies in the system were not the result of unconstitutionality in the legislative provision, but rather of the manner in which the legislation is interpreted and implemented. The court also found that it was possible to read the relevant subsections in a manner consistent with the Constitution.

2.2.86 As far as the use of intermediaries is concerned, the court found that section 170A(1) should be interpreted to mean that a child should be assessed prior to testifying in court to determine if an intermediary is needed. Should the assessment indicate that an intermediary is required, the State must arrange for an intermediary to be present in court when the accused goes to trial. At the commencement of the trial, the State must then apply under section 170A(1) for the appointment of an intermediary.

2.2.87 The High Court and Constitutional Court were in agreement that properly trained intermediaries provide valuable support for children, and generally improve rather than impede the fairness of court hearings. The remedies of the High Court were, however, much more extensive in scope, and involved alterations to existing legislation.[143] The question that can be posed is which judgment accorded more closely with the 2005 UN Guidelines and offered the most effective way forward.[144]

2.2.88 Currently the Constitutional Court's interpretation is limited to situations that involve child complainants in sexual offence cases. This creates procedural

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142 The High Court held that sections 153(3) and (5), 158(5), 164(1) and 170A(1) and (7) were inconsistent with section 28(2) of the Constitution.

143 Matthias & Zaal at 264.

144 Matthias & Zaal at 265.

discrimination, because only a subclass of child witnesses receives extra protection, which is not required for any other child witnesses.[145]

2.2.89 It has been argued[146] that the problematic reference to s 170A in section 61(2) should be removed. Section 61 should instead allow all child witnesses and other vulnerable adult witnesses the right to an intermediary, unless a substantial reason to the contrary is found by the court and immediately conveyed. This would not have the effect that intermediaries must be appointed in all cases.

2.2.90 Where a separate room or electronic equipment are not available, there must be a duty to transfer cases to another children's court where they are. This should galvanise government to restart its rollout of facilities.

2.2.91 The Constitutional Court ordered the Department of Justice to submit a report to the court[147] on the readiness of the courts to provide the specialised services needed by children. The DOJCD report was submitted on 1 July 2009 and was followed by a supplementary report. In 2015 the Centre for Child Law published the findings of an investigation on whether, in the five years since the DOJCD report was submitted, progress had been made towards the goal of children being able to testify in a safe and child-friendly environment. The findings of this investigation were mixed. [148]

f) Children initiating proceedings themselves

2.2.92 Section 14 of the Children's Act provides that a child has the right to bring, and to be assisted in bringing, a matter to court.[149]

2.2.93 Section 14 resonates with Section 34 of the Constitution, which provides that everyone has the right to have their legal dispute settled in court or before another

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145 Matthias & Zaal at 265.

146 Matthias & Zaal at 267.

147 On 1 July 2009.

148 Centre for Child Law University of Pretoria ***Making Room: Facilitating the Testimony of Child Witnesses and Victims*** 2015.

149 Section 14 of the Children's Act 38 of 2005 reads as follows:
Access to court
Every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court.

independent, impartial tribunal or forum.[150] Section 14 goes beyond providing access to court; it also provides that children should be assisted to obtain such access. Section 14 does not include the "substantial injustice" criterion that appears in other Constitutional provisions.

2.2.94 Section 14 should be read with section 15 of the Children's Act.[151] In listing the categories of people who may approach a court, section 15 specifically includes "a child who is affected by or involved in the matter to be adjudicated" and "anyone who is acting in the interest of the child".[152]

2.2.95 In ***Ex parte Van Niekerk and another: In re Van Niekerk v Van Niekerk***[153] the court ordered that the children be allowed to intervene and be joined as parties to the proceedings between their parents. The court indicated that they were entitled to be joined in terms of section 28(1)(h), because unless they were joined they would not be able to appeal against an adverse order.[154]

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150 Section 34 of the Constitution, 1996 reads as follows:
Access to courts

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

151 Section 15 of the Children's Act 38 of 2005 is similar to section 38 of the Constitution, 1996. Section 38 of the Constitution, 1996 provides as follows:
Enforcement of rights
38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

152 Section 15 of the Children's Act 38 of 2005 reads as follows:
Enforcement of rights
15. (1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.
(2) The persons who may approach a court are –
(a) A child who is affected by or involved in the matter to be adjudicated;
(b) anyone acting in the interest of the child or on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons, and
(d) anyone acting in the public interest.

153 ***Ex parte Van Niekerk and another: In re Van Niekerk v Van Niekerk*** [2005] JOL 14218 (T).

154 Par [8].

2.2.96 In terms of the common law, a child does not have the capacity to litigate without the assistance of a parent, guardian, or curator ad litem. The question is therefore whether the common law has been developed to allow a child to approach the court without the assistance of a parent, guardian or curator, with or without the assistance of a legal representative.[155]

2.2.97 Furthermore, although sections 14 and 15 of the Children's Act are welcome advancements, children's ability to challenge the decisions regarding parental responsibilities and rights is limited by sections 22(6)(a)(ii) and (iii), 22 (6)(b)(ii) and (iii), 28 (3)(c) and (d), and 34(5)(b)and (c). In those sections, children or anyone acting in children's interests are required to obtain the "leave of the court" to bring the application before they can make such applications. Furthermore, not only the child, but anyone who acts in the child's interests, needs to obtain the court's approval. This requirement can directly or indirectly affect the effectiveness of children's participation.[156]

Questions:

11. What is the correct procedure for the assignment of a legal representative?
12. Who must decide to assign a legal representative for the child? Which body should make the assignment? (For example, the State Attorney or Legal Aid Board.) How is the legal practitioner assigned?
13. Can a legal representative be assigned by the High Court?
14. What will constitute "substantial injustice" in divorce proceedings?
15. What is the position in regard to unopposed divorces? When would it be necessary to appoint a legal representative for a child in a low-conflict or unopposed divorce?
16. Who will decide if substantial justice would otherwise result?
17. According to which principles will this decision be made?
18. Under what circumstances is a child entitled to a legal representative?
19. How should the envisaged rights be implemented?
20. What are the scope and functions of the legal representative once appointed?
21. Who pays for the legal costs involved in representing the child?
22. Who is qualified to represent children? Who decides whether a curator ad litem is required or whether the child is capable of directing the litigation and should therefore have his or her own attorney?
23. It is clear that the SCA sees legal representation for children as necessary to augment their lack of capacity and as appointed by the court. Does this mean a section 28(1)(h) legal practitioner cannot assist in place of a guardian?
24. How often are the existing sections providing for the voice of the child used? Is there a budget in place to give effect to these sections?

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155 Centre for Child Law University of Pretoria ***Child Law Matters*** Issue 31 10 September 2010.

156 Centre for Child Law University of Pretoria ***Child Law Matters*** Issue 15 Thursday 17 April 2008 . The writer refers to the fact that in practice one could probably bring the application to obtain the court's leave at the same time as bringing the substantive application, as prayer one in the notice of motion.

2.3 Relocation of families (with reference to the abduction of children)

a) Background

2.3.1 Relocation disputes have been described[157] as cases which often involve two competent and committed parents, one with sound reasons for wishing to relocate, the other with equally valid reasons for resisting the application.

2.3.2 Divorced parents need to adjust and rearrange their lives after a divorce.[158] A situation can, therefore, arise where one parent wishes to move to another city, province or country with the child in his or her care.[159] This move could affect the relationship between the child and the other parent, and would require a change in the parenting arrangements. As a result, often the other parent does not agree with the move. This results in a dispute and the court has to give a decision. [160]

2.3.3 Relocation disputes are among the most difficult cases that courts have to deal with in family matters.[161] Relocation law has, furthermore, been described as unpredictable and expensive, increasing conflict and discouraging settlement.[162]

2.3.4 It stands to reason that, whether the courts allow or deny the move, one parent might be emotionally devastated. Despite this emotional devastation, as long as both

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157 Principal Family Court Judge of New Zealand. Boshier P "Have Judges been Missing the Point and Allowing Relocation Too Readily?" 2010 1 ***Journal of Family Law Practice*** 10.

158 Domingo W "For the Sake of the Children: South African Family Relocation Disputes" 2011 14 ***PER/PELJ*** 159 (hereafter "Domingo") at 159 refers to the following reasons sometimes given for relocating include matters: the availability of attractive employment opportunities for either the resident parent or his/her spouse in the new location; a loss of confidence in the country's economy; the escalating crime rate; the availability of better education for the children; and the lack of a family support system wherever the family was initially situated.

159 Domingo at 148.

160 Stahl PM "Emerging Issues in Relocation Cases" 2013 25 ***Journal of the American Academy, of Matrimonial Lawyers*** 425 (hereafter "Stahl") at 425; Andrews PD ***Links Between International Abduction and Relocation: Moving Towards Like-mindedness in Relocation Disputes Internationally – Is it Time for a Protocol Regulating International Relocation Disputes?*** LLM thesis University of Western Cape 2012 (hereafter "Andrews thesis") at (iii) and 27.

161 Domingo at 148; Stahl at 440 with reference to Freeman M & Taylor N "The Reign of Payne 2" 2011 20 ***Journal of Family Law & Practice***; Andrews thesis at (iii) and 27.

162 Thompson R "Presumptions, Burdens and Best Interests in Relocation Law" 2015 53 ***Family Court Review*** 40. Thompson argues that the pure "best interests" approach to relocation is a failure and proposes presumptions and burdens to guide best interests.

parents remain child-focused and support the child's relationship with his or her other parent, relocation may not be harmful to the child or in some instances may even be a positive experience for the child. However, relocation cases reflect the tension between the freedom of adults to leave a relationship and begin a new life for themselves, versus the harsh reality that while relationships may be dissoluble, parenthood is not.[163]

2.3.5 The reasons given for relocating include matters such as the availability of attractive employment opportunities for either the resident parent or his or her spouse in the new location, a loss of confidence in the country's economy, the escalating crime rate, the availability of better education and health care for the children, and the lack of a family support system wherever the family was initially situated.[164]

2.3.6 Although it is hard to predict the outcome of a specific relocation dispute, four common outcomes have been identified:[165]

a) the court allows the parent to relocate with the child;
b) the court disallows the relocation request, but the status quo is preserved because the parent decides not to move without the child;
c) the court disallows relocation and the parent moves without the child, resulting in primary custody being transferred to the non-moving parent; or,
d) the relocation is allowed and the other parent chooses to follow to the new community.

2.3.7 It has been argued that polarised views are not helpful in making relocation decisions in a given case. Relocation needs to be thought of within a risk context, and within each case certain familial, residential and mobility factors may decrease or increase risk or resilience for a particular child. It is suggested that court and care evaluators need to be open to the particular facts within each family that will help to determine the risk and protective factors that exist, rather than look to bright-line rules in solving these cases.[166]

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163 Parkinson P, Cashmore J & Single J "The Need for Reality Testing in Relocation Cases" 2010 44 ***Family Law Quarterly*** 1 (hereafter "Parkinson, Cashmore & Single") at 1.

164 Domingo at 148.

165 Andrews thesis at 54 with reference to Elrod LD "Moving On: The 'Best interest of Children in Relocation Cases' 2010 1 ***Journal of Family Law and Practice*** 51.

166 Stahl at 441.

2.3.8 Relocation disputes are seen as a growing problem with an increase in the number of parents living apart. This trend is attributed to, firstly, the relative fragility of cohabiting relationships - which have increased at an exponential rate – compared with marriages. Secondly, there has been an increase in international mobility. Thirdly, due to Internet dating, there has been a change in dating patterns. Distance has become less of an obstacle to the development of new relationships in the early stages.[167]

2.3.9 The reason for the low settlement rate in relocation cases is that little middle ground exists between the two parents' positions, on which to base a compromise. Either the resident parent will move or not.[168] Sharing travelling costs, accepting longer holiday contact periods, or delaying the move for a few years are some possibilities to ameliorate the situation. Webcam, telephone and email are options for communication between the child and the non-resident parent, but these have recently not been regarded as adequate substitutes for the experience of family life or regular visits in person. For example, a parent cannot hug a child by webcam.[169]

b) International position

2.3.10 Article 9(3) of the United Nations Convention on the Rights of the Child (UNCRC) contains a consideration that has important bearing on relocation disputes. This provision calls on State Parties to respect the right of a child who is separated from one or both parents to maintain personal relations and direct contact with both parents, on a regular basis, except if it is contrary to the child's best interest. South Africa's domestic laws are guided by the provisions set out in the UNCRC.

2.3.11 Internationally, some countries or states adopt a neutral approach to resolving relocation disputes (for example Australia and New Zealand), whereas others are either pro-relocation (for example England and Wales) or anti-relocation (for example Alabama, Louisiana, and Sweden). In some countries, resident parents have the right to solely determine where they and their child will reside. In others (for example New Zealand) both guardians are required to agree on the child's place of residence. The

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167 Parkinson, Cashmore & Single at 3.

168 Parkinson, Cashmore & Single at 18; Stahl at 425.

169 Parkinson, Cashmore & Single at 19; Stahl at 441.

statutory frameworks governing the handling of relocations by the courts vary internationally; so, too, does the approach that is adopted in determining the child's welfare or best interests in a relocation dispute. In the United States, for example, the American Academy of Matrimonial Lawyers (AAML) has developed a Model Relocation Act.[170]

c) South African legislative framework

2.3.12 Section 18 of the Children's Act[171] sets out responsibilities and rights parents have in respect of their children. These include the right and responsibility to care for the child, to maintain contact with the child and to act as guardian of the child.

2.3.13 Unless a court orders otherwise, both parents retain guardianship of a child after a divorce.[172]

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170 Andrews thesis at 44. See discussion below.

171 Section 18 of the Children's Act 38 of 2005 provides as follows:

18 Parental responsibilities and rights

(1) A person may have either full or specific parental responsibilities and rights in respect of a child.

(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right-

(a) to care for the child;
(b) to maintain contact with the child;
(c) to act as guardian of the child; and
(d) to contribute to the maintenance of the child.

(3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must-

(a) administer and safeguard the child's property and property interests;
(b) assist or represent the child in administrative, contractual and other legal matters; or
(c) give or refuse any consent required by law in respect of the child, including-
(i) consent to the child's marriage;
(ii) consent to the child's adoption;
(iii) consent to the child's departure or removal from the Republic;
(iv) consent to the child's application for a passport; and
(v) consent to the alienation or encumbrance of any immovable property of the child.

(4) Whenever more than one person has guardianship of a child, each one of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or responsibility arising from such guardianship.

(5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3) *(c)*.

172 Sections 19 and 20 of the Children's Act 38 of 2005.

2.3.14 Section 18(4) of the Children's Act stipulates that co-holders of guardianship over a child can, subject to section 18(5) of the Children's Act exercise their parental responsibilities and rights independently and without the consent of the other guardian.

2.3.15 Section 18(5) of the Children's Act provides, inter alia, that the person acting as guardian must inter alia give or refuse consent to the child's departure or removal from the Republic, or for the application for a child's passport.

2.3.16 Therefore, when it comes to a decision to depart with a child or to remove a child from the Republic, all those who have guardianship over the child must give their consent before the child can be relocated outside of the Republic.

2.3.17 Although a child has his or her primary residence with one parent, post-divorce the other parent will retain the right to be consulted and to approve of certain decisions made by the primary caretaker in respect of the child.[173]

2.3.18 If a guardian refuses to consent to the removal of the child from the country, the parent wishing to relocate will have to approach the High Court to obtain consent from the court.

2.3.19 By contrast with the above scenario, in situations where relocation would not take the child outside the Republic, guardians can make decisions without consulting or getting approval from others who hold guardianship over the child.[174] A parent with whom the child permanently resides can, therefore, independently and without the consent of other parent decide to relocate with the child within the Republic.

2.3.20 However, section 6(5) of the Children's Act[175] states that a child, having regard to his age and maturity, and a person who has parental responsibilities and rights in

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173 Centre for Child Law University of Pretoria ***Relocation*** Issue 21 1 October 2008.

174 ***Joubert v Joubert*** 2008 (6) SA 30 (C).

175 Section 6 of the Children's Act provides as follows:
6 General principles

(1) The general principles set out in this section guide-
(a) the implementation of all legislation applicable to children, including this Act; and
(b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.

(2) All proceedings, actions or decisions in a matter concerning a child must-

respect of that child must both be informed of decisions in matters concerning the child that would significantly affect the child.

2.3.21 Furthermore, section 31 of the Children's Act[176] stipulates that a co-holder of parental responsibilities and rights must consult, and give consideration to the views of other co-holders of responsibilities and rights, as well as the child, when making decisions that are likely to change significantly - or to have a significant adverse effect

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(a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
(b) respect the child's inherent dignity;
(c) treat the child fairly and equitably;
(d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;
(e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and
(f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has.

(3) If it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child.

(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; and
(b) a delay in any action or decision to be taken must be avoided as far as possible.

(5) A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

176 Section 31 of the Children's Act 2005 provides as follows:

31 Major decisions involving child

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

(b) A decision referred to in paragraph *(a)* is any decision-
(i) in connection with a matter listed in section 18 (3) *(c)*;
(ii) affecting contact between the child and a co-holder of parental responsibilities and rights;
(iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or
(iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.

(2) *(a)* Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph *(b)*, that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.

(b) A decision referred to in paragraph *(a)* is any decision which is likely to change significantly, or to have a significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child.

on - the co-holder's exercise of parental responsibilities and rights in respect of the child.

2.3.22 This includes decisions which would affect contact between the child and the other co-holder of parental responsibilities and rights, such as a decision to relocate with the child to another province or city within the country.

d) Case law

2.3.23 Since South Africa does not have legislation dealing specifically with relocation disputes, the case law in this regard needs to be considered. The position is, however, unclear.[177] An argument has been made that general consistency in approach by our courts when dealing with relocation disputes is needed. Guidelines should be developed for this purpose. [178]

2.3.24 Two distinct approaches can be identified: the pro-relocation approach and the neutral approach.

2.3.25 The pro-relocation approach does not necessarily imply a rebuttable presumption. However, various reasons are provided as to why the relocation should proceed. There is a general acceptance or, in some instances, a presumption in favour of the resident parent. The children are allowed to go with the resident parent wherever he or she chooses to live, unless it is necessary to disallow a relocation to prevent harm to the children. By contrast, in the neutral approach, there is neither a presumption in favour of or against relocation, and the court applies a fresh inquiry into each case as it arises.[179]

2.3.26 Arguments that support a presumption in favour of relocation risk conflating the best interests of the child with the interests of the resident parent. Arguments against relocation, although they may be cloaked in the rhetoric of children's interests, are often about a non-resident parent's interest in remaining close to the child. All of these are legitimate interests.[180]

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177 Centre for Child Law University of Pretoria ***Relocation*** Issue 21 1 October 2008 at 2; Domingo at 149 and 153.

178 Domingo at 149.

179 Domingo at 153.

180 Domingo at 156.

2.3.27 Prior to the commencement of the Children's Act relocation applications by the resident parent were generally granted by our courts. The exception was cases where it was evident that the care-giver's decision was motivated by mala fides.[181]

2.3.28 The approach in older cases was that the resident parent had the right to decide where the child should live, unless the non-resident parent could demonstrate that the proposed relocation would be detrimental to the child.[182] The rights of the resident parent were seen as being paramount in relocation disputes.[183] This idea resonated with the traditional notion of custody, in which one parent was seen as having the sole right to exercise all aspects of parental authority - to the exclusion of the other parent.[184] The distant parent, usually the father, would disengage and be only marginally involved in his children's lives.[185]

2.3.29 The custody approach was later rejected and replaced with the "best interest of the child" principle - a principle based on common law[186] and the Constitution. Both "prescribe that the child's best interest must determine the outcome when a court has to make an order regarding a child".[187] Section 7 of the Act sets out a lengthy list of factors which courts need to take into account when determining the best interests of a child.[188]

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181 Andrews thesis at 32; Domingo at 166; ***Jackson v Jackson*** 2002 (2) SA 303 (SCA).

182 ***Van Rooyen v Van Rooyen*** 1999 (4) SA 435 (C); **Godbeer v Godbeer** 2000 (3) SA 976 (W).

183 Albertus L "Relocation Disputes: Has the Long and Winding Road Come to an End? A South African Perspective" 2009 2 ***Speculum Juris*** 70 (hereafter "Albertus") at 71.

184 Domingo at 156 with reference to Parkinson at 259.

185 Stahl at 426.

186 See ***Shawzin v Laufer*** 1968 (4) SA 657 (A) as discussed in Andrews thesis at 32, where the best interest principle was first raised.

187 ***Jackson v Jackson*** 2002 (2) SA 303 (SCA) at par 2.

188 Domingo at 151: These include the nature of the relationship between the child and parents (sec 7(1)(a)); the attitude of the parents toward the child and to the exercise of parental responsibilities and rights in respect of that child (sec 7(1)(b); the likely effect on the child of changed circumstances such as separation from either or both parents (sec 7(1)(d);the need for the child to remain in the care of his or her parent, family or extended family and to maintain a connection with his or her culture or tradition (sec 7(1)(f); the child's age, maturity, stage of development, background, physical and emotional security and intellectual, emotional, social and cultural development (sec 7(1)(g)-(h); and the need of the child to be brought up within a stable environment (sec 7(1)(k).

2.3.30 Exactly what the "best interest" test entails, however, is unclear. In the ***Jackson*** case it was stated that it would not be in the interest of the children that the custodian parent be thwarted in his or her endeavour to emigrate, in pursuance of a decision reasonably and genuinely taken.[189]

2.3.31 The case of ***RC v CS***[190] dealt with the issues relating to the best interest of the child in a relocation application. The applicant sought an order in terms of Section 18 of the Children's Act, because the respondent had repeatedly refused to consent to the relocation. The applicant requested that she be granted permission to relocate her minor child permanently from South Africa to France. The court had to decide what was in the best interest of the minor child. The court went on to consider the relevant provisions of section 7 of the Children's Act relating to relocation. More specifically, it considered the provisions set out in sections 7(1)(d), (e) and (f).

2.3.32 In ***B v M***[191] it was held that the best interest principle is the paramount consideration within a hierarchy or concatenation of factors, but is not always the only factor receiving consideration in matters concerning children. This interpretation seems to lean towards a more neutral position, where neither parent should have a presumptive right either to relocate or to block relocation.

2.3.33 The Children's Act not only introduced a change in terminology but has also introduced a shift in the way we think and conceptualise paradigms in family law.

2.3.34 The term "care", as used in the Children's Act, 2005, has a much wider ambit than the term "custody" as previously used. "Care" means not only providing for the child's daily needs, such as a safe home, food, education, and love. It also includes promoting the well-being of the child, maintaining a sound relationship with the child, and - of paramount importance - attending to the best interests of the child. Both parents have these responsibilities and rights.[192]

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189 See also ***Godbeer v Godbeer*** 2000(3) SA 976 (W) and ***F v F*** 2006 (3) SA 42 (SCA) at 34.

190 ***RC v CS*** [2011] JOL 28064 (GSJ) as referred to in Andrews thesis at 34.

191 ***B v M*** 2006 (3) All SA 109 (W) par 146.

192 Domingo at 149. See definition of care in section 1 of the Children's Act.

2.3.35 While the paramount consideration is the best interests of the child, there is today a greater legislative emphasis on the importance of maintaining the involvement of both parents after separation.

2.3.36 The post-divorce family unit has been dubbed the "binuclear family" by Professor Robert Oliphant. He defined a binuclear family as a large, inter-connected family, with one household headed by the ex-wife and another household headed by the other ex-husband, with the child being a member of both households.[193] Fathers have become less willing to become marginal parents.[194]

2.3.37 The neutral approach has been implemented in a few cases since the Children's Act was enacted. In ***Cunningham v Pretorius***,[195] taking into account the new family law framework set out in the *Children's Act,* Murphy J held that in deciding relocation disputes, what is required is that the court acquires an overall impression and brings a fair mind to the facts set up by the parties. The relevant facts, opinions and circumstances must be assessed in a balanced fashion, and the court must render a finding of mixed fact and opinion. In the final analysis a structured value-judgment is made about what the court considers will be in the best interest of the child.

2.3.38 In the 2010 case of ***HG v CG***,[196] Chetty J's guiding principles are the Constitution and the Children's Act. Interestingly, Chetty J does not make reference to any previous cases on relocation. The court instead relies heavily on the wishes of the children.[197]

2.3.39 Courts have also relied on the "reasonable person test."[198] In ***AC v KC*** the court held that the court *a quo* had adequately and holistically, taken into account the section 7 factors to determine the best interests of the child. Therefore the final question,

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193 Domingo at 150 with reference to Glennon 2008 ***Utrecht Law Review*** 66. It should be noted that being a member of a family does not equate to living with a family on a day to day basis.

194 Stahl at 426.

195 ***Cunningham v Pretorius*** 31187/08 2008 ZAGPHC 258 21 August 2008 (unreported).

196 ***HG v CG*** 2010 (3) SA 352 (ECP).

197 See full discussion of this case above.

198 **AC v KC** *A389/08 2008 ZAGPHC 369 16 June 2008 (unreported).*

objectively viewed, was whether or not the decision taken by the mother was one which a reasonable person would have taken.[199]

2.3.40 This view by the appeal court has been criticised[200] as incorrect, because, the balancing of competing factors is not used to determine whether the decision by the resident parent is reasonable or not, but is rather used to ascertain whether the decision is in the best interests of the child or not. This case incorrectly allows the best interests of the mother to usurp the best interests of the child.

e) Policy arguments

2.3.41 Worldwide, acrimonious policy debates are taking place about whether there should be a presumption for or against relocation. So difficult are these issues that the Uniform Law Commission in the United States decided in 2009 to give up its attempt to develop a model law on the subject. In these debates, the gender issue is unavoidable, because it is almost always women who want to relocate and men (non-resident parents) who oppose such moves.[201] The point has also been raised that the law can, and sometimes does, prevent the primary care-taker (usually the mother) from moving, but there is no similar limits on the non-primary care-taker.

2.3.42 Another point to consider is whether the parents will comply with the applicable order.[202] Contact often seems to be lost through estrangement, or becomes very intermittent owing to the disengagement of the contact partner. There are significant issues of cost and logistical difficulty in terms of travel. There should be a reality test to determine whether the court's orders for children to spend time with the other parent are likely to be complied with. The probability of compliance should be one of the factors taken into account in determining whether the relocation is likely to be in the best interests of the child.[203]

2.3.43 For example, regular air travel between cities can be unaffordable for parents who earn average incomes. This could render certain relocation arrangements

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199 Par 15.

200 Domingo at 155; Albertus at 78.

201 Parkinson, Cashmore & Single at 2.

202 Parkinson, Cashmore & Single at 26.

203 Parkinson, Cashmore & Single at 27.

unrealistic. A young child may have to be accompanied by a parent; with the result that two adult return airfares (one trip to fetch the child, and another trip to return the child) plus one child's return airfare are likely to be necessary to facilitate a single visit for one child. Such travel costs could be prohibitive and may lead to a break-down in child-sharing arrangements and significant stress for the travelling parent. In turn, that could have deleterious effects on the child's well-being. The visiting parent might alternatively be able to stay in the other parent's town for the duration of the visit; however, this option could also impose financial stress if there is no free accommodation available. It may also exceed the amount of annual leave the travelling parent has.[204]

2.3.44 Court orders may provide that the parents should share the cost of travel for the children. In Australia, high costs incurred to see one's children are a ground for reducing the normal level of child support.[205]

2.3.45 To the extent that a proposed relocation is based upon cheaper housing or better financial prospects, the child support impact of the relocation should be taken into account. The expected financial benefits of a relocation need to be assessed in light of all the above costs.[206]

2.3.46 Another issue is the burden of travel on children. Onerous journeys might be necessary for the child to spend face-to-face time with the other parent. It is a common pattern that a relocating parent will take the initiative to propose generous arrangements so that the other parent can spend time with the child. However, even if a relocating parent proposes to fly children backwards and forwards on a regular basis, so much travel might not be in the best interest of the child.[207]

2.3.47 If the relocation is abroad, court orders should compel the relocating parent to ensure that the order is enforceable in the foreign country, and that a trust fund be created. Should the matter concern relocation within the Republic, the relocating parent may also be compelled to set up a trust fund. Such provisions would provide some protection to the non-resident parent in the event of the resident parent failing to uphold

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204 Parkinson, Cashmore & Single at 28.

205 Parkinson, Cashmore & Single at 30.

206 Parkinson, Cashmore & Single at 30.

207 Parkinson, Cashmore & Single at 32.

the contact arrangements.[208] Courts may be authorised to impose restrictions associated with international moves, including the ordering of bonds, to help ensure that funds are available in the event that the orders are not followed.[209]

2.3.48 It has been argued that where a mother, who is the resident parent, forms a relationship with a new partner in another city, there seems no reason in principle why courts should not also have to consider whether the new partner could move to the same city as the mother. The mother's new partner makes a choice to form a relationship with someone who has ties, through her children, to a specific location. The mother also needs to accept responsibility for the consequences of her choice of a new partner.[210] However, the courts could also consider whether the father could relocate as well as the mother, if a move is inevitable.

f) Proposals

2.3.49 The main concern is the obvious lack of legislative guidelines.[211]

2.3.50 Parkinson, Cashmore and Single[212] have remarked as follows:

> ..it is tempting to resolve these difficult cases with the assistance of wishful thinking. That makes the decision a little easier. The value of empirical research is to help test that wishful thinking against the realities of other people's experience.

2.3.51 On 23-25 March 2010, more than fifty judges and experts in family law from all over the world met in Washington, DC to discuss international family relocation. This meeting culminated in the release of the "Washington Declaration on International Family Relocation".[213] South Africa can draw on these recommendations.[214]

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208 Albertus at 77.

209 Stahl at 432.

210 Parkinson, Cashmore & Single at 18. In Australia the parent who wishes to move does not bear any onus of proving that the relocation is reasonable. The court must examine, not only the resident parent's proposal to relocate, but also whether the non-resident parent could relocate as well. This reduces the gendered nature of the issues in relocation cases.

211 Andrews thesis at 57.

212 Parkinson, Cashmore & Single at 34.

213 This meeting took place at the Hague Conference on Private International Law, hosted by the International Centre for Missing and Exploited Children, with the support of the United States Department of State (hereafter the Hague Conference on Private International Law). Hague Conference on Private International Law. It is a a global inter- governmental organisation that develops and services multilateral legal instruments, which respond to global needs. The official website of the Hague Conference on Private International Law is accessible at http://www.hcch.net.

2.3.52 The declaration states that relocation determinations should be made without any presumptions for or against relocation. This stance accords with the neutral approach discussed earlier. To identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach, the declaration recommends that the exercise of judicial discretion should be guided in particular - but not exclusively - by the following factors, listed in no order of priority:

a) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest;
b) the views of the child having regard to the child's age and maturity;
c) the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;
d) where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;
e) any history of family violence or abuse, whether physical or psychological;
f) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;
g) pre-existing (care) and (contact) determinations;
h) the impact of the refusal on the child, in the context of his or her extended family, education and social life, on the parties;
i) the nature of the inter-personal relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;
j) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;
k) issues of mobility for family members; and
l) any other circumstances deemed to be relevant by the judge.

The weight to be given to any one factor will vary from case to case.

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[214] Andrews thesis at 66 refers to various attempts to agree on common standards in relocation disputes, to wit International Family Justice Judicial Conference 2009; International Conference on Cross-Border Family Relocation, 2010; International Child Abduction, Forced Marriage and Relocation Conference, 2010, Second and Third Malta Judicial Conferences on Cross-Frontier Family Law Issues 2006 and 2009, Special Commission, 2012.

2.3.53 In addition to the above guidelines, Domingo[215] recommends that when courts consider different proposals set forth by the parties, they need also to consider:

a) possible alternatives to the proposed relocation;

b) whether or not it is reasonable and practicable for the person opposing the application to move to be closer to the child if the relocation were to be permitted; and

c) whether or not the person who is opposing the relocation is willing and able to assume primary caring responsibility for the child if the person proposing to relocate chooses to do so without taking the child.

2.3.54 Stahl[216] elaborates on the crucial factor, to wit, whether the country to which the moving parent wants to take the child is a partner with South Africa on the international Hague Convention on Private International Law.[217] The Hague Convention is designed to help signatory countries to obtain the return of children who have been removed to another Hague Convention country, if necessary, whereas non-signing countries typically do not participate in such an endeavour. In addition, if a child is moved legally to a Hague Convention country, it is anticipated that the country to which the child has moved will support court orders and enforce access promised in those orders from the original home country.[218]

2.3.55 In the United States, the Arizona Revised Statutes section 25-408 identifies factors determined by the legislature to be critically important for courts to consider. Some factors of interest not already referred to above are –

a) that the court should consider which parent is more likely to allow the child frequent meaningful and continuing contact with the other parent;[219]

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215 Domingo at 164 and the references made therein.

216 At 441.

217 Hague Conference on Private International Law, **Convention on the Civil Aspects of International Child Abduction**, October 25 1980.

218 Japanese civil law, for eg. stresses that in cases where custody cannot be reached by agreement between parents, the Japanese court will not resolve the issue based on the best interests of the child. The child will not be returned to the home country.

219 Stahl at 449 distinguishes between facilitative gatekeeping (one parent supports the child's relationship with the other parent); restrictive gatekeeping (marginalize or interfere with the other parent's relationship with the child) and protective gatekeeping (parent who engages in restrictive behaviour has legitimate reasons for attempting to limit the other parent's involvement with the child).

b) whether one parent intentionally misled the court to cause unnecessary delay, to increase the cost of litigation or to persuade the court to give a legal decision-making or a parenting time preference to that parent;

c) whether the relocation will allow a realistic opportunity for parenting time with each parent.

2.3.56 In Australia, Parkinson and Cashmore[220] argue that there should be no presumptions, but that legislative or appellate guidance should be provided on how to approach these disputes. “Good faith” should be irrelevant to decision-making, and children should not be placed at the centre of the conflict. The adjudication of relocation disputes should be on the basis of asking three questions:

a) how close is the relationship between the non-resident parent and the child and how important is that relationship developmentally to the child;

b) if the relocation is permitted, how viable are the proposals for contact with the non-resident parent;

c) if the relationship between the child and the non-resident parent is developmentally important to the child and is likely to be diminished if the move is allowed, then –

(i) what are the viable alternatives to the parents living a long distance apart; and

(ii) is a move with the resident parent the least detrimental alternative?

2.3.57 The American Academy of Matrimonial Lawyers has developed a Model Relocation Act, which could provide South Africa with some guidance.[221] The Model Relocation Act requires a sixty-day notice of change in the principal residence of a child, and permits the non-resident parent to object to the relocation. Relocation is defined as "a change in principal residence of the child for a period of sixty days or more, but does not include a temporary absence from the principal residence.”[222]

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220 Parkinson P & Cashmore J “Reforming Relocation Law: An Evidence-Based Approach” 2015 53 ***Family Court Review*** 23.

221 Domingo at 165 with reference to AAML 1998 http://www.aaml.org

222 Domingo at 165 with reference to Albertus 2009 ***Speculum Juris*** 85.

2.3.58 Legislation dealing with relocation should therefore deal, among other things, with the definition of relocation;[223] objections to relocations (can parties other than resident parents object to the relocation?); factors to be considered; and the burden of proof (which party should bear the burden of proof with regard to these factors?). In addition, the legislation "should also govern the mediation process to be followed in respect of relocation disputes and provide guidelines as to how a parenting plan can best deal with such disputes should they arise."[224]

g) Link between relocation and abduction

2.3.59 Relocation and abduction of children are really two sides of the same coin.[225] The similarities between abducted children and relocated children are striking. Both instances involve the loss of important relationships and familial contact; only one parent is involved in the child's everyday life; there is a need to adapt to new circumstances; and this follows a period of high tension or conflict in the family life, from which the child may already be suffering effects.[226]

2.3.60 The international movement of children can be divided into two facets. On the one hand, there is the court-ordered sanction of movement, following a successful application to relocate. On the other hand, there is lawless movement or abduction.[227]

2.3.61 Approaches to relocation have been recognised as having an impact on child abduction and a bearing on the operation of the Hague Convention of 1980.[228] Parents sometimes feel trapped and predisposed to make a conscious decision to take the law into their own hands.[229]

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223 A definition would be useful in South Africa in view of the fact that the Children's Act does not draw a distinction between "departure" and "removal."

224 Domingo at 165 with reference to Albertus 2009 ***Speculum Juris*** 85.

225 See G (Children) [2010] EWCA Civ 1232 at par 12 as referred to by Freeman M ***Parental Child Abduction: The Long Term Effects*** International Centre for Family Law, Policy and Practice 2014 (hereafter "Freeman") at 16.

226 Freeman at 45.

227 Andrews thesis at 2 with reference to Thorpe LJ "Relocation - The Search for Common Principles" 2010 ***Journal of Family Law and Practice*** 4.

228 Andrews thesis at 2.

229 Andrews thesis at 28.

2.3.62 Depending on the country in which they find themselves and the laws applicable to relocation with the child, a parent may be faced with the decision to remove the child either lawfully or wrongfully.[230]

2.3.63 The debates in this area relate to the restrictive versus liberal nature of the relocation jurisdiction, and the impact of that distinction on the incidence of abduction. Under an overly restrictive relocation regime, a higher number of relocating parents (usually mothers) will abduct their children, rather than staying in the jurisdiction in which they currently live. If there is an overly liberal relocation regime, more potentially left-behind parents (usually fathers) will abduct their children rather than face living in a country from which the children have been relocated.[231]

2.3.64 The idea should also be considered that "expectation" can have negative effects. Expectation refers to knowing what is likely to happen in a specific jurisdiction if an application is made. Where expectation works negatively, some mothers might decide to relocate without fully considering the alternatives. Mothers may feel propelled towards this option if relocation is usually allowed, since they may feel this is what is expected of mothers in their circumstances.[232]

2.3.65 As discussed above, there is no uniformity in approach to relocation internationally. However, various attempts have been made to agree on common international standards.[233]

h) Conclusion

2.3.66 The goal is to introduce some certainty to this area of the law by mandating notice of a proposed move, defining what constitutes a relocation, and directing courts about both circumstances that should be considered and those that should not. The introduction of certainty will reduce the need for lengthy litigation and, thus, reduce the costs associated with disputes over relocation.

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230 Andrews thesis at (iv).

231 Freeman M "International Family Mobility: Relocation and Abduction: Links and Lessons" 2013 ***IFL*** 41 at 44.

232 Ibid.

233 See fn 60 above.

2.3.67 It has been suggested[234] that a model Relocation Act, fashioned along the lines of the AAML, would be beneficial in a country with no clear guidelines on the topic - save for the diversity of approaches that are reflected in its jurisprudence.

Questions:

25. Should relocation be addressed in legislation?
26. What considerations should be considered in drafting legislation in this regard?

2.4 Adult dependent children (adult dependants)

a) Introduction

2.4.1 The Children's Act provides for the protection, promotion and fulfilment of the rights of the child as set out in the Constitution.[235]

2.4.2 In terms of the Act, the age of majority for children has been lowered from 21 years to 18 years.[236] This change has brought our law into alignment with the notion in international human rights law that 18 years marks the end of childhood.[237]

2.4.3 In South Africa, however, the social reality is that "many children have not concluded their secondary education, let alone their tertiary education, when they turn 18 and remain financially dependent on their parents several years after they attain the age of majority".[238] Persons between the ages of 18 and 21 are often unable to earn sufficient income to pay their tuition fees or to support themselves, and they remain financially dependent on their parents.[239]

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234 Andrews thesis at 81.

235 Constitution of the Republic of South Africa, 1996 Preamble.

236 The definition of "child" in section 1 of the Children's Act, 2005 reads as follows:
'**child**' means a person under the age of 18 years;

237 See De Jong M "A Better Way to Deal with the Maintenance Claims of Adult Dependent Children Upon the Parent's Divorce" 2013 76 ***THRHR*** 654 (hereafter "De Jong ***THRHR*** 2013") and the references made therein to Schäfer L ***Child Law in South Africa: Domestic and International Perspectives*** Lexis Nexis Durban 2011 (hereafter "Schafer") at 16; Boezaart T "Child law, the Child and South African Private Law" in Boezaart T (ed) ***Child Law in South Africa*** Juta Claremont 2009 at 17.

238 ***Butcher v Butcher*** 2009 (2) SA 421 (C) at 427I.

239 ***Butcher v Butcher*** *at* 427I; ***JG v CG*** 2012 (3) SA 103 (GSJ) para 48; see also Schäfer at 23.

2.4.4 It is also true that persons with disabilities may never become fully independent of their parents.

2.4.5 Both these categories of adult dependent children are not catered for in the Children's Act.

b) Duty of support (subsection of parental responsibilities and rights?)

2.4.6 At common law, the parental duty of support not only embraces the necessities of life such as food, clothing and shelter, but also extends to education and care in sickness. The child must be provided with all those things that are required for his or her proper upbringing.[240]

2.4.7 It is a well-established principle in our law that the common law parental duty of support lasts until the child becomes self-supporting, regardless of when that happens.[241]

2.4.8 This principle has been confirmed in various pieces of legislation:

a) Section 2 (1) of the Maintenance Act[242] provides that "…this Act shall apply in respect of the legal duty of any person to maintain any other person irrespective of the nature of the relationship between those two persons giving rise to that duty".[243] Section 2(2) goes further and provides that "[t]his Act shall not be interpreted so as to derogate from the law relating to the liability of persons to maintain other persons."

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240 De Jongh ***THRHR*** 2013 and the references therein to Clark "Duties of Support of Living Persons" in Van Heerden B, Cockrell A & Keightley R (eds) ***Boberg's Law of Persons and the Family*** 2ed Juta Kenwyn 1999 at 243–244; Van Schalkwyk "Maintenance for Children" in Boezaart T (ed) ***Child Law in South Africa*** Juta Claremont 2009 at 39.

241 De Jong ***THRHR*** 2013 and the references therein to ***Raichman's Estate v Rubin*** 1952 (1) SA 127 (C); ***Gliksman v Talekinsky*** 1955 (4) SA 468 (W); ***Sikatele v Sikatele*** [1996]1 All SA 445 (Tk); ***Kemp v Kemp*** 1958 (3) SA 736 (D); ***Ex parte Pienaar*** 1964 (1) SA 600 (T); ***Smit v Smit*** *1980 (3) SA 736;* ***Hoffmann v Herdan*** 1982 (2) SA 274 (T)); The decision in the Kemp judgment was confirmed in ***Bursey v Bursey*** 1999 (3) SA 33 (SCA), ***Butcher v Butcher*** 2009 (2) SA (C); ***JG v CG*** 2012 (3) SA 103 (GSJ).

242 Maintenance Act 99 of 1998.

243 See the South African Law Reform Commission ***Revision of the Maintenance Act 99 of 1998*** Issue Paper 28 Project 100C 2014, where the question is posed whether a provision should be included in the Maintenance Act that specifically prescribes the application of the Act to cases where the adult child still requires support from the parent responsible for maintaining them?

Section 15(1) provides that a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue. The duty extends to such support as a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education.

b) The Mediation in Certain Divorce Matters Act, 1987[244] provides in section 4(1) and (2) that the Office of the Family Advocate may, on application by one of the parties, the court or a Family Advocate, institute an enquiry into *any matter* concerning the welfare of each minor *or dependent child of the marriage concerned*.

c) The court is empowered in terms of section 6(1) and (3) of the Divorce Act 70 of 1979 to grant maintenance orders, including interim maintenance orders, in favour of an adult dependent child of parties to a divorce action (para 12). In terms of section 6(1)(a), a decree of divorce shall not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor *or dependent* child of the marriage are satisfactory or the best that can be effected in the circumstances. Section 6(3) empowers the court to make any order it deems fit regarding the maintenance of *a dependent child of the marriage* or regarding the custody or guardianship of, or access to, a minor child of the marriage. Section 7(2) entitles the court to take into account "any other factor" when making a maintenance order in favour of a spouse upon divorce.

d) Rule 43 of the Uniform Rules of Court applies whenever a spouse seeks relief from the court in respect of specific identified matters pertaining to the pending divorce. Although rule 43(1)(c) and (d), which deals with interim custody or care and interim access or contact, specifically refers to interim orders made in respect of *minor* children, rule 43(1)(a), which deals with interim maintenance, contains no such restriction. Rule 43(5)

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244 Mediation in Certain Divorce Matters Act 24 of 1987.

entitles the court to make "such order as it thinks fit to ensure a just and expeditious decision".

2.4.9 The concept "maintenance" is not defined in the Children's Act in the way guardianship, contact and care are defined. It can therefore be argued that it retains its common law meaning.[245]

2.4.10 It should, however, be noted that, at common law, the parental duty of support exists independently of parental authority. Parental authority, or parental power, consists of guardianship, custody and access; the duty of support in respect of a child is not regarded as a component of parental authority.[246]

2.4.11 The Children's Act has, however, now recast the term "parental authority" or "parental power" as "parental responsibilities and rights". It appears that the new term encompasses more than the common law term.[247] In terms of section 1(1) read with section 18(2) of the Children's Act, *parental responsibilities and rights* include the responsibility and right to care for the child, to maintain contact with the child, to act as the child's guardian and *also to contribute to the child's maintenance*. Since 1 July 2007, when sections 1 and 18 came into operation, the duty of support in respect of a minor child younger than 18 years, has therefore become part and parcel of parental responsibilities and rights.

2.4.12 In terms of section 1(1) *care* entails something more than the common law concept of "custody", in that it not only includes a reference to the primary residence of the child, but also contains elements of maintenance. See para (a)(iii) of the definition of "care" in section 1(1) that includes "the necessary financial support".

2.4.13 Section 1(2) of the Children's Act also provides that "in addition to the meaning assigned to the terms "custody" and "access" in any law, and the common law, the terms "custody" and "access" in any law must be construed also to mean "care" and "contact" as defined in this Act.

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245 Heaton J ***South African Family Law*** 3ed Lexis Nexis Durban 2010 at 178; Heaton in Davel CJ and Skelton AM (eds) ***Commentary on the Children's Act*** Juta 2007 *at* 3–5.

246 Skelton AM "Parental Responsibilities and Rights" in Boezaart T (ed) ***Child Law in South Africa*** Juta Claremont 2009 63 at 68; Cronjé DSP & Heaton J ***South African Family Law*** Butterworths Durban 2 ed 2004 at 277–280.

247 De Jongh ***THRHR*** 2013 at 654.

c) Adult dependants without disability

2.4.14 The reduction in the age of majority had several repercussions for young dependent adults between the ages of 18 and 20.[248] This discussion focuses on the predicament in which many of these young dependent adults may find themselves, with regard to their right to support after their parents' divorce. The problem already existed before the enactment of the Children's Act, but was exacerbated by the lowering of the age of majority (as explained above).

2.4.15 The courts have dealt with this matter as follows:

a) In ***Smit v Smit***[249] Flemming J stated that "..when the child turns 21,[250] a claim by one parent against the other for the latter's portion of the common parental duty to support is, usually at least, no longer relevant. It is the child itself who henceforth must claim directly against one or both parents to the extent that he may have a claim for support with effective content."

b) In ***Bursey v Bursey,***[251] the court rejected the father's argument that the mother lacked *locus standi* to continue to enforce maintenance obligations after the child attained majority, and held that an obligation to maintain a child, which was incorporated in a settlement agreement when the child was still a minor, was indeed enforceable at the instance of the mother by means of a writ of execution - despite the fact that the child had since become a major.

c) **In *Butcher v Butcher,***[252] the court had to decide whether the court was competent to order the father to pay, *pendente lite,* "(a) maintenance to

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248 Schäfer L ***Child Law in South Africa: Domestic and International Perspectives*** Lexis Nexis Durban 2011at 23.

249 ***Smit v Smit*** 1980 (3) SA 1010 (O) at 1018B–C.

250 As the age of majority then was.

251 ***Bursey v Bursey*** 1999 (3) SA 33 (SCA).

252 ***Butcher v Butcher*** 2009 (2) SA 421 (C) at 427.

the applicant in an amount that benefits the parties' major children; (b) additional amounts directly to the major children or expenses on their behalf, although they have not been joined as parties in the divorce proceedings". Gassner AJ did, however, distinguish the facts of the *Bursey* case from the present case, where there was no enforceable maintenance order in place (which would have been granted when the children were still minors). She held that a distinction should be drawn between general or shared expenses and specific expenses in respect of adult dependent children, and that only the first category can be included in a spouse's claim for maintenance in rule 43 applications and upon divorce.

d) In ***Gray v Gray,***[253] the court rejected the decision in Butcher, and allowed a mother's application for interim maintenance for her 21-year-old son in a Rule 43 application.

e) In ***JG v CG,***[254] the court had to determine the issue of the mother's entitlement to claim monthly maintenance *pendente lite* in respect of expenditure pertaining to her major son, who had not been joined in the divorce action and had not supported the mother in the rule 43 application. The court rejected the decision in *Butcher* and advocated "a proper and purposive interpretation" of the provisions of rule 43, read with sections 6 and 7(2) of the Divorce Act and the common law (paras [20]–[21], [27] and [49]), so as to allow a parent to request not only shared or general expenses but also specific individual expenses in respect of an adult dependent child, without such child being joined in the rule 43 proceedings.

All these discretionary and empowering provisions suggest that a court would be entitled to make an order for maintenance in respect of a dependent child, in favour of one of the spouses, in rule 43 applications and also upon divorce (paras [26], [31] and [32]). The court added that joinder of the adult dependent child to existing proceedings for maintenance would always remain a possibility, should the court be

253 ***Gray v Gray*** (SGJ) Case no 37106/2009 (27 September 2010).

254 ***JG v CG*** 2012 (3) SA 103 (GSJ).

concerned about making an order in the absence of such child (para [33]). Symon AJ said "it would [therefore] not be alien to accepted common law principles to make one spouse make a payment to another in respect of their shared obligation to meet the expenses of maintaining the child in the matrimonial home, *pendente lite*" (para [36]). An interim order made in rule 43 proceedings without the participation of the dependent child as a party would only bind the parents and not the dependent child, and the child would still be free to institute his or her own maintenance proceedings against an errant parent in terms of section 6 of the Maintenance Act 99 of 1998 (paras [37], [39] and [53]). The maintenance court would then have the power to make a maintenance order; to substitute or discharge any existing maintenance order, including one issued by the High Court; or to make no order (section 16(1)(a)–(c) of the Maintenance Act). In this regard, Symon AJ made the following very important statements (para [45], see also para [1]):

> [C]hildren (even those who are major, but dependent) should not unnecessarily be drawn into the matrimonial conflict if this can be avoided, and particularly when the process is at its most acute – between the date of institution of the divorce action and the finalisation thereof. It would seem to me to be counterproductive to insist upon the assertion of independent rights to maintenance by dependent children in the matrimonial home against the parents in the already strained pre-divorce environment, and *pendente lite*. This can be inflammatory and unhelpful, drawing the major children into taking sides, and making them potential litigants in their own right about expenditure relating to them, and which is bound to create even further conflict before the divorce action is resolved;

and (para [46])

> [i]n my respectful view, the dependent children (particularly when residing in the matrimonial home) should remain removed from direct conflict for as long as possible, and pending the divorce.

For the above reasons, Symons AJ felt that if it is reasoned, from a constitutional perspective, that active and effective remedies are necessary to cater for procuring maintenance for minor children and promoting children's rights (as contained in section 28 of the Constitution of the Republic of South Africa, 1996) then the same reasoning, even only by analogy, should apply to protect the interests of dependent children (para [49]).

d) Adult dependants with disability

2.4.16 As stated above, persons with disabilities might never become fully independent of their parents. It stands to reason that the duty of support in regard to this category of person will never cease.

2.4.17 However, an interesting distinction and interaction between the parental duty to support an adult dependant, on the one hand, and the legal capacity of the adult dependant, on the other, is evident from the views set out in the Convention on the Rights of Persons with Disabilities (CRPD), and from the International Disability Alliance's (IDA) views on this matter. The basic premise is that adult children with disability should not be treated differently from other adults with disability.

2.4.18 The CRPD emphasises the independence and autonomy of a person with psycho-social disability, and seeks not to perpetuate a paternalistic relationship between a parent and his or her *adult* child with disability.

2.4.19 In commenting on the implementation of the CRPD in respect of children with disabilities, the International Disability Alliance remarked as follows: [255]

> All children, including those with disabilities, have an evolving legal capacity, which at birth, begins with full capacity for rights, and evolves into full capacity to act in adulthood. Children with disabilities have the right to have their capacity recognized to the same extent as other children of the same age, and to be provided with age- and disability-appropriate supports to exercise their evolving legal capacity. Parents and guardians have the rights and responsibility to act in the best interests of their children while respecting the child's evolving legal capacity, and the state must intervene to protect the legal capacity and rights of children with disabilities if the parents do not do so, in accordance with the Convention on the Rights of the Child. The parents' or guardians' rights to act on behalf of their children cease when the child reaches the legal adult age. This must be the same for all persons to avoid classifying people with disabilities as children at an older age than others.

It has been suggested that a formal appointment, or at least some sort of hearing, should mark the transition to adulthood.

2.4.20 The South African Law Reform Commission, in its investigation into assisted decision-making,[256] is recommending in its draft Bill[257] that an adult dependant with

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255 IDA CRPD ***Forum Contribution to the Office of the United Nations High Commissioner for Human Rights' Thematic Study to Enhance Awareness and Understanding of the Convention on the Rights of Persons with Disabilities, Focusing on Legal Measures Key for the Ratification and Effective Implementation of the Convention*** Geneva 15 September 2008 paras 7 and 8.

256 SALRC Project 122 ***Assisted Decision-Making: Adults with Impaired Decision-Making Capacity***.

disability should receive informal support to cover both financial and personal welfare matters. The extended safeguards in the Bill would provide additional protection to adult children, under the concept of informal support.

2.4.21 The powers under the amended Bill's informal support concept (clause 6) would allow parents to act widely with regard to personal welfare issues, without the necessity of a formal appointment. The power to consent to medical treatment is not allowed.[258] Consent to medical treatment by the parents of an adult child who is not capable of giving consent is allowed in terms of the National Health Act's section 7(1)(b).

2.4.22 Practical experience in the Masters' Offices shows that the majority of adult children with disability do not have extensive estates in their own names. Where they indeed have such estates, their property is usually either administered through the Guardians Fund, through a trust created for this purpose, or by a curator appointed for this purpose. The automatic appointment of parents as formal supporters thus seems to be unnecessary.

2.4.23 In ***Haywood v Haywood and Others,***[259] Judge Gamble held that the court was satisfied that the parties contemplated continued payments by the applicant directly to the first respondent after their son's majority when they concluded the settlement agreement embodied in the draft order of divorce. The applicant's obligation to maintain the son has therefore not lapsed. In interpreting the order, the judge took into account the circumstances which prevailed at the time of the conclusion thereof, to the effect that the son suffered from on-going severe mental health conditions which would make it difficult for him to study and enter the open labour market.

e) Arguments in respect of proposed amendments to Children's Act

2.4.24 Because the duty of support in respect of a child has now become part and parcel of parental responsibilities and rights, and more specifically the duty to care for a child, and because this duty may continue after a child attains majority, the question

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257 Adults with Impaired Decision-Making Capacity Bill.

258 As envisaged in sec 7(1)(a)(ii) of the National Health Act 61 of 2003. See also clause 78(1)(a)(ii) of the original Bill.

259 ***Haywood v Haywood and Others*** [2014] JOL 31970 (WCC).

may be posed whether certain provisions of the Children's Act should not perhaps also apply to adult dependants of divorcing parents.

2.4.25 One such example would be to include adult dependants in the Children's Act in respect of their maintenance claims upon their parents' divorce or separation, by dealing with these claims in parenting plans (in terms of sections 33–35 of the Children's Act)[260] together with minor siblings' maintenance claims and arrangements regarding the minor children's guardianship, care and contact.[261]

2.4.26 Such an amendment would not be unacceptable or impermissible, as the present position is that in limited cases the Children's Act is explicitly made applicable to children over the age of 18. For example, section 176(2) permits a child in alternative care to remain in that care until his or her twenty-first birthday in order to complete his or her education or training. See also the clarification provided in the amendment of section 176(2) in the Children's Second Amendment Bill.[262]

2.4.27 In terms of this proposal, parents should be allowed to deal with their adult dependent children's maintenance needs and arrangements regarding their accommodation and schooling in a parenting plan entered into upon divorce. The schooling, housing arrangements and maintenance claims of adult dependants and minor siblings could, therefore, be dealt with together. All these issues are intrinsically linked. It is therefore imperative that they should be considered holistically. Preferably they should also be dealt with in one plan.

2.4.28 Section 34(1)(a) requires a parenting plan to be put in writing and signed by the parties to the agreement. Therefore, making adult dependent children parties to the

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260 Section 33(3) makes it clear that a parenting plan may determine any matter in connection with parental responsibilities and rights, including:
"(a) where and with whom the child is to live;
(b) the maintenance of the child;
(c) contact between the child and –
(i) any of the parties; and
(ii) any other person; and
(d) the schooling and religious upbringing of the child".

261 See De Jong ***THRHR*** 2013 at 654 where she suggests that the Children's Act could be interpreted purposively and contextually to include both minor and major dependent children born from a marriage within its ambit, like all other legislation dealing with children's maintenance claims and other children's issues upon their parents' divorce or alternatively, that the necessary amendments be made to the CA to ensure this interpretation, or alternatively that a formal amendment of the Children's Act to include the maintenance of adult dependents within its ambit.

262 Children's Second Amendment Bill [B14-2015] dated 17 April 2015.

agreement could also be considered. However, as discussed above, such a step has the potential for escalated conflict where the child becomes a party to the parents' divorce or separation.

2.4.29 It is also significant to note that the Children's Act specifically mandates mediation, or at least a process which is less confrontational and more conducive to conciliation and problem-solving, when parenting plans are to be concluded.[263] Section 33(2) read with section 33(5) provides that the co-holders of parental responsibilities and rights in respect of a child, who are experiencing difficulties in exercising their responsibilities and rights, should first seek to agree on a parenting plan by attending mediation with a social worker or other suitably qualified person, or by obtaining the assistance of a Family Advocate, social worker or psychologist. In the informal, private and less threatening atmosphere of a mediation process, adult dependants should negotiate their maintenance claims in the presence of both their parents - and even in the presence of other minor siblings, who also have a right to participate in the process in terms of section 10 of the Children's Act.

2.4.30 Taking into account the sensitivities surrounding the position of adult dependants with disabilities, the term "parenting plan" should perhaps be changed to "family responsibility plan".

Questions:

27. How should the Children's Act deal with adult dependants?
28. Is the current position, where the duty of support has been incorporated as a subsection of parental responsibilities and rights, conceptually correct - and is it working well in practice?

2.5 Unmarried fathers

a) Background

2.5.1 In terms of our common law, as amplified by the case of ***B v S,***[264] a father of an extra-marital child did not have any inherent rights of access and custody to his child.[265]

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263 De Jong M "Opportunities for Mediation in the New Children's Act 38 of 2005" 2008 ***THRHR*** 630 at 631–633.

264 ***B v S*** 1995 (3) SA 571 (A).

If a father of an extramarital child wanted access and custody, he had to petition a court alleging and proving on a balance of probabilities that it was in the best interests of the child concerned. The court suggested that "if there are sound sociological and policy reasons for affording such fathers an inherent access right" then the matter should be dealt with legislatively.[266]

2.5.2 Following the decision in ***B v S*** (*supra*), the legislature passed the Natural Fathers of Children Born out of Wedlock Act.[267] In terms of section 2 of this Act, a father seeking to acquire rights in terms of the Act had to make application to court. Upon a preponderance of a number of factors, the court had to determine whether it was in the best interests of the child to permit the father to exercise parental rights.[268] In terms of section 3, after an application was lodged with a court, any party, or the court itself, could request the Family Advocate to conduct an "enquiry" into the best interests of the child concerned.[269]

2.5.3 In contrast to the common law and the Natural Fathers of Children Born out of Wedlock Act, section 21 of the new Children's Act takes a more nuanced approach to the rights of unmarried fathers in respect of their biological children.[270]

2.5.4 An unmarried father ipso facto acquires full parental responsibilities and rights if he meets the requirements[271] prescribed in section 21 of the Children's Act.[272] The

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265 ***B v S*** (*supra*) at 575G-H: The fact is that in Roman-Dutch law an illegitimate child fell under the parental authority, and thus the guardianship and custody, of its mother; the father had no such authority: Van Leeuwen Het Roomsch-Hollandsch Recht H 1.7.4; Van Bynkershoek Quaestiones Juris Privati 3.11; Van der Linden Koopmans Handboek 1.4.2. To acquire parental authority he had either to marry or be married to the child's mother or he had to adopt the child: Voet Commentarius ad Pandectas 1.6.4.

266 At 583G.

267 Natural Fathers of Children Born out of Wedlock Act 86 of 1997 (repealed).

268 Section 2 (1) read with sections 2(2) and 2(5). Paleker at 5.

269 It was felt that the common law position as modified by the Natural Fathers of Children Born out of Wedlock Act (*supra*) was unconstitutional because it unfairly discriminated against biological fathers on the basis of sex and marital status, both of which are enumerated grounds of discrimination mentioned in section 9 (the equality clause) of the Bill of Rights contained in the Constitution of the Republic of South Africa Act 108 of 1996. See in this regard Davel CJ & Skelton AM (eds) ***Commentary on the Children's Act*** Juta 2007 at 3-10.

270 Paleker at 7.

271 One of the requirements set out in section 21 is that the unmarried father has successfully applied to be identified as the father of the child in terms of section 26. Section 26 makes provision for a person who is not married to the mother of a child to claim paternity. Section 26(1)(b) provides for an application to court for an order confirming his paternity where the mother 's consent cannot be obtained. It is not clear which court may be approached.

father can insist on gaining access to his child, and if the mother refuses this then he can take action. If he goes to court to exercise his rights, he goes with a prima facie entitlement and not because he has no inherent rights.[273]

2.5.5 If there is a dispute regarding whether the father meets these requirements, both parties must attempt to reach an agreement through mediation.[274]

2.5.6 The argument has, however, been raised[275] that the Children's Act continues to differentiate between biological fathers and mothers in respect of the initial allocation of parental responsibilities and rights. The constitutionality of this differentiation is questioned.

b) Problems have been identified with this section

(i) Absence of regulations

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[272] Section 21 of the Act reads as follows:

Parental responsibilities and rights of unmarried fathers

21.(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 lived or is living 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 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.

(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.

[273] Paleker at 7.

[274] See discussion on the mediation process in Chapter 3.

[275] Louw A "The Constitutionality of a Biological Father's Recognition as a Parent" 2010 1 ***PER/ PELJ*** 3.

2.5.7 Chapter 3 does not make provision for regulations to assist with the implementation of section 21. One option proposed[276] is that section 21(1)(b) should provide space for the promulgation of regulations to guide what considerations may be taken into account to determine whether an unmarried father complies with section 21(1)(a) or (b).

2.5.8 There is also significant uncertainty about what is meant by "permanent life partnership" and the various requirements of section 21(1)(b). IT has been proposed that words that may lead to unnecessary factual disputes be removed from section 21(1)(a) and (b).[277]

(ii) Historical perspective

2.5.9 The Act seems to have been drafted with a historical perspective. In other words, if a child is already somewhat advanced in age, the father would be able to show proof of his payments for maintenance and contributions to the child's upbringing and so on. However, if the child is new-born and the mother refuses to acknowledge the father at all, by refusing to register the father's name on the birth certificate or refusing to accept any contributions or maintenance, it is extremely difficult to prove compliance with sections 21(1)(b)(ii) and (iii).

(iii) Certificate indicating father's status

2.5.10 Unmarried fathers are, despite section 21, still forced to go to court to get a court order stating that they automatically acquired rights. This is because they need something physical to show that they have rights. This is necessary both in cases of dispute and where there is no dispute.

2.5.11 This problem may be addressed by the issuing of a certificate indicating the status of the unmarried father.[278] There are essentially three categories of unmarried fathers who would require a certificate:

i) Where there is no dispute between the parents and they need a simple administrative procedure to apply jointly for the certificate;

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276 DSD ***Recommendations in Respect of Final Draft*** 2013 at 20.

277 Ibid.

278 DSD ***Recommendations in Respect of Final Draft*** 2013 at 22.

ii) Where there is a dispute between the parties but they are both willing to have mediation for the matter, they obtain the services of a private mediator, and they successfully mediate the matter and then want to jointly apply for a certificate; and

iii) Where the biological mother is unwilling to have mediation and the unmarried father approaches the Family Advocate for assistance.

2.5.12 After the finalisation of mediation, the mediator should be able to issue a successful unmarried father with a certificate that confirms his status as the child's father. There should also be a process through which unmarried fathers can approach the Office of the Family Advocate for such a certificate, even if the mother does not dispute that he acquired rights.

(iv) Intervention by Office of Family Advocate

2.5.13 Section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987[279] provides for the intervention by the Office of the Family Advocate under certain circumstances and cases. The Office of the Family Advocate must institute an enquiry, during the divorce or separation of parties to civil marriages, civil unions, and customary marriages if so requested by the parties or instructed by the court. The enquiry is conducted in order to enable the Family Advocate to furnish the court with a report and recommendations regarding any matter concerning the welfare of a child of the couple concerned. The Act is also applicable to maintenance matters and domestic violence

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279 Section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 reads as follows:

4. Powers and duties of Family Advocates

(1) The Family Advocate shall-

(a) after the institution of a divorce action; or

(b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act 70 of 1979),

if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him by the court.

(2) A Family Advocate may-

(a) after the institution of a divorce action; or

(b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979,

if he deems it in the interest of any minor or dependent child of a marriage concerned, apply to the court concerned for an order authorizing him to institute an enquiry contemplated in subsection (1).

(3) Any Family Advocate may, if he deems it in the interest of any minor or dependent child of a marriage concerned, and shall, if so requested by a court, appear at the trial of any divorce action or the hearing of any application referred to in subsections (1) *(b)* and (2) *(b)* and may adduce any available evidence relevant to the action or application and cross-examine witnesses giving evidence thereat.

cases. The erstwhile Natural Fathers of Children born out of Wedlock Act 86 of 1997, repealed by the Children's Act, similarly provided for the Mediation in Certain Divorce Matters Act to be applicable to court proceedings brought by unmarried fathers. Thus the Office of the Family Advocate could intervene as soon as the papers were issued.

2.5.14 The Children's Act did not repeat the provisions of the 1997 Act when it was repealed. In a step forward, the Children's Act provides for mediation by (inter alia) the Family Advocate between unmarried fathers and biological mothers of children - something neither the Mediation in Certain Divorce Matters Act nor the Natural Fathers of Children born out of Wedlock Act did. It also provides that the outcome of the mediation may be reviewed by a court.

2.5.15 It would, however, seem as though the concepts of "mediation" and "review" are incompatible. The section should rather provide that parties should first attempt mediation before proceeding to court. However, neither section 21 nor section 29 makes provision for an application by the father to be lodged with the court if mediation is unsuccessful. It follows that it is also not possible for the Family Advocate to conduct an enquiry or investigation (as opposed to mediation) in terms of section 21, because the Mediation in Certain Divorce Matters Act has not been made applicable to unmarried fathers.

Questions:

29. Should section 21 be amended to provide for the promulgation of regulations. If so, what should these regulations entail?
30. How should compliance with section 21(1)(b) (ii) and (iii) be determined?
31. Should section 21 make provision for the issuance of a certificate indicating the status of the unmarried father?
32. Should sections 21 and 29 be amended to make provision for an application to be lodged by an unmarried father and the possibility of an enquiry by the Office of the Family Advocate?

2.6 The impact of domestic violence or sexual abuse on the resolution of family law disputes (with specific reference to the care of and contact with children)

a) Legislative framework

(i) Domestic Violence Act, 1998

2.6.1 Section 1 of the Domestic Violence Act, 1998[280] provides for the definition of domestic violence,[281] as well as for the definitions of economic abuse,[282] emotional, verbal and psychological abuse,[283] harassment[284] and intimidation,[285] which are all regarded as elements of domestic violence.

2.6.2 Should a person become the victim of domestic violence, that person has the right to -

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280 The Domestic Violence Act 116 of 1998.

281 **'domestic violence'** means–
a) physical abuse;
b) sexual abuse;
c) emotional, verbal and psychological abuse;
d) economic abuse;
e) intimidation;
f) harassment;
g) stalking;
h) damage to property;
j) entry into the complainant's residence without consent, where the parties do not share the same residence; or
j) any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant;

282 **'economic abuse'** includes–

a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence; or
b) the unreasonable disposal of household effects or other property in which the complainant has an interest;

283 **'emotional, verbal and psychological abuse'** means a pattern of degrading or humiliating conduct towards a complainant, including–

a) repeated insults, ridicule or name calling;
b) repeated threats to cause emotional pain; or
c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant's privacy, liberty, integrity or security;

284 **'harassment'** means engaging in a pattern of conduct that induces the fear of harm to a complainant including–
a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;
c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant;

285 **'intimidation'** means uttering or conveying a threat, or causing a complainant to receive a threat, which induces fear;

- apply for a protection order at the nearest police station or magistrate's court; or
- lay a criminal charge at a police station and apply for a protection order.

2.6.3 A protection order is an order issued by a court at one party's request, ordering the other party in the domestic relationship to stop the abuse. It may also prevent the perpetrator from getting help from any other person to commit abusive acts. An interim protection order can be issued at any time of the day or night for the victim's protection.[286]

2.6.4 Any victim of domestic violence, including a child, can apply for a protection order. If a child is too young, his or her parent or guardian, or any person acting on behalf of someone responsible for the child can, with that person's permission, apply.

2.6.5 Section 7(6) of the Act[287] allows a magistrate who makes a protection order to suspend or limit the contact between the respondent and a child, if this is in the best interest of the child.

(ii) Children's Act, 2005

2.6.6 Section 47(2) of the Children's Act[288] provides that if, during the course of

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286 Sections 4 to 6 of the Domestic Violence Act 116 of 1998.

287 Section 7(6) of the Domestic Violence Act 116 of 1998 reads as follows:
7. Court's powers in respect of protection order
(1) – (5) …..
(6) If a court is satisfied that it is in the best interest of any child it may –
a) refuse the respondent contact with such child; or
b) order contact with such child on such conditions as it may consider appropriate.

288 Section 47 of the Children's Act 38 of 2005 reads as follows:
Referral of children by other court for investigation

47. (1) If it appears to any court in the course of proceedings that a child involved in or affected by those proceedings is in need of care and protection as is contemplated in section 150, the court must order that the question whether the child is in need of care and protection be referred to a designated social worker for an investigation contemplated in section 155(2).

(2) If, in the course of any proceedings in terms of the Administration Amendment Act, 1929 (Act No. 9 of 1929), the Matrimonial Affairs Act, 1953 (Act No. 37 of 1953), the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act No. I16 of 35 1998) or the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), the court forms the opinion that a child of any of the parties to the proceedings has been abused or neglected, the court-
(a) may suspend the proceedings pending an investigation contemplated in section 155(2) into the question whether the child is in need of care and protection; and

proceedings in terms of (inter alia) the Divorce Act, the court forms the opinion that a child of any of the parties to the proceedings has been abused or neglected, the court may suspend the proceedings, pending an investigation contemplated in section 155(2) into the question whether the child is in need of care and protection as contemplated in section 150.[289] The court must also request the Director of Public Prosecutions to attend to the allegations.[290]

2.6.7 Furthermore, section 110 of the Children's Act[291] makes provision for the

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(b) must request the Director for Public Prosecutions to attend to the allegations of abuse or neglect.

(3) A court issuing an order in terms of subsection (1) or (2) may also order that the child be placed in temporary safe care if it appears to the court that this is necessary for the safety and well-being of the child.

289 Section 150 of the Children's Act 38 of 2005 reads as follows:

Child in need of care and protection

(1) A child is in need of care and protection if the child—
(a) has been abandoned or orphaned and is without any visible means of support;
(b) displays behaviour which cannot be controlled by the parent or care-giver;
(c) lives or works on the streets or begs for a living;
(d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
(e) has been exploited or lives in circumstances that expose the child to exploitation;
(f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
(g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
(h) is in a state of physical or mental neglect; or
(i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

290 See the relevant common law crimes as expanded, amended and newly created by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (see for eg crimes relating to sexual grooming, flashing and child pornography). Section 54 of this Act further provides for the obligation to report the commission of a sexual offence against a child or mentally disabled person.

291 Section 110 of the Children's Act 38 of 2005 reads as follows:

Reporting of abused or neglected child and child in need of care and protection

110. (1) Any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.

reporting of abused or neglected children to the police, the DSD, or a child protection organisations.

2.6.8 Risk assessment is a critical component in following up allegations of child abuse and neglect. It can be construed as an ongoing activity from the commencement of the process of receiving reports of alleged abuse and deciding on action to be taken.[292] Risk assessment is addressed in section 142(c) of the Act and in Regulation

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(2) Any person who on reasonable grounds believes that a child is in need of care and protection may report that belief to the provincial department of social development, a designated child protection organisation or a police official.

(3) A person referred to in subsection (1) or (2)-

(a) must substantiate that conclusion or belief to the provincial department of social development, a designated child protection organisation or police official; and

(b) who makes a report in good faith is not liable to civil action on the basis of the report.

(4) A police official to whom a report has been made in terms of subsection (1) or (2) or who becomes aware of a child in need of care and protection must-

(a) ensure the safety and well-being of the child concerned if the child's safety or well-being is at risk; and

(b) within 24 hours notify the provincial department of social development or a designated child protection organisation of the report and any steps that have been taken with regard to the child.

(5) The provincial department of social development or designated child protection organisation to whom a report has been made in terms of subsection (1), (2) or (4), must-

(a) ensure the safety and well-being of the child concerned, if the child's safety or well-being is at risk;

(b) make an initial assessment of the report;

(c) unless the report is frivolous or obviously unfounded, investigate the truthfulness of the report or cause it to be investigated;

(d) if the report is substantiated by such investigation, without delay initiate proceedings in terms of this Act for the protection of the child; and

(e) submit such particulars as may be prescribed to the Director-General for inclusion in Part A of the National Child Protection Register.

(6) (a) A designated child protection organisation to whom a report has been made in terms of subsection (1), (2) or (4) must report the matter to the relevant provincial department of social development.

(b) The provincial head of social development must monitor the progress of all matters reported to it in terms of paragraph (a).

(7) The provincial department of social development or designated child protection organisation which has conducted an investigation as contemplated in subsection (5) may-

(a) take measures to assist the child, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation;

(b) if he or she is satisfied that it is in the best interest of the child not to be removed from his or her home or place where he or she resides, but that the removal of the alleged offender from such home or place would secure the safety and well-being of the child, request a police official in the prescribed manner to take the steps referred to in section 153; or

(c) deal with the child in the manner contemplated in sections 151, 152 or 155.

(8) The provincial department of social development or designated child protection organisation which has conducted an investigation as contemplated in subsection (5) must report the possible commission of an offence to a police official.

[292] DSD National Social Development Children's Act Practice Note no 2 of 2011: Transitional Matters: Implementation of the Children's Act 38 of 2005.

35. Regulation 35 makes provision for a broad risk assessment framework to guide decision-making for identification of children who are being abused or neglected, and an assessment of risk factors to support a conclusion of abuse and neglect on reasonable grounds as contemplated in section 110 of the Act.

2.6.9 Section 153 of the Children's Act[293] makes provision for the process to be

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293 Section 153 of the Children's Act 38 of 2005 reads as follows:

Written notice to alleged offender

153. (1) A police official to whom a report contemplated in section 110 (1) or (2) or a request contemplated in 110 (7) has been made, may, if he or she is satisfied that it will be in the best interests of the child if the alleged offender is removed from the home or place where the child resides, issue a written notice which—

(a) specifies the names, surname, residential address, occupation and status of the alleged offender;
(b) calls upon the alleged offender to leave the home or place where the child resides and refrain from entering such home or place or having contact with the child until the court hearing specified in paragraph (c);
(c) calls upon the alleged offender to appear at a children's court at a place and on a date and at a time specified in the written notice to advance reasons why he or she should not be permanently prohibited from entering the home or place where the child resides: Provided that the date so specified shall be the first court day after the day upon which the notice is issued; and
(d) contains a certificate under the hand of the police official that he or she has handed the original of such written notice to the alleged offender and that he or she has explained to the alleged offender the importance thereof.

(2) The police official must forthwith forward a duplicate original of the written notice to the clerk of the children's court.

(3) The mere production to the court of the duplicate original referred to in subsection (2) is prima facie proof of the issue of the original thereof to the alleged offender and that such original was handed to the offender.

(4) The provisions of section 55 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) apply, with the necessary changes, to a written notice handed to an alleged offender in terms of subsection (1).

(5) A children's court before which an alleged offender to whom a written notice in terms of subsection (1) has been issued, appears, may summarily inquire into the circumstances which gave rise to the issuing of the notice.

(6) The court may, after having considered the circumstances which gave rise to the issuing of the written notice and after having heard the alleged offender—

(a) issue an order prohibiting the alleged offender from entering the home or place where the child resides or from having any contact with the child, or both from entering such home or place and having contact with the child, for such period of time as the court deems fit;
(b) order that the alleged offender may enter the home or the place where the child resides or have contact with the child upon such conditions as would ensure that the best interests of the child are served;
(c) order that the alleged offender will be responsible for the maintenance of his or her family during the period contemplated in paragraph (a);
(d) refer the matter to a designated social worker for an investigation contemplated in section 155 (2); or
(e) make such other order with regard to the matter as the court deems fit.

followed by the police officer to whom a report of abuse has been made, to issue the alleged offender with a written notice to the effect that he must leave the home where the child resides, or not have contact with the child, until the court hearing (on the first court day after the day upon which the notice is issued). The children's court may summarily inquire into the circumstances which gave rise to issuing the written notice. After having heard the alleged offender, the children's court may make such order as it deems fit, or refer the matter to a designated social worker for an investigation contemplated in section 155(2) of the Children's Act.

2.6.10 Section 155(2) of the Children's Act[294] provides that before a child is brought before the children's court, a designated social worker must investigate the matter and must, within 90 days, compile a report (in the prescribed manner) on whether the child is in need of care and protection. Section 155(6), (7) and (8) enumerates the orders the children's court may make once the child has been brought before it.

2.6.11 In the Constitutional Court Case of ***C and Others v Department of Health and Social Development, Gauteng and Others***[295] the court made provision for an automatic review of the removal of a child when abuse is alleged, before compilation of the report in terms of section 155(2).

b) Effect of sexual and domestic violence allegations on care and contact disputes

2.6.12 Although allegations of domestic violence and sexual abuse can occur in the context of divorce, most disputed custody cases do not involve such accusations.

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(7) Misuse of a power referred to in subsection (1) by a police official constitutes grounds for disciplinary proceedings against such police official as contemplated in section 40 of the South African Police Service Act, 1995 (Act No. 68 of 1995.

294 Section 155 of the Children's Act 38 of 2005 reads as follows:

Decision of question whether child is in need of care and protection

155. (1) A children's court must decide the question of whether a child who was the subject of proceedings in terms of section 47, 151, 152 or 154 is in need of care and protection.

(2) Before the child is brought before the children's court, a designated social worker must investigate the matter and within 90 days compile a report in the prescribed manner on whether the child is in need of care and protection.

295 ***C and Others v Department of Health and Social Development, Gauteng and Others*** 2012 (2) SA 208 (CC).

2.6.13 One of the few clear and immediate indicators for changing a care or contact order has always been an accusation of sexual abuse or domestic violence by one parent. This urgency arises because the health and welfare of children is of paramount importance when determining the best interest of the child.[296] Furthermore, in a national survey by the Institute of Security Studies (2002) on domestic violence in South Africa, 34.4% of women reported that in addition to the harm they had personally suffered, their abusers had also threatened to harm their children. Among this group, 18.2% of women reported threats to the lives of their children.[297]

2.6.14 Research has shown that families affected by domestic violence are relatively likely to have on-going disputes about care, contact and maintenance of children, even after the parents have separated. This suggests that abusive partners often continue their attempts to control their ex-partners through the children.[298] There is also a problem of escalating violence at the time of divorce and separation, which could in extreme cases end up in harm to the children or partner.

2.6.15 There is general agreement that one should therefore not approach domestic violence or sexual abuse accusations with a sceptical stance, and each matter should be thoroughly investigated. There is a real danger that a violent partner may harm children and the other partner to prevent them from leaving. Family members may even be killed when a relationship ends.[299]

2.6.16 Geographical isolation, gender stereotypes, lack of resources, lack of privacy, economic dependence, and limited access to services have been identified as barriers

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296 Section 7 of the Children's Act clearly includes the need to protect the child from any physical or psychological harm as a factor to take into consideration when the best interest standard is applied.

297 Bonthuys E in Heaton J (ed) ***The Law of Divorce and Dissolution of Life Partnerships in South Africa*** Juta Cape Town 2014 (hereafter "Heaton (ed) 2014") at 480 with reference to Rasool S, Vermaak K, Pharoah R, Louw A & Stavrou A ***Violence Against Women: A National Survey*** (Institute for Security Studies, 2002) 35 Table 10. See also Shepard MF & Hagemeister AK "Perspectives of Rural Women: Custody and Visitation With Abusive Ex-Partners 2013 28 ***Journal of Women and Social Work*** 165 (hereafter "Shepard & Hagemeister") at 167 and references made therein: Research has indicated that men who batter their partners are also likely to be abusive and controlling toward their children.

298 Logan TK, Walker R, Horvath LS and Leukefeld C "Divorce, Custody and Spousal Violence: A Random Sample of Circuit Court Docket Records" 2003 18 ***Journal of Family Violence*** at 269.

299 Nolan LC "Identifying Parents Who May Kill their Children in Highly Contested Custody Cases: Can Mental Health Providers Help Judges Avoid the Deadly Game of Russian Roulette?" 2009/10 9 ***Whittier Journal of Child and Family Advocacy*** 227.

for rural American women who experience domestic violence.[300]

2.6.17 It is troublesome that many allegations of child abuse and domestic violence surface for the first time in private law proceedings, whereas they were previously undetected.[301] One reason for this situation could be that when one parent becomes aware that the other is abusing the child, or where domestic violence occurs in the household, it may become the reason why divorce proceedings are instituted.

c) Problems identified

(i) Risk analysis and assessing veracity of allegations

2.6.18 It is of utmost importance to determine whether accusations of domestic violence or sexual abuse are true or false. However, it is often very difficult to assess the veracity of the allegations.

2.6.19 A crucial dimension in assessing cases of alleged child abuse is risk analysis. A process of weighing up the risks of various forms of intervention, and also of refraining from intervening, has to be undertaken for every child referred for protective services. Where a report is considered sufficiently serious to warrant an investigation by a social worker, it is necessary to establish whether any risk to the child can be dealt with by the use of enabling or empowering approaches. Approaches that call for voluntary involvement of the family in preventive strategies should be the first choice unless they are inadequate to prevent harm to the child.[302]

2.6.20 The most difficult problem in evaluating research into allegations of child sexual abuse is evaluating the criteria researchers use to assess the veracity of allegations. There is also a fair amount of disagreement among writers about the characteristics of false allegations.[303]

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300 Shepard & Hagemeister at 165.

301 Nicholson A The Honourable Chief Justice of the Family Court of Australia "Court Management of Cases Involving Child Abuse Allegations" Keynote address 7th Australian Conference on Child Abuse and Neglect 19 October 1999 (hereafter "Nicholson") at 2.

302 SALRC Discussion Paper supra at 390.

303 Faller KC, Corwin DL & Olafson E "Literature Review: Research on False Allegations of Sexual Abuse in Divorce" 1993 6 ***The APSAC Advisor*** 7 at 9.

2.6.21 It is accepted that the evaluator should have knowledge of three forensic areas:

a) practices and procedures in the child care and contact area;

b) sexual abuse evaluation techniques; and

c) assessment of alleged sexual offenders.

Given the controversy surrounding assessment in this area, evaluators have been strongly criticised and accused of lack of actual knowledge about child sexual abuse.[304] (See also the discussion on expert evidence below.)

(ii) Mediation (or other ADR) processes and domestic violence

2.6.22 The question has been posed whether child custody ADR should be accepted as an appropriate method for settling disputes, where domestic violence or sexual abuse has been identified or where such allegations have been made.

2.6.23 It has been conceded that mediation is a blunt instrument which is not able to change the overall dynamics of a society. Prevailing patriarchal norms could therefore be reinforced during the mediation process. Community norms or values that characterise rural communities especially, and are often supported by religious institutions - such as the importance of family privacy, traditional gender roles, and the value placed on keeping families intact - can pressurise victims of domestic violence to keep silent.[305] For this reason, it has been argued[306] that mediation in matters of domestic violence is contra-indicated.

2.6.24 The features of domestic violence include controlling behaviour by the perpetrator (for example, tapping the phone of the partner); isolation of the victim (from family members and friends and by withholding money); and coercion and fear (which could become a life-or-death issue).[307] It is clear that fair mediation would not be possible in these circumstances, precisely because abused spouses have been conditioned to relent, compromise and conform in the hope of protecting themselves from violence. This learned pattern of dealing with the abuser cannot be easily broken,

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304 Bow JN, Quinnell FA, Zaroff M & Assemany A "Assessment of Sexual Abuse Allegations in Child Custody Cases" 2002 33 ***Professional Psychology: Research and Practice*** 566 at 566.

305 Shepard & Hagemeister at 166.

306 Collett, M "Mediation and Domestic Violence" Paper presented at the Conference on New Developments in Family Mediation co-hosted by the UKZN, NWU and SAAM at the Durban–Westville Campus 29 September 2015.

307 Ibid.

especially in a process that requires compromise.[308] Victims of domestic violence are therefore greatly disadvantaged in mediation.

2.6.25 However, from a different perspective, there are other factors that should also be taken into consideration. Mediation could be the only hope for the victim to become empowered. Mediators may use their skills to recognise the problem, to balance the inequities of power, and to conduct the mediation process in accordance with the needs of the family.[309] It may also be an opportunity for the violence to be "signposted" and "flagged".[310]

2.6.26 Different forms of mediation, such as advocacy, activist or shuttle mediation, may allow mediation to proceed. For example, in Montana (United States), divorcing couples with a history of domestic violence are required to mediate over the phone. In California, when domestic violence is alleged or a protective order is in place, the remedy is to allow separate mediation sessions, where the mediator meets with each partner separately; in some cases a support person is allowed.[311] Couples could also be required to agree to end the abuse, and to have frequent sessions with clear guidelines for conduct, before entering mediation.

2.6.27 Craig Schneider,[312] a practising mediator and legal practitioner in South Africa, argues that mediation is possible for matters of contact with and financial support for children, even in households where domestic violence has taken place. Clearly there are certain cases where abuse is so extreme that mediation may not be possible. However, domestic violence per se should not rule out mediation as a first option. Should mediation be applied in domestic violence matters, it would reduce the court rolls and prevent abuse of the proceedings, and could assist in re-building bridges to family unity.

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308 Johnson NE, Saccuzzo DP & Koen W "Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect" 2005 11 ***Violence Against Women*** 1022 (hereafter "Johnson, Saccuzzo & Koen") at 1025.

309 Johnson, Saccuzzo & Koen at 1027.

310 "Signposting" means referring a victim for appropriate assistance. "Flagging" refers to running an intervention, and informing the authorities.

311 Johnson, Saccuzzo & Koen at 1023. De Jong "Chapter 13: Mediation and Other Appropriate Forms of Alternative Dispute Resolution Upon Divorce" in Heaton (ed) 2014 at 605-606 and ftnt 253 states that mediation, in contrast to litigation, may provide a comfortable atmosphere in which violence can be assessed and addressed.

312 Schneider C "Mediation in Children's Act, 2005" Paper presented at Miller Du Toit Cloete Family Law Conference Cape Town 2008.

2.6.28 As a prerequisite for taking precautionary measures, the domestic violence or abuse must be acknowledged. One study has shown that mediators failed to recognise or report domestic violence in 56.9% of cases where domestic violence or abuse did in fact occur. By comparison, the court's screening form failed to indicate domestic violence in 14,7% of the violent cases. Finally, mediation resulted in poor outcomes for domestic violence victims, in terms of protections such as supervised visitation and protected child exchanges.[313]

2.6.29 The Children's Act compels or makes provision for parties to seek mediation before approaching a court.[314] However, although exceptions are provided in some sections - to the effect that mediation is prohibited where allegations of sexual abuse have been made, none of these provisions contains exceptions for domestic violence, even where the violence is of a serious nature.[315]

2.6.30 It has been argued[316] that courts applying these sections should read in an exception for domestic violence. Otherwise, the sections could be open to constitutional challenge because of their effect on both women's rights to safety and security and the best interests of their children.[317]

(iii) Abuse of the process

2.6.31 In its investigation into the Review of the Child Care Act, the SALRC stated[318] that it is not unusual for one or both parents to use their child as a "weapon" in the matrimonial warfare. This includes the resident parent sabotaging the contact visits of the non-resident parent. Such scenarios are particularly likely in high-conflict divorce cases where a parent might even go so far as to abduct the child to a foreign country.

2.6.32 The SALRC was alarmed by the allegation that some lawyers may deliberately

313 Johnson, Saccuzzo & Koen at 1022.

314 See full discussion of mediation in terms of the Children's Act in Chapter 3.

315 Bonthuys E "Chapter 11: Domestic Violence" in Heaton (ed) 2014 at 487.

316 Ibid.

317 See, however, the opposite argument stated above. See also the impact of section 7 of the Children's Act where the best interest standard includes family violence as a factor to be considered together with the need to protect the child from any physical or psychological harm, on these sections.

318 SALRC Project 110 Discussion Paper 2001 at 649.

escalate the acrimony between divorcing or separating parents. Such unethical practice includes encouraging clients to make false claims of abuse, or encouraging women to invoke violence as a way to ensure an advantage in parenting and property disputes. Clients could then apply for protection orders in terms of the Domestic Violence Act[319] to frustrate the attempts of the other parent to see or care for his or her child.[320] False allegations continue to enter divorce proceedings by way of lawyers who place allegations of criminal behaviour in affidavit material, without substantiation from child welfare or police authorities, and without consequences to the accusing parent or lawyer involved.

2.6.33 However, criticism has also been levelled against a culture where child abuse allegations in private disputes about children are too readily construed as false, or as being motivated by the desire to gain a tactical advantage, or as a hysterical outpouring of one disgruntled parent engaged in a war of attrition with the other parent.[321]

2.6.34 The SALRC recommended[322] that where allegations of child abuse surface in divorce cases, or where domestic violence is evident (whether through affidavits, in evidence, or from investigations conducted by a Family Advocate, or otherwise), the court hearing the divorce matter may, of its own accord or upon application, order that the divorce matter stand down, and order a children's court enquiry first. The SALRC thought that this process should reduce conflict in divorce proceedings by removing the incentive to make false allegations; in addition, it should provide children who are at risk of abuse with the protective framework of the new children's statute.

2.6.35 The recommendation of the SALRC was included in section 47(2) of the Children's Act. Section 47(2) now ensures that accusations can be tested by the court immediately. The question arises whether section 47(2) is working well in practice. Does it provide adequate protection to children and parents in instances where a party to a divorce action is accused of sexual abuse?

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319 Domestic Violence Act 116 of 1998.

320 See discussion in Heaton (ed) 2014 at 489 of ***B v B*** 2008 (4) SA 535 (W) and ***Narodien v Andrews*** 2002 (3) SA 500 (C) as being examples of instances of parents abusing the provisions of the Domestic Violence Act to obtain advantages, in relation to care of and contact with their children.

321 Nicholson at 1.

322 SALRC Project 110 Report 2002 at 198.

2.6.36 Even though section 47(2) refers, amongst others, to the Domestic Violence Act, the protection granted in terms of section 47(2) is only available to children.

2.6.37 It should be noted that any accusation, whether true or false, may have a devastating effect on the relationship between the parent and the child. See also the discussion on unacceptable delays below.

(iv) Unacceptable delays

2.6.38 Children caught up in residence and contact disputes in which child abuse allegations have been made are often subject to an extremely drawn out, expensive and often inconclusive legal process, which gives rise to considerable professional and parental dissatisfaction. [323]

2.6.39 In Australia the Chief Justice of the Family Court of Australia addressed the problem by developing new ways for the courts to manage care and contact disputes in which child abuse allegations had been made. The new court programme, referred to as the Magellan Project, was based on the following principles:[324]

- a child-focused approach that included the appointment of a legal representative for the child, to be funded by the state legal aid authority;
- a judge-lead, tightly managed, fixed time programme with pre-set steps;
- early intervention with full intervention resources made available at the outset;
- a multi-disciplinary team to manage the family throughout the programme;
- use of expert authority in investigations and assessments, using child protection and court counsellors as the professional investigators and assessors;
- clear information about programme processes and progress for families, including circulation of expert reports to families.

2.6.40 Parallel to the Magellan Project was the Columbus Project in Western Australia, which extended the concept of individualised case management. The distinctive

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323 Australian Law Reform Commission ***Seen But Not Heard*** Report 1997.

324 Brown T "Project Magellan" Paper presented at the Child Sexual Abuse: Justice Response or Alternative Resolution Conference convened by the Australian Institute of Criminology Adelaide 1-2 May 2003.

features of the Columbus Project were as follows[325]–

- cases were individually managed, not just fast-tracked, through a series of Columbus family conferences (jointly chaired by a Registrar and Family Counsellor) until either a stable, safe contact regime is established or the matter is referred back to the general court system;
- the inclusion of therapeutic services and referrals as part of the conference process;
- proceedings of the conferences are not admissible in evidence (privileged).

2.6.41 Both these projects sought to deal with parenting disputes involving allegations of serious physical and sexual abuse to reduce the distress of children by achieving quicker and more lasting resolution of disputes and to reduce the costs associated with these cases. Similar suggestions may be helpful for South Africa.

Questions:

33. How prevalent are allegations of child abuse or domestic violence during divorce or separation cases?
34. How prevalent are unfounded allegations?
35. Who mainly makes the allegations - mothers or fathers?
36. Do the allegations cause delays? If so, how can this problem be addressed?
37. What is the effect of such allegations on a child?
38. Does section 47 provide adequate protection to children, parents and other parties?
39. Is effective or adequate screening currently available to identify domestic violence and sexual abuse?[326]
40. Should mediation be available for parties where domestic violence or sexual abuse allegations have been made, or where protection orders are in place?

2.7 Professional reports (expert reports)

a) Introduction

2.7.1 Professional reports may either be ordered by the court or submitted by parties themselves as part of the evidence that they put before the court.

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325 Kerin P & Murphy P "Overview of an Emerging Model of an Integrated Family Court System" Paper presented at the 8th Australian Institute of Family Studies Conference Melbourne 12-14 February 2003 at 3.

326 See De Jong "Chapter 13: Mediation and Other Appropriate Forms of Alternative Dispute Resolution Upon Divorce" in Heaton (ed) 2014 at 592 for a discussion of screening tools which include questionnaires designed with direct and indirect questions to tease out the truth, careful interviewing, and caucusing where parties are seen separately.

2.7.2 The use and abuse of expert reports in courts remains a controversial topic. Two general viewpoints exist in respect of care and contact evaluations:[327]

a) Care and contact evaluations give the court great insight into parenting through observation, evaluation, and investigation; and the recommendations and conclusions made in these evaluations serve an invaluable purpose in custody and parenting disputes; or

b) Care and contact evaluations serve as a "clearing house" for otherwise inadmissible hearsay, and supplant the role of the judicial officer by setting forth options on the ultimate issue being decided at trial.

b) Current position in South Africa

2.7.3 Section 6 of the Divorce Act[328] provides that an enquiry must be instituted, and a report submitted to the court, by the Family Advocate in terms of section 4(1)(a) or 2(a) of the Mediation in Certain Divorce Matters Act, 1987 before a decree of divorce may be granted. The court may also cause any investigation which it deems necessary to be carried out, and may order any person to appear before the court.

2.7.4 Section 62 of the Children's Act[329] provides that a children's court may order an investigation to establish the circumstances of the child, the parents of the child, and other relevant persons.

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327 Mc Grath KJ Lead Referee Hennepin County Family Court Minneapolis "Practice Tips: For Mental Health Therapists, Lawyers and Judicial Officers in Family Law Cases" Paper presented at AFCC 9th Symposium on Child Custody Evaluations 28-30 October, 2010 (hereafter " Mc Grath") at 4.

328 Divorce Act 70 of 1979.

329 Section 62(1) of the Children's Act reads as follows:

Professional reports ordered by the court

62. (1) A children's court, for the purposes of deciding a matter before it or any issue in the matter, may order, if necessary, that a designated social worker, family advocate, psychologist, medical practitioner or other suitably qualified person carry out an investigation to establish the circumstances of—

(a) the child;
(b) the parents or a parent of the child;
(c) a person who has parental responsibilities and rights in respect of the child;
(d) a care-giver of the child;
(e) the person under whose control the child is; or
(f) any other relevant person.

(2) A person referred to in subsection (1) may, subject to section 63 (1) and (2)-

2.7.5 Section 63 of the Children's Act[330] provides the requirements for the admissibility of written reports as evidence in court.

2.7.6 Section 50 of the Children's Act provides that a children's court may, before it decides a matter, order any person to carry out an investigation that may assist the court in deciding the matter and to furnish the court with a report and recommendation thereon.

2.7.7 Section 59 of the Children's Act[331] deals with the circumstances under which witnesses may be called.

(a) obtain supplementary evidence or reports from other suitably qualified persons;
(b) be required by the court to present the findings of the investigation to the court by -

(i) testifying before the court; or
(ii) submitting a written report to the court.

330 Section 63 of the Children's Act 38 of 2005 reads as follows:
Evidence

63. (1) A written report, purported to be compiled and signed by a medical practitioner, psychologist, family advocate, designated social worker or other suitably qualified person who on the face of the report formed an authoritative opinion in respect of a child or the circumstances of a child involved in a matter before a children's court, or in respect of another person involved in the matter or the circumstances of such other person, is, subject to the decision of the presiding officer, on its mere production to the children's court hearing the matter admissible as evidence of the facts stated in the report.

(2) The written report contemplated in subsection (1) must be submitted to the children's court within the prescribed period prior to the date of the hearing of the matter.

(3) If a person's rights are prejudiced by a report referred to in subsection (1) the court must-

(a) disclose the relevant parts of the report to that person within the prescribed period prior to the date of the hearing of the matter if that person is a party to the proceedings; and

(b) give that person the opportunity-

(i) to question or cross-examine the author of the report in regard to a matter arising from the report; or

(ii) to refute any statement contained in the report.

331 Section 59 of the Children's Act reads as follows:
Witnesses
59. (1) The clerk **of** the children's court must, in the prescribed manner, summons a person to appear as a witness in a matter before the court to give evidence or to produce a book, document or other written instrument on request by-

(a) the presiding officer in the matter;
(b) the child or a person whose rights may be affected by an order that may be made by the court in those proceedings; or
(c) the legal representative **of** a person referred to in paragraph *(b).*

2.7.8 No regulations exist for sections 62 and 63 of the Children's Act.

2.7.9 The principles applicable to the admissibility and evaluation of expert opinion evidence are well-established.[332] Chetty J points out – [333]

> It is clear… that expert opinion is not the mere conjecture, surmise or speculation of the expert: it is his judgment in a matter of fact. It is equally clear, that whilst in many cases a court needs and benefits from an expert's opinion, the expert witness should not usurp the function of the court.

2.7.10 In respect of the proper role and function of expert witnesses in disputes involving children and families, the Appeal Court stated as follows: [334]

> An expert in the field of psychology or psychiatry who is asked to testify in a case of this nature, a case in which difficult emotional, intellectual and psychological problems arise within the family, must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he or she is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning and is accordingly to that extent in as good a position as the trial Court was.

c) Problems identified

(i) Costs of reports

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(2) A summons referred to in subsection (1) must be served on the witness as if it were a summons to give evidence or to produce a book, document or other written instrument at a criminal trial in a magistrate's court.

(3) Sections 188 and 189 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977),read with such changes as the context may require, apply to a person who has been summonsed in terms of subsection (1) or required by the presiding officer to give evidence.

(4) A person summonsed in terms of subsection *(l)a)* and who complied with the summons, is entitled to an allowance from state funds equal to that determined for witnesses summonsed to appear in criminal trials in a magistrate's court.

(5) A person summonsed in terms of subsection (l)(b) or (c) is not entitled to an allowance from state funds except if the presiding officer so orders.

332 ***P v P*** 2007 (5) SA 94 (SCA) at par [16] with reference to Zeffertt DT, Paizes AP & Skeen A ***The South African Law of Evidence*** 2003 at 299 ff; Schwikkard PJ & Van der Merwe SE ***Principles of Evidence*** 2 ed 2002 at 89 ff and the cases cited by these writers. See also ***Stock v Stock*** 1981 (3) SA 1280 (A) at 1296 E-F and ***Jackson v Jackson*** 2002 (2) SA 303 (SCA) at 311F-G, 323E-324C and 327g-333I.

333 ***P v P*** supra at [16] with reference to the original divorce order dated 26 October 2004 in the Port Elizabeth High Court.

334 ***Stock v Stock*** 1981 (3) SA 1280 (A) at 1296E-F.

2.7.11 Where a report is requested by the presiding officer, the DOJCD will pay expert witness fees. However, it is not clear whether this refers to witness fees, which differ from the fees attached to doing an investigation and writing a report. It has been argued[335] that a funding policy for reports requested by a presiding officer needs to be established. If a report is to be paid for by the State, the circumstances in which a presiding officer may order such a report must be clearly described, and whether the funding responsibility rests with the DOJCD or the DSD. Provision can also be made for an order by the presiding officer that the cost of the report has to be paid by the parties to the proceedings.

2.7.12 Where parties have to pay for the reports, a problem might arise in that the experts who make recommendations might seek to please the parties who briefed them. This could result in the expert tailoring his or her recommendations to the advantage of the person who pays the fees.

2.7.13 The financially stronger party has an advantage in that it can prolong the process to exhaust the other party's legal resources.

(ii) Ethical problems

2.7.14 Some mental health professionals find that the differing demands of treating a patient versus evaluating parties in a care and contact dispute may set up ethical problems. Evaluation for legal purposes should be guided by the legal concept of procedural fairness, in which both parents are treated and evaluated fairly and objectively. By contrast, treatment of a patient necessarily involves a degree of empathy with the client.[336]

2.7.15 A lack of standardised procedures also contributes to ethical problems. In the ***Jackson*** case,[337] the social worker recommended that custody be transferred to the respondent, without interviewing the appellant, despite the fact that the children had been in his custody since the divorce. When repeatedly taxed by the court on her failure to do so, she insisted that she was not asked to look at his suitability and did not

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335 DSD ***Recommendations in Respect of Final Draft*** 2013 at 58.

336 Bonthuys E "Epistemological Envy: Legal and Psychological Discourses in Child Custody Evaluations" 2001 118 ***SALJ*** 329 (hereafter "Bonthuys ***SALJ***") at 334.

337 Supra at par [15].

see the need to do so. She indicated that although this was not the normal approach in recommending a variation of custody, different cases warranted different approaches.

2.7.16 It has also been reported[338] that some magistrates and attorneys believe abused children should not be given therapy before the trial of their abuser, because children are suggestible, resulting in fears that pre-trial therapy can affect the credibility of the child's evidence. However, trials are often concluded years after the alleged incident/s took place.[339] Delays in giving a child professional therapy to deal with the trauma of abuse could result in psychological harm to the child.

(iii) Proliferation of expert reports

2.7.17 The question should be posed whether there is any real advantage in appointing various experts in one case.

2.7.18 In ***P v P,*** [340] the testimony of all the experts (three clinical psychologists, a psychiatrist, the Family Advocate and the Family Counsellor) was rejected. The experts, the advocate and the counsellor were all in agreement as to the proposed outcome of the case (even though, in the case of the experts, they were acting for opposing parties). The decision of the court was based on an unfavourable credibility finding of the testimony, based on the facts. The court stated as follows:

> [17] The trial judge did not question the specialised knowledge, training or experience of the various expert witnesses, but identified his main problem with such experts as being '[their] inability… to draw a line between matters of fact and matters of value thereby distorting the judicial process by acting like judges.' For this reason, he considered their evidence to have 'no real probative value'.

2.7.19 In ***HG v CG,***[341] the children's views prevailed in spite of some experts advising otherwise. The court stated as follows:

> [21] The attitude of the children to the proposed relocation to Dubai, articulated in the aforegoing reports of Messrs Goosen and Coertzen, was neither properly considered nor accorded due weight by the applicant's experts. Having been commissioned by the applicant, their loyalty to her cause appears to have influenced their final recommendations.

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338 Narsee A "Don't Help Abused Kids" ***Times Live*** 15 September 2015 refers to research conducted by Ansie Fourie (NWU) and Liana le Roux (UP).

339 See discussion on videotaped evidence in Chapter 3.

340 ***P v P*** 2007(5) SA 94 (SCA).

341 ***HG v CG*** 2010 (3) SA 352 (ECP) at 364.

Ms Coertzen was the Family Advocate and Mr Goosen was the clinical psychologist appointed by the Office of the Family Advocate. The applicant appointed two clinical psychologists (producing various reports) and one social worker who all reported in her favour.[342]

2.7.20 The increase in the prevalence and influence of testimony by mental health professionals has been attributed[343] to at least two factors. The first relates to the erosion of the legitimacy of the maternal preference rule[344] in care and contact cases.

2.7.21 Possibly more influential was the creation of the Office of the Family Advocate, brought about by the Mediation in Certain Divorce Matters Act. Family Advocates are legally trained and are thus, presumably, influenced more by legal perspectives than by mental health concerns. However, Family Advocates do not themselves investigate and report on all cases. They are assisted by Family Counsellors, who are state social workers and may also appoint private social workers to investigate cases on their behalf. Family Advocates often also recruit expert advice from psychologists and psychiatrists.[345] A further factor concerns the incontrovertible nature of evaluations by Family Advocates and Counsellors, from which there lies no appeal. The preferred way of dealing with unfavourable reports is to obtain further psychologists' reports, prompting contradictory reports by the other parties.[346]

(iv) Legal versus psychological discourses in child custody evaluations

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342 See also ***Bethell v Bland*** 1996 (2) SA 194 (W), where the court was presented with conflicting reports by one social worker, one psychiatrist, one psychologist and a Family Counsellor. In ***Ex parte Critchfield*** 1999 (1) All SA 319 a psychologist and a psychiatrist testified on behalf of the mother, while the father availed himself of the services of one social worker and three psychologists.

343 Bonthuys with reference to ***McCall v McCall*** 1994 (3) SA 201 (C) at 205B–G; ***Madiehe (born Ratlhogo) v Madiehe*** [1997] 2 All SA 153 (B) at 157*e–g*; ***Van der Linde v Van der Linde*** 1996 (3) SA 509 (O) at 514–5; ***Van Pletzen v Van Pletzen*** 1998 (4) SA 95 (O) at 101D.

344 This rule is based upon the implicit notion that the psychological interests of children are best served by maintaining the bonds with their mothers who have generally been their primary caretakers. It was substantiated by the psychological research of John Bowlby on the effects of maternal deprivation upon young children. See Bonthuys reference to ***Attachment and Loss: Volume 1: Attachment*** (1969)*;* ***Volume 2: Separation: Anxiety and Anger*** (1973); ***Volume 3: Loss Sadness and Depression*** (1980).

345 Bonthuys ***SALJ*** at 329.

346 Bonthuys ***SALJ*** at 330.

2.7.22 Lawyers need to understand the common psychological tests used in evaluations. They should also be familiar with all types of mental and psychological disorders, (for example depression, sexual disorders, and personality disorders) and their effect on children and on care and parenting time. Similarly, mental health professionals should be knowledgeable in respect of the legal terms and rules of evidence.

2.7.23 It is important that the parties to a dispute (who might not be lawyers, psychologists, or even educated at all) should understand the terminology. In the United Kingdom, Judge Jeremy Lea said that reports by experts are not written solely for the benefit of professionals, advocates and judges. Parents and other litigants also need to understand what is being said, and why. The social worker's report in the case in question was so riddled with jargon that it "might as well have been written in a foreign language".[347]

2.7.24 However, problems of transferring and accepting mental health knowledge in the legal system go deeper than merely finding legal mechanisms for receiving and evaluating mental health evidence. They relate also to the interaction between systems of knowledge, each of which has its own distinct objectives and accepted methods of attaining knowledge.[348]

2.7.25 When mental health knowledge is inserted into the formal legal process, mental health claims are judged and processed according to the requirements of the legal system in order to qualify as valid legal knowledge. This means that mental health knowledge is necessarily reconstructed and truncated in the process. This scenario results in "interference" between the two systems. Thus mental health knowledge claims are seemingly incorporated in the legal system, but such knowledge has different meanings in each of the two systems.[349]

2.7.26 The law draws logical conclusions based on the external behaviour of a person, to determine whether an accused person's state of mind should be classified as dolus or culpa in criminal cases. By contrast, mental health discourses often refer to the

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347 Doughty S Social Affairs Correspondent ***Daily Mail*** 3 August 2015.

348 Bonthuys ***SALJ*** at 344.

349 Bonthuys ***SALJ*** at 344 with reference to Michael King & Christine Piper ***How the Law Thinks About Children*** 2 ed 1995 at 51-55.

unconscious mind, and accept as valid non-rational explanations and processes such as “projection” and “internalization” – concepts which bear no relation to the legal concepts of intention and negligence.[350] Moreover, professionals should be wary of drawing legal conclusions from tests. The results of tests designed to measure mental health do not necessarily correlate with legal concepts such as “the best interests of the child” or parenting capacity.[351]

2.7.27 When judges are faced with conflicting evidence, the nature of the legal process demands that they choose one or the other version. Since they do not usually have extensive knowledge of mental health disciplines, judges cannot evaluate such evidence by its own standards. They generally apply the legalistic criteria of logic, relevance, and reliability to decide which reports to accept.[352] This could mean that in effect judges and lawyers reduce mental health professionals' reports to common sense, and ignore those opinions with which they do not agree.[353]

2.7.28 It should be noted that inherent in mediation is a clear intention to synthesise behavioural sciences and law, so as to improve psychological functioning of separating couples in ways that promote their own and their children’s best interests.[354]

(v) Unnecessary reports

2.7.29 The question has been posed whether care and contact evaluations are necessary, or even helpful, where both parents can be described – or describe themselves - as good parents and the dispute centres on who has the best plan for the family. Compare this type of family to that which faces challenges related to chemical dependency, poor mental health, or domestic violence. Families with special-needs children also face specific challenges. For families with any such challenges, it is often

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350 Bonthuys ***SALJ*** at 344.

351 Bonthuys ***SALJ*** at 336. The cross-cultural aspect could also be problematic. Psychometric tests created and standardised in other countries are not necessarily valid in South Africa. They can skew the results in favour of people who are similar to populations used for the standardisation.

352 Bonthuys ***SALJ*** at 337.

353 Bonthuys ***SALJ*** at 335.

354 De Jong M “ A Pragmatic Look at Mediation as an Alternative to Divorce Litigation” 2010 ***TSAR*** 515 at 519 at par 3.3.3 with reference to Bryant and Faulks “The ‘Helping Courts’ Come Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia” 2007 ***Journal of Judicial Administration*** 93 at 96.

helpful for the court to hear from an expert on the effect of these issues on custody and parenting time.[355]

(vi) Experts: competing or neutral?

2.7.30 When an expert is retained by one parent, it is crucial that the lawyer explains carefully the expert's role and the limitations the expert faces because he or she might not have access to the other parent or the child(ren).[356] Problems arise when mental health professionals act as witnesses for one party only.[357]

(vii) Hearsay

2.7.31 Many evaluations are based on numerous documents, conversations, emails and other information from people who will not be called to testify. Much of this information, absent proper foundation and the availability of the person with first-hand knowledge, is classic hearsay. Although many arguments are made as to why certain information should be treated as an exception to the rule on hearsay, the fact is, custody evaluations serve partly to streamline the admission of evidence. Most parents cannot afford to obtain the testimony of all the people who might have important information, and most courts cannot afford the time to hear from these witnesses. The reliance on hearsay evidence therefore seems to be the product of compromise by players in the system - judicial officers, lawyers, and evaluators. However, the question remains: is this "devil's handshake" helpful to families?

d) Possible reforms

2.7.32 Particular attention should be paid to the qualifications of mental health experts, their relationships to the parties, their methods of evaluation, and the reasons for their conclusions. The last point is especially important where one of the parents is labeled as mentally disordered or inadequate. Unless evidence by mental health experts is certain to be of a sufficiently high standard to assist the court in making a fair and

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355 Mc Grath at 5.

356 Mc Grath at 5.

357 Bonthuys ***SALJ*** at 340.

accurate finding about the best interests of the child, such evidence should be excluded as being irrelevant.[358]

2.7.33 It is interesting to note the reforms in the United Kingdom in respect of expert witnesses. On 22 April 2014, reforms in respect of expert witnesses were implemented in England and Wales by section 13 of the Children and Families Act 2014.[359] (See also Practice Direction 25B.)

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358 Bonthuys ***SALJ*** at 346.

359 Section 13 of the Children and Families Act 2014 reads as follows:
13. Control of expert evidence, and of assessments, in children proceedings

(1) A person may not without the permission of the court instruct a person to provide expert evidence for use in children proceedings.

(2) Where in contravention of subsection (1) a person is instructed to provide expert evidence, evidence resulting from the instructions is inadmissible in children proceedings unless the court rules that it is admissible.

(3) A person may not without the permission of the court cause a child to be medically or psychiatrically examined or otherwise assessed for the purposes of the provision of expert evidence in children proceedings.

(4) Where in contravention of subsection (3) a child is medically or psychiatrically examined or otherwise assessed, evidence resulting from the examination or other assessment is inadmissible in children proceedings unless the court rules that it is admissible.

(5) In children proceedings, a person may not without the permission of the court put expert evidence (in any form) before the court.

(6) The court may give permission as mentioned in subsection (1), (3) or (5) only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings justly.

(7) When deciding whether to give permission as mentioned in subsection (1), (3) or (5) the court is to have regard in particular to—

(a) any impact which giving permission would be likely to have on the welfare of the children concerned, including in the case of permission as mentioned in subsection (3) any impact which any examination or other assessment would be likely to have on the welfare of the child who would be examined or otherwise assessed,

(b) the issues to which the expert evidence would relate,

(c) the questions which the court would require the expert to answer,

(d) what other expert evidence is available (whether obtained before or after the start of proceedings),

(e) whether evidence could be given by another person on the matters on which the expert would give evidence,

(f) the impact which giving permission would be likely to have on the timetable for, and duration and conduct of, the proceedings,

(g) the cost of the expert evidence, and

(h) any matters prescribed by Family Procedure Rules.

(8) References in this section to providing expert evidence, or to putting expert evidence before a court, do not include references to—

(a) the provision or giving of evidence—

(i) by a person who is a member of the staff of a local authority or of an authorised applicant,

(ii) in proceedings to which the authority or authorised applicant is a party, and

(iii) in the course of the person's work for the authority or authorised applicant,

(b) the provision or giving of evidence—

2.7.34 Section 13 deals with the duties of an expert, the expert's report itself, and arrangements for an expert to attend court. (See also the Family Procedure Rules Amendment, 2013/2014). The Act puts on statutory footing the rules set out in FPR 25, specifically FPR r 25.1-5, relating to the court's duty to restrict expert evidence.

2.7.35 Section 13 introduces the requirement that the courts must give permission for expert evidence to be used in care proceedings. However, this prescript does not apply to local authority social workers, or to Children and Family Court Advisory and Support Service (CAFCASS) staff.

2.7.36 This amendment was a response to the rise in the use of so-called experts - who were used in 92 percent of care cases, with an average of almost four reports per case. Family Justice Minister Simon Hughes said that, for too long children have suffered excessive delays. Expensive and unnecessary expert witnesses and reports often added to the problem.[360]

2.7.37 It has been argued that expert evidence in family proceedings concerning children should be permitted only when necessary to resolve the case justly, taking account of factors including the impact on the welfare of the child.

2.7.38 The word "necessary" was defined in ***Re H-L (A Child)***[361] by way of reference to ***Re P (Placement Orders: Parental Consent)***.[362]

> ..it "has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand", having "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable." In my judgment, that is the meaning, the connotation, the word 'necessary' has in rule 25.1.

(i) by a person within a description prescribed for the purposes of subsection (1) of section 94 of the Adoption and Children Act 2002 (suitability for adoption etc.), and

(ii) about the matters mentioned in that subsection,

(c) the provision or giving of evidence by an officer of the Children and Family Court Advisory and Support Service when acting in that capacity, or

(d) the provision or giving of evidence by a Welsh family proceedings officer (as defined by section 35(4) of the Children Act 2004) when acting in that capacity.

(9)-(11)….

360 Gov.uk Family justice reforms to benefit children Press release 22 April 2014 accessed on 19 June 2015.

361 ***Re H-L (A Child)*** [2013] EWCA Civ 655 at para 3.

362 ***Re P (Placement Orders: Parental Consent)*** [2008] EWCA Civ 535, [2008] 2 FLR 625, paras [120], [125].

2.7.39 Although social workers and CAFCASS officers are expressly excluded from the statutory definition of “expert”, they are certainly meant to be viewed as experts by the court. As Munby P explained in evidence before the Public Bill Committee of the House of Commons,[363]

> When I say "expert", I mean expert with a capital E, because, in my book, social workers are experts. In just the same way, CAFCASS officers are experts. What has gone wrong with the system is that we have at least two experts in every care case—a social worker and a guardian—and yet we have grown up with the culture of believing that they are not really experts and we therefore need experts with a capital E. Much of the time we do not.

2.7.40 However, the issue might not be that social workers and guardians lack expertise, but that their role in the proceedings is not that of an impartial or independent expert.(For a recent case on a guardian who was not a “neutral' party, see ***MW v Hertfordshire County Council***).[364]

Questions:

41. Should competing experts reports in custody cases be eliminated?
42. What value do expert reports add to the court process?
43. Are expert reports abused by parties?
44. Who should fund expert reports?
45. Should the UK reforms be considered for South Africa?

2.8 Child-headed households

2.8.1 The decision to provide legal recognition for child-headed households in South Africa has been supported, given the rapidly increasing numbers of orphans and the insufficiency of alternative placement options.[365] “Family” has become a dynamic concept in our country, and there is increased acceptance of unconventional domestic groupings.[366] Legal recognition might represent a measure to promote dignified survival and development for children for whom there is no better care alternative.[367]

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363 House of Commons Public Bill Committee Debate 5 March 2013 col 33.

364 ***MW v Hertfordshire County Council*** [2014] EWCA Civ 405.

365 Couzens M & Zaal FN “Legal Recognition for Child-Headed Households: An Evaluation of the Emerging South African Framework” 2009 17 ***International Journal of Children’s Rights*** 299 (hereafter “ Couzens & Zaal”) at 317.

366 Couzens & Zaal at 304 with reference to Goldblatt and Liebenberg, 2004.

2.8.2 Section 137 of the Children's Act,[368] makes provision for, inter alia, the recognition of child-headed households by the provincial head of social development under specific circumstances. It also provides that a child-headed household must function under the supervision of an adult designated by the children's court or organ of state or a specified non-governmental organisation.[369]

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367 Couzens & Zaal at 304. See however, the discussion below. Couzens & Zaal concedes that children living in child-headed households frequently experience serious material difficulties (at 301). Members may drop out of school, they have poor access to health care, children may be forced into dangerous or illegal employment or pressured into early marriages, they often suffer from psycho-social problems and their low social status impedes meaningful participation within the local community (at 302).

368 **Child-headed household**

Section 137 of the Children's Act 38 of 2005 reads as follows:

137.(1) A provincial head of social development may recognise a household as a child-headed household if-

(a) the parent, guardian or care-giver of the household is terminally ill, has died or has abandoned the children in the household;
(b) no adult family member is available to provide care for the children in the household;
(c) a child over the age of 16 years has assumed the role of care-giver in respect of the children in the household; and
(d) it is in the best interest of the children in the household.

(2) A child-headed household must function under the general supervision of an adult designated by-

(a) a children's court; or
(b) an organ of state or a non-governmental organisation determined by the provincial head of social development.

(3) The supervising adult must-

(a) perform the duties as prescribed in relation to the household; and
(b) be a fit and proper person to supervise a child-headed household.

(4) A person unsuitable to work with children is not a fit and proper person to supervise a child-headed household.

(5) (a) The child heading the household or the adult contemplated in subsection (2) may collect and administer for the child-headed household any social security grant or other grant in terms of the Social Assistance Act, 2004 (Act 13 of 2004) or other assistance to which the household is entitled.
(b) An adult that collects and administers money for a child-headed household as contemplated in paragraph (a) is accountable in the prescribed manner to the organ of state or the non-governmental organisation that designated him or her to supervise the household.

(6) The adult referred to in subsection (2) may not take any decisions concerning such household and the children in the household without consulting-

(a) the child heading the household; and
(b) given the age, maturity and stage of development of the other children, also those other children.

(7) The child heading the household may take all day-to-day decisions relating to the household and the children in the household.

(8) The child heading the household or, given the age, maturity and stage of development of the other children, such other children, may report the supervising adult to the organ of state or non-governmental organisation referred to in subsection (2) (b) if the child or children are not satisfied with the manner in which the supervising adult is performing his or her duties.

(9) A child-headed household may not be excluded from any grant, subsidy, aid, relief or other assistance or programmes provided by an organ of state in the national, provincial or local sphere of government solely by reason of the fact that the household is headed by a child.

369 See also section 150(2) of the Children's Act, 2005 that includes children living in child-headed households as a category who must automatically receive welfare investigation when discovered.

2.8.3 The provincial head (senior welfare officer) has a discretion on whether to grant legal recognition to the household. The children's courts are not involved in this decision, but only allocate the supervisors.

2.8.4 The Social Assistance Act, 2004[370] provides for a monthly state grant to be payable for the support of young children in need. This is based on an assessment of the means of their "resident parents".

2.8.5 Section 1 of the Act defines a "primary care-giver"[371] as 'a person older than 16 years, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of that child'.[372] The grant is payable to primary care-givers only on behalf of children below the age of 14.

2.8.6 The Act does not make any direct reference to child-headed households. However, the functional definition of "primary care-giver" should allow a child head who is older than 16 to claim grants on behalf of any members of the household who are younger than 14, without having to prove blood ties.[373]

2.8.7 Whereas no court order is required by section 137, a court order is a requirement for the Social Assistance Act to kick in.

2.8.8 The following problems have been identified for discussion:

a) There is a view that premature awarding of adult status and responsibility to children and adolescents would inevitably deprive

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Section 46(1)(b) of the Children's Act, 2005 further expressly stipulates that the court may make an order placing a child in a child-headed household who is in need of care and protection, under the supervision of an adult person designated by the court.

370 Social Assistance Act 13 of 2004.

371 The definition of "care-giver" in section 1 of the Children's Act, 2005 refers to any person other than a parent or guardian, who factually cares for a child, and includes, amongst others, the child who heads a child-headed household.

372 Couzens & Zaal regard the channelling of grants through primary care-givers, rather than specifically parents, as referred to in previous legislation, as a significant innovation.

373 Couzens & Zaal at 305.

heads of households of their own childhoods and would therefore infringe a child's right to alternative care.[374]

b) Section 137 does not provide any indication of what criterion a provincial head should utilise in deciding whether to accord recognition or not. It has been suggested[375] that recognition should depend on a prior assessment of the viability of the household and more specifically the capability of the child or children leading the household. Recognition should not refer only to the household, but must also designate a specific child or children as the head of the household.

c) With regard to a grant in terms of the Social Assistance Act, the limitation of the age of the primary care-giver to 16 years or older, and children on whose behalf the grant is received to 14 years or younger, might be too restrictive. In addition, the Social Assistance Act and the Children's Act should be coordinated.

d) The court capabilities seem to be imperfectly realized. It would appear that courts can only perform their capabilities in respect of child-headed households that have previously been recognised by a provincial head. If a care hearing has been held and a children's court has come to a conclusion, based on strong evidence, that a child-headed household is not only viable but is the best placement destination for a particular child, it is illogical that such placement should be impossible merely because it so happens that a provincial head has not recognised the household.[376]

e) The possibility of placing a household under a cluster foster-care scheme and the responsibilities of the adult supervisor in these circumstances are not clear.

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374 Sloth-Nielsen J ***Realising the Rights of Children Growing Up in Child-headed Households: A Guide to Law, Policies and Social Advocacy***. University of the Western Cape 2004; Phillips C ***Child-headed Households: A Feasible Way Forward or An Infringement of Children's Rights to Alternative Care?*** LLD thesis Universiteit Leiden 2011 at 268.

375 Couzens & Zaal at 310 with reference to Plan Finland's experience in Uganda in this regard.

376 Couzens & Zaal at 314.

f) Some recourse for members of the household in situations of dispute should be indicated. Corporal punishment should be avoided. One possibility would be to provide for mediation by the supervisor.

g) The mandatory appointment of a legal guardian to ensure protection of the child's property until the child reaches the age of majority could be considered.[377] However, research doesn't show that the majority - or even a substantial number - of child-headed households actually own property. In fact, child-headed households are usually extremely poor. This suggestion would therefore only be relevant in exceptional cases where the household actually has property.

h) Given that the oldest child must be at least 16, it could also be possible to award legal capacity to the heads of these households, or perhaps a statutory range of competencies for the heads of these households, which could include dealing with property, accessing grants and documents, enrolling siblings in school, and so on.[378]

Questions:

46. Should child-headed households be regarded as a viable option to protect children in need of care?
47. How could the legal regulation of child-headed households be improved?

2.9 Children in need of care: Alternative care, abandoned children, and temporary care

2.9.1 Section 150 of the Act[379] provides that a child is in need of care and protection when, inter alia, he or she has been abandoned or orphaned and is without any visible means of support.

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377 Proposal discussed in DSD ***Consolidated Amendments Report*** 2013 at100.

378 Professor Elsje Bonthuys in submission to the SALRC on September 2015.

379 Section 150 of the Act reads as follows:

Child in need of care and protection

150. (1) A child is in need of care and protection if the child—
(a) has been abandoned or orphaned and is without any visible means of support;
(b) displays behaviour which cannot be controlled by the parent or care-giver;

2.9.2 The court in ***SS v Presiding Officer, Children's Court, Krugersdorp and Others***[380] interpreted the phrase "without any visible means of support". It stated that that "visible" meant "evident", and that the focus was on the financial means of the child, rather than that of the foster parent or care-giver. The decision-maker had to determine whether anyone, including the child's current care-givers, has a legal duty to support the child. Not all relatives bore a legal duty of support. The following kin bore a duty of support: biological and adoptive parents, whether married or not; maternal and paternal grandparents, regardless of whether the parents were married; siblings; and step-parents in exceptional and narrowly defined cases. Uncles and aunts bore no duty to support their nieces and nephews. Even if there should be a relative somewhere, the child might still be found to be in need of care, based on the facts of the case.

2.9.3 It should, however, be noted that in some cases these children are cared for financially, or intermittently, by family members, even where the adult family members don't actually live in the household on a permanent basis.

2.9.4 It has been proposed[381] that the words "and is without any visible means of support" should be removed and replaced with "abandoned or orphaned and not in the care of a family member".

2.9.5 The effect of this proposal would be that children who are abandoned or orphaned but who are living with a family member (who is not a biological parent), are not automatically deemed to be in need of care and protection.

(c) lives or works on the streets or begs for a living;
(d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
(e) has been exploited or lives in circumstances that expose the child to exploitation;
(f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
(g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
(h) is in a state of physical or mental neglect; or
(i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

380 ***SS v Presiding Officer, Children's Court, Krugersdorp*** 2012 (6) SA 45 (GSJ).

381 See discussion of this proposal in DSD ***Recommendations in Respect of Final Draft*** 2013 at 128.

2.9.6 In order to deal with children who are orphaned or abandoned but living with family members, section 150(2) could be amended by inserting a new subsection 2(c). Subsection 2(c) would then add children who have been abandoned or orphaned and are not living with their biological parents, but who are in the care of a family member,[382] to the category of children who *may* be in need of care and protection.

2.9.7 Section 150(2) requires that the cases of children who may be in need of care and protection should be "investigated". It has been proposed that this word be changed to "assessed" and that such an assessment can be done either by a social worker or by a child and youth care worker.

2.9.8 If after assessment the social worker or child and youth care worker finds that the child is not in need of care and protection, the social worker or child and youth care worker could, where necessary, take measures to assist the child. These measures might include counselling, mediation, prevention, and early intervention services. Further measures might include assisting the family to apply for appropriate social grants, family reconstruction and rehabilitation, behaviour modification, problem solving, and the formalization of parenting responsibilities and rights using sections 22, 23, 24 or 27 of the Act, as well as referral to another suitably qualified person or organisation.

2.9.9. If, after assessment, it is decided that the child is in need of care and protection, efforts will be made to refer the child to a designated social worker who will then undertake an investigation in terms of section 155.

2.9.10 The effect of these proposals is that care-givers of abandoned and orphaned children who are members of the extended family will not be eligible to become foster carers, unless the child is in need of protection for reasons set out in section 150(1)(a). Therefore, it is important that these family care-givers are able to access a grant that is a reasonable amount and reflects the fact that they are taking responsibility for children who are not their biological children - who would otherwise be wards of the State.

2.9.11 The research indicates that many South African children live with family members who are not their parents, and that these family members may need access to certain rights in order to improve the lives of such children. So the question is also

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[382] As defined in subsection (c) of the definition of family member in section 1.

whether section 32 of the Children's Act[383] is sufficient, or should be expanded to award these carers with either full or limited parental rights.

Question:

48. How should the situation be dealt with where abandoned or orphaned children are being cared for by family members who do not bear any duty to support them?

2.10 Artificial insemination

2.10.1 Section 40(1)(a) of the Children's Act[384] provides that a child born as a result of artificial insemination of one of the spouses in a marital relationship must, for all purposes, be regarded to be the child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation.

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383 Section 32 of the Children's Act 38 of 2005 reads as follows:
Care of child by person not holding parental responsibilities and rights

32.(1) A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a care-giver who otherwise has no parental responsibilities and rights in respect of a child, must, whilst the child is in that person's care-

(a) safeguard the child's health, well-being and development; and
(b) protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards.

(2) Subject to section 129, a person referred to in subsection (1) may exercise any parental responsibilities and rights reasonably necessary to comply with subsection (1), including the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or guardian of the child.

(3) A court may limit or restrict the parental responsibilities and rights which a person may exercise in terms of subsection (2).

(4) A person referred to in subsection (1) may not-
(a) hold himself or herself out as the biological or adoptive parent of the child; or
(b) deceive the child or any other person into believing that that person is the biological or adoptive parent of the child.

384 Section 40(1)(a) of the Children's Act 38 of 2005 reads as follows:

Rights of the child conceived by artificial fertilisation

(1) (a) Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation.

2.10.2 Children born to a married couple will therefore automatically result in equal parental responsibilities and rights for both spouses.

2.10.3 Section 40 does not apply to unmarried couples. If the mother gives birth to a child conceived with a donor egg and the father's sperm, the mother has automatic rights as the birth mother, and the unmarried father qualifies in terms of section 21 based on his biological relationship with the child.

2.10.4 Where the mother is biologically related to the child but the unmarried father is not, section 21 is not applicable. In cases concerning unmarried lesbian mothers, one mother will not be biologically related to the child, unless one mother donates the egg and the other mother carries the baby.

2.10.5 Where persons in a permanent life partnership agree to have a child together through artificial fertilisation and both parents are involved in the child's upbringing and support the child, the question might be posed whether their parental responsibilities and rights should not be equally recognised - without them having to apply to a court for the acquisition of parental responsibilities and rights, or applying for adoption.

2.10.6 Provision needs to be made to include unmarried parents, in a permanent life partnership, who have a child together by agreement through artificial insemination, within the ambit of section 40.[385]

2.10.7 A decision must be made whether automatic acquisition is what is required, or whether unmarried couples should formalise their relationship with the child through adoption or sections 22 or 23 and 24.

2.10.8 Should automatic acquisition be the preferred option, a decision needs to be taken to determine what the test should be for acquiring automatic parental responsibilities and rights. For example, does it rest on biology, marital status, or the parent's relationship with the child?

Questions:

49. What should be the test for acquiring automatic parental responsibilities and rights: biology, marital status, or relationship with the child?

[385] See DSD ***Recommendations in Respect of Final Draft*** 2013 at 43.

50. Should section 40 also apply to unmarried couples?

CHAPTER 3

SPECIFIC ISSUES IDENTIFIED FOR DISCUSSION: PROCESS

In this chapter the processes needed - both in and out of court - to improve support of the policies set out in the Children's Act and other family legislation are discussed and considered. The processes described will be interrogated, where relevant, from both a private and a public family law perspective.[1]

A. Introduction: Adversarial versus collaborative approach

3.1 Family disputes

3.1.1 So-called "friendly" or "amicable" divorces are presumed to be difficult for children, but not necessarily permanently damaging.[2] Long-term studies have shown that children go through a period of disruption following divorce and many children retain negative feelings about their parents' divorce, but after several years there is little sign of severe emotional or behavioral problems stemming from the divorce.[3] The principle also applies to children from unmarried couples who separate. The only factor that predicts poor adjustment in children after a divorce or separation is continued conflict.[4]

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1 Note should be taken of the SALRC investigation, Project 94 Alternative Dispute Resolution. In terms of Project 94 an Alternative Dispute Resolution Act will be developed. It may eventually be necessary to incorporate the ADR findings from this investigation into this Act. However, it is regarded as an important step to first determine the role of ADR in respect of family disputes as a separate question due to the special policy considerations which apply in family legislation ie the best interest of the child, equality and non-sexism.

2 Adler RE ***Sharing the Children*** Clearwater Florida USA: Authorhouse 2001 (hereafter "Adler") at 17. See also De Jong M "An Acceptable, Applicable and Accessible Family-law System for South Africa – Some Suggestions Concerning a Family Court and Family Mediation" 2005 ***TSAR*** 33 (hereafter "De Jong 2005 ***TSAR***"); De Jong M "A Pragmatic Look at Mediation as an Alternative to Divorce Litigation" 2010 ***TSAR*** 515 (hereafter "De Jong 2010 ***TSAR***") 516–517 with regard to the negative effects of the adversarial system in family matters). "Hence, it is accepted that where divorce or separation occurs within an environment of conflict and constant acrimony, children are likely to be negatively affected whether over the short or long term as compared to children involved in friendly and cooperative separations or divorce.

3 Adler at 17-18.

4 Adler at 20.

3.1.2 Unfortunately, a significant number of divorcing and separating parents become locked in bitter and sometimes violent family disputes, both before, during and after the separation or divorce.[5]

3.1.3 Many parents lose sight of the fact that they will have to remain in contact with each other after a divorce or separation. Even where parties never lived with each other, but conceived a child together, there is a strong chance they will remain in frequent contact with each other while the child is a minor.[6]

3.1.4 In some cases, the resident parent uses the child as a "weapon" in the matrimonial "warfare", and sabotages the contact visits of the non-resident parent. This is particularly likely to happen in high-conflict divorce or separation cases, where a parent might even go so far as to abduct the child to a foreign country.[7]

3.1.5 In other instances, non-resident parents may fail to pay maintenance, may threaten to sue for custody (to take the children away), or may use the children to harass the resident parent. Non-residents may also use contact arrangements to stay in contact with the other parent and thereby continue the abuse which occurred during the marriage or relationship.[8]

3.1.6 As stated in Chapter 1, commercial disputes are essentially transactional in nature, whereas the conflicts in family disputes are essentially relational.[9]

3.1.7 The question has been posed how the current legal system or process applicable to divorce and separation affects the volatile situation that often exists in family disputes.

3.2 Adversarial legal system?

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5 SALRC Project 110 Report Chapter 14.

6 Ibid.

7 Parental and child abduction and the Hague Convention on the civil aspects of international abduction.

8 See also the impact of domestic violence and sexual abuse on care and contact disputes as discussed in Chapter 2 above.

9 Thomas E Carbonneau "A Consideration of Alternatives to Divorce Litigation" (10986) 1986 4 ***University of Illinois Review*** 1119 at 1154 as referred to in Morris at 9.

3.2.1 It is important to determine to what extent family law in South Africa is still dominated by an adversarial atmosphere.

3.2.2 On one hand, it has been argued that the adversarial atmosphere in which care and contact disputes are currently determined - both in and out of the court room - tends to exacerbate the already problematic family situation. Each parent has to try and prove that he or she is the better parent – usually by making the other parent look bad, wrong, or unfit.[10] Since attorneys and advocates are schooled in the adversarial system of litigation, when they deal with divorces it is often all about tactics, representing only their client's best interests and subscribing to a "winner-takes-all" mentality.[11]

3.2.3 The adversarial system of litigation currently used in the courts, works well in most other fields of South African law. However, this system was not designed or developed to deal with these important intimate, emotional and psychological aspects of divorce. It has become clear that the adversarial system, in which divorcing parties are pitted against each other during the entire divorce process, tends to encourage and exacerbate a sense of bitterness and irreconcilability between divorcing parties.[12] Custody litigation proceedings aggravate the acrimony between parents, creating more pain for the children and an escalating hostility that may never end.[13]

3.2.4 The negative elements of litigation have been described as follows:[14]

a) discouragement of open communication;
b) emphasis placed on competition;
c) difficulty in developing true facts;
d) polarisation of issues;
e) escalation of the parties' emotions;
f) lawyer's alignment with a client's view of the facts;
g) lawyer taking on the client's problems;
h) lawyer taking on responsibility for resolving conflict; and
i) decreasing collegiality between lawyers.

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10 Adler at 16.

11 De Jong 2005 ***TSAR*** 33 at 33.

12 De Jong 2005 ***TSAR*** 33 at 33.

13 Adler at 17.

14 Webb S & Ousky R "History and Development of Collaborative Practice" 2011 49 ***Family Court Review*** 213 at 215.

3.2.5 In short, the adversarial system is not designed to deal with the huge emotional trauma and the many non-legal issues which usually accompany family law disputes, especially family separation.[15]

3.2.6 Furthermore, South Africa still does not have a specialised family court. It has also been argued[16] that Judges of the High Court, and presiding officers from the Civil Regional Courts, are usually generalists who lack specialised training to deal with the intricate and complex family law issues around child care and contact, and the financial arrangements upon divorce or family breakdown. Pressure on the courts to deal expeditiously with cases also makes it difficult for judges to examine all cases thoroughly. It has even been alleged that some judges of the High Court have no interest in family law matters and regard these matters as less important than other cases. The random rotation system in South African courts means that judges who have no specialised training, interest or experience in family law might be assigned to a very delicate family law matter. To make matters worse, different judges can be assigned to handle different matters arising from a single family law dispute over a period of time.[17]

3.2.7 In the past it was assumed that the courts were best suited to decide questions of custodial rights and access to children, and to decide family disputes in general. However, in recent years this assumption has come to be questioned. South African judges have noted that the coldness of a courtroom and an ensuing court order is neither the best venue nor the best vehicle to resolve matters affecting children, who are often relegated to being innocent bystanders between two warring factions - long after the court's gavel has fallen. This discord often translates into parents' refusals to comply with a court's order, a situation that will necessitate further litigation and will run up more costs and induce more heartache. The legislature's stance towards mediation shows that it not only acknowledges the limitations of adversarial litigation, but also recognises the integrity of mediation as an effective dispute resolution mechanism.[18]

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15 De Jong 2010 ***TSAR*** 515. See also ***Clemson v Clemson*** [2000] 1 All SA 622 (W) at 627.

16 De Jong M "Arbitration of Family Separation Issues – A Useful Adjunct to Mediation and the Court Process" 2014 17 ***PER /PELJ*** 2356 (hereafter "De Jong ***PER/PELJ***") at 2362.

17 In terms of the Department of Justice and Constitutional Development's new ***Norms and Standards for the Performance of Judicial Functions***" Item 5.2.5 in GN 147 in GG 37390 of 28 February 2014, High Court cases must now be finalised within 1 year from the date of the issuing of summons.

18 Paleker at 9.

3.2.8 However, on the other hand and, in an opposite view, it has been argued[19] that most civil cases are in fact already settled out of court, rather than by means of judicial determination and that private ordering has long been the de facto default.[20] In jurisdictions where there is so little adjudication, it is therefore odd that the debate has become framed in terms of ADR versus court-imposed rulings.

3.2.9 This false dichotomy ignores the main mode of dispute management in family (and other civil matters), which is lawyer-led negotiation.[21] This is usually concluded in a settlement culture, without a court appearance except to check and record a consent order for the purpose of fairness and enforceability.[22] Most families do not have the resources to fund an "all-out, knock-down" conflict, and lawyers have no interest in having clients run up bills they are unable to pay.

3.2.10 In terms of this argument, it is posed that the persistence of the belief that the system is dominated by conflict and adversarialism is mainly a confirmation bias. The bias is fuelled by the appeal of high-profile divorces as stories within the preferred frames of popular media, promoted as part of the occupational self-interest of mediation practitioners. Rich people will always enjoy a choice of domicile and the luxury of conflict and trial, should they wish for it – and there will always be lawyers to serve this niche market. Their experience, however, is no basis for public policy in

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19 Ferguson L "Arbitration in Financial Dispute Resolution: The Final Step to Reconstructing the Default(s) and Exception(s)?" 2012 35 ***Journal of Social Welfare and Family Law*** 115 (hereafter "Ferguson") at 120 with reference to Genn, H "Civil Mediation: a Measured Approach?" 2010 32 ***Journal of Social Welfare and Family Law*** 195 at 196.

20 This is where a judge informally refers the parties to mediation. Hence, on the designated trial date whilst the matter is being heard before a judge, it is perfectly legitimate for him/her to stand down the matter and direct that the parties together with their attorneys try and reach a settlement agreement. Hence, although the judge will hear the matter, the parties are first directed to attempt to resolve the matter between themselves. Parties are usually given 2 or 3 hours to try and reach an agreement, whereafter, they can appear in court and inform the judge if they have made any progress towards settling the matter. This informal pressure imposed on parties by a judge results in a majority of matters being settled through negotiations, round table discussions and cooperative talks. See O'Leary JA *"Strategies for Development of Family Divorce Mediation in South Africa"* Paper presented at the South African Law Reform Commission Focus Group Forum Cape Town 2008.

21 See comments of De Jong in Heaton (ed) 2014 at 579-580 regarding the negative aspects of lawyer-led negotiations.

22 Ferguson at 131. In 1993 the DOJCD noted that only about 5% of all lawsuits even reach the trial stage because the vast majority of them are settled out of court; Department of Justice and Constitutional Development ***Annual Report*** 1 July 1991-30 June1992 RP40/1993 par 1.65 at 16.

designing systems to deal with the massive number of divorce cases among ordinary citizens.[23]

3.2.11 It is also true that parties do not always have a preference for ADR. They sometimes seek a litigator in their lawyer, and certainty of outcome. They want resolution of their dispute as cheaply and quickly as possible through a process that they understand.[24]

3.2.12 The complexity of the ADR processes, and the eventual need for legally valid documentation of agreements, mean that a divorcing parent might find it more useful to have a lawyer who can act as a trusted adviser, rather than dealing with a third party (the ADR mediator) whose allegiances are unknown. Parties may also be reluctant to participate in ADR, partly because of low levels of trust in their former partners – understandably so within the context of divorce.[25] In cases that proceed to court, legal standards of fairness, due process and protection of legal and fundamental rights are adhered to. Failure to provide for these safeguards may result in gender inequality and lack of accountability in eventual divorce or separation outcomes.[26]

Question:

1. How many family disputes end up in court?
2. Are the current dispute resolution processes adversarial in nature? Please provide examples.

3.2.13 It is clear that there are different views on this matter. It would, therefore, seem that the proper place of ADR as a possible way to deal with family disputes should be determined in conjunction with an investigation into possible improvements of the court system.

3.2.14 South African courts permit a relaxation of the adversarial approach in matters involving children, in respect of enquiries into the best interests of children without regard to the onus of proof in the conventional evidential sense, and also in respect of the admissibility of hearsay evidence in review proceedings involving children.

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23 Dingwall R "Divorce Mediation: Should We Change our Mind?" 2010 32 ***Journal of Social Welfare & Family Law*** 107 (hereafter "Dingwall") at 107.

24 Stowe M "Family Law Arbitration: A New Dawn for ADR?" accessed at http://www.marilynstowe.co.uk/2011/11/30/family-law-arbitration-a-new-dawn-for-alternative-disputeresolution/ on 21 August 2014.

25 Dingwall at 109.

26 Bonthuys ***SALJ*** at 329.

However, it would seem that the adversarial system of litigation still forms the basis of the divorce and related processes in the High Court and the Regional Court[27] - and the children's court today.

3.2.15 Furthermore, although a more inquisitorial approach is followed in, for example, the maintenance court, the general rules of the law of evidence applicable to civil proceedings in a magistrate's court still applies.[28]

3.2.16 In the ***MB v NB*** case[29] in 2010, the judge penalised the attorneys by limiting the fees they could recover from their client, because they had failed to send the divorce to mediation at an early stage. The judge, Brassey AJ, was highly critical of those attorneys who approach divorce as a "war" and who use their "legal" weapons in a fight to destroy the opposition.[30] The judge stated:

> As happens in most wars of attrition, by the time the war has come to an end both sides have lost. There is now permanent hatred between the parties and their joint assets have been consumed to pay legal fees.[31]

3.2.17 Just as parties have the option to enter into an ante-nuptial contract when they marry, so should they be able to determine the consequences of their marriage and, possibly, their divorce. Since the advent of no-fault divorce, parties have been in a position to decide when their marriage should come to an end.[32] It follows that parties would also like to have the freedom to tailor the procedure to be followed to meet the needs of their particular dispute.[33]

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27 De Jong M "A Better Way to Deal with the Maintenance Claims of Adult Dependent Children Upon their Parent's Divorce" 2013 76 ***THRHR*** 654 (hereafter "De Jong 2013 ***THRHR***") and references to ***B v S*** 1995 (3) SA 571 (A), ***T v M*** 1997 (1) SA 54 (A), ***Napolitano v De Wet NO*** 1964 (4) SA 337 (T**),** ***Zorbas v Zorbas*** 1987 (3) SA 436 (W) and ***J v J*** 2008 (6) SA 30 (C).

28 Section 10(5) of the Maintenance Act 99 of 1998; see also Van Zyl L ***Handbook of the South African Law of Maintenance*** 3rd edition Lexis Nexis 2010 at 68.

29 ***MB v NB*** 2010 (3) SA 220 (GSJ).

30 See also ***Clemson v Clemson*** [2000] 1 All SA 622 (W) where the court found that the only rational explanation for the application being brought in terms of Rule 6(12) of the Uniform Rules of the Supreme Court was to harass the Respondent in order to intimidate her as part of a wilful, deliberate strategy. The attorney was ordered to pay the Respondent's costs de bonis propriis and was precluded from collecting any fee from his client in regard to the application.

31 Brassey, AJ in ***MB v NB*** 2010 (3) SA 220 (GSJ) ("the Brownlee case').

32 Trengove JJ "Divorce Law Reform" 1984 ***De Rebus*** 353 at 355 says that "[a]s a result of the no-fault principle, the decision whether a marriage should be dissolved now rests largely in the hands of the parties themselves …".

33 Butler D "South African Arbitration Legislation - the Need for Reform" 1994 27 ***CILSA*** 122 at 122.

3.2.18 ADR processes may address the problems associated with the adversarial system of litigation in family matters. They can also reduce the State's (and lawyers') intrusion into the private life of families, thus giving the parties greater autonomy.[34]

Questions:

3. Are the courts functioning well and are they best suited to decide family law questions?
4. To what extent should ADR be used to complement the court system? What role does ADR processes play in the build-up to divorce proceedings or separation?
5. Is court-connected mediation a possible solution in family dispute resolution?

3.2.19 Such an approach would call for a reappraisal of the relationship between law, family and the State. It would require redesigning the institutional systems which regulate domestic relationships and which accept the inevitability of breakdown in some cases, and plan for it from the outset.[35]

3.2.20 It should be emphasised that out-of-court dispute resolution processes and resolution through agreements should not be seen simply as "add-ons" to litigation. Instead, they should be viewed as the preferred option, with the court remaining a valued player, but a last resort.

3.2.21 A change in case management and litigation styles could lead to a more diverse and less conflicting approach by the courts and the legal profession.[36]

3.2.22 It has been suggested that the divorce and family dispute resolution fraternity should be a "big tent" that accommodates all types of dispute resoluton, rather than being a house divided. Lawyers, mediators, parent coordinators, custody evaluators and collaborative lawyers should share the values, philosophy and techniques that provide a foundation for future growth among all,[37] both in and outside the court.

3.2.23 The importance of parenting information and education should also be acknowledged.

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34 Cohen CH "The Many Faces of Arbitration: Why not Use It for Property Disputes in Divorce?" 1993 ***De Rebus*** 642.

35 Dingwall at 108.

36 Dingwall at 109.

37 Schepard A "Editorial Notes – Special Issue: Collaborative Practice" 2011 49 ***Family Court Review*** 207 at 208.

B. Appropriate court processes

3.3 Case-flow management

a) Introduction

3.3.1 Long court battles often cause harm to children and their relationships with their parents. As discussed in the previous chapter, cases that are especially problematic are those where there are claims of violence or abuse or intractable cases where there are care and protection issues, voluminous files, or re-litigation.

3.3.2 Some of the key problems, identified by stakeholders,[38] with regard to enforcing one's rights in care and contact arrangements through the court system, include the following:

a) There is a long waiting list to get a court date to hear family law matters. The court roll in both the High Courts and the children's courts are always over-burdened with family law matters, and, in most instances, such cases are given least priority. Family law practitioners find that their matters are constantly adjourned in favour of other criminal and civil matters. This results in their clients having to wait years for a court order.

b) Court battles often turn out to be lengthy and very costly. These protracted court proceedings result in parties having to pay exorbitant amounts of money for legal fees. In many instances it causes even more acrimony between the parties, and the parent who cannot afford on-going litigation is forced to give in to the wealthier parent, often to the detriment of the children.

c) Children get caught up in the adversarial court battle which is detrimental to their development. Court proceedings move the focus from the welfare and the best interests of the children to which parent or party will be perceived to be the winner after the matter has been concluded by the court.

d) Parties are not in control of important decisions concerning their lives and their children's lives.

e) Lawyers often contribute to the dispute being prolonged, bitter, and costly.

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[38] Legal practitioners participated in a workshop organised by the SALRC on 12 April 2008 in Cape Town.

3.3.3 Robust judicial case arrangement is important to reduce delays. An understanding of child development and how it affects children's time-frames, and consequently should affect case management decisions, is of the utmost importance.[39] It has been argued that it might be necessary to break what has been described as an accepted "culture of delay".[40]

3.3.4 Time-tabling and case-management decisions must be child-focussed and should be made with explicit reference to the child's needs and time frames. A legislated time limit for the completion of care and contact proceedings could be considered. A coherent process for dispute resolution which is child-focussed should be developed.

b) Current South African law in respect of case-flow management

3.3.5 Section 171 of the Constitution[41] provides that all courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation. Section 180 of the Constitution provides that national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution.

3.3.6 Item 16(6)(a) of Schedule 6 to the Constitution provides that as soon as practical after the Constitution has taken effect, all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the Constitution.

3.3.7 The Superior Courts Act of 2013[42] was enacted to give effect to these Constitutional prescripts. In section 2(1)(b) of the Superior Courts Act, the objects of the Act are stated to be - inter alia - to make provision for the administration of the

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39 Family Justice Review Panel UK Ministry of Justice, the Department of Education & the Welsh Assembly Government ***Family Justice Review*** Final Report November 2011 par 68 at 15.

40 Botha K ***Ascertaining the Voice of the Child in South African Divorce Law*** LLM thesis University of South Africa November 2015 (hereafter "Botha thesis") at 44 refers to the inordinate length of time taken for matters involving the care of and contact with children to reach finality.

41 Constitution of the Republic of South Africa, 1996.

42 Superior Courts Act 10 of 2013 assented to by the State President on 12 August 2013. The Superior Courts Act repeals the whole of the Supreme Court Act 59 of 1959. In terms of section 53 of the Superior Courts Act any reference to the Supreme Courts Act 1959 must be construed as a reference to the Superior Courts Act or a corresponding provision of this Act.

judicial functions of all courts, including governance issues, over which the Chief Justice exercises responsibility.

3.3.8 In its Preamble the Superior Courts Act recognises that the rationalisation envisaged in item 16(6)(a) of Schedule 6 of the Constitution is an on-going process which is likely to result in further legislative and other measures to establish a judicial system suited to the requirements of the Constitution.

3.3.9 In terms of section 8(2) of the Superior Courts Act, the Chief Justice exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts. In terms of section 8(6)(e) of the Superior Courts Act, the judicial functions referred to in section 8(2) include the management of procedures to be adhered to in respect of case flow management, and the finalisation of any matter before a judicial officer, including any outstanding judgement, decision, or order.[43]

3.3.10 In terms of the CJRP,[44] the Minister of Justice and Constitutional Development and the Chief Justice have to work together to attain the goals set out in the project.

3.3.11 On 17 April 2015 it was reported[45] that Justice and Correctional Services Minister Michael Masutha is considering the merits of a proposal on courts administration and judicial governance, which could see the establishment of a Judicial Council and a Courts Advisory Body.[46] The proposal, submitted by a judicially appointed committee on institutional models, envisages roles in the courts' advisory body for "all players in the justice sector". The Judicial Council would be the "highest decision-making body on judicial matters" and would comprise heads of courts. The Office of the Chief Justice will report to the National Assembly through the Minister.[47]

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43 The Office of the Chief Justice was established as a government department by Presidential Proclamation (44 of 2010, dated 23 August 2010).

44 See discussion on CJRP in Chapter 1 above.

45 ***Legal Brief Today*** 17 April 2015 Issue number 3734.

46 The statements were made by the Minister in a written response to questions posed in the National Assembly by COPE's Deirdre Carter. See also the discussion in this regard in Hoexter C & Olivier M ***The Judiciary in South Africa*** Juta Cape Town 2014 at 104 and further.

47 See also Calland R "Judicial Governance in South Africa": Progress, Procrastination and Prognosis" CPLO Roundtable 26 October 2015.

Various options for a judiciary-led court administration will be discussed at a colloquium on the future of South Africa's justice system, planned for 2016.

3.3.12 It would seem that any future recommendations made in this section would be directed to the Office of the Chief Justice rather than the Government.

c) Existing case-flow management initiatives

3.3.13 Case-flow management in South Africa is being addressed on an on-going basis. The Civil Practice Directives of the Chief Justice and Regional Court Presidents, for example, deal with the daily functioning of the courts, and the management of court rolls and case-flow and are aimed at introducing uniformity.[48] The Office of the Chief Justice has indicated an interest in addressing, amongst other challenges, problems relating to case-flow management, in order to ensure that "the courts take their rightful place as guardians of our constitutional democracy, and serve the nation more effectively and efficiently."[49] Chief Justice Mogoeng has also indicated that the "judiciary had decided to begin a massive project that would see the overhauling of all the rules of the High Court and magistrates' courts."[50] The directives referred to above do not overrule the Rules of Court which have the force of law.

3.3.14 The Department of Justice, through its branch, Court Services, has also, for example, introduced a case flow management (CFM) framework. This framework addresses case management challenges with the help of electronic innovation.[51] The programme includes the following projects:

a) E scheduler (electronic CFM system) helps to manage the cases on court roles.

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48 Botha thesis at 116 refers to the recently instituted case flow management programme, the object of which is to ensure that matters are allocated trial dates more quickly. See Practice Directive 31 read together with guidelines issued` by the registrar of the Durban High Court "Procedure for the allocation of trial dates" dated 19 December 2014.

49 "Chief Justice Mogoeng seeks judicial independence" ***De Rebus*** June:7 [2013] 92 with reference to a 2013 Annual Human Rights Lecture at the University of Stellenbosch' law faculty; See also Judge President Dunstan Mlambo's presentation "Can ADR deliver justice to Companies as Contemplated in the Constitution and the Companies Act?" at the Companies Tribunal Conference "Promoting a Culture of Resolving Disputes Through ADR"" held in Midrand on 17 February 2016.

50 ***De Rebus*** supra at 93.

51 See also discussion below on the use of technology.

b) JDAS (Justice Deposit Account System) is a financial and case management system that administers money kept in trust within magistrates' courts. The Maintenance module, inter alia, automates the calculation of arrears over multiple orders and sentences.

c) JMIS (Justice Management Information System) comprises data analysis tools and has the capacity to extract information and support reporting.

d) High Court Tool (civil cases) is an administration system for civil matters; it provides for capturing these cases and allocating court dates, court rooms, and judges for specific matters per court.

e) Virtual Library is an electronic library system; it provides courts with a gateway to information to empower judges, magistrates, prosecutors and other relevant role-players to access legal information.

3.3.15 In countries such as Australia and New Zealand, various programmes focussing on children have been used with some success over the past few years. Examples are the "Parenting Hearings Programme (PHP)" and the "National Early Intervention Programme (NEIP)".[52]

3.3.16 In terms of the PHP, suitable cases are identified and given an initial two-hour court hearing date within 14 days. Before going to court, parents watch a DVD explaining the process and emphasising how important it is for them to put their children first, and outlining the effect of parental hostility on the children.

3.3.17 At the hearing, the parties speak directly to the judge, with the aim of identifying the issues in dispute and seeking to resolve them on the spot. If all issues are not resolved at the initial hearing, a date for the final hearing is set within two months. Presiding judges make specific directions as to what evidence could be filed for the first hearing, and judges play an active role in directing the course of the proceedings. No provision is made for mediation in the PHP.

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[52] See justice.gov.nz and aminz.org.nz.

3.3.18 By contrast, the NEIP makes use of expert lawyers who are appointed as counsel to assist the court. These expert lawyers conduct mediations, with a success rate of 84% consistently achieved. A lawyer is also appointed for the child.

3.3.19 Another aspect of the NEIP is a Chambers meeting. This meeting determines whether a case should proceed on the "urgent" track, and enables judges to make standard directions. A 15-minute Judicial Conference takes place within 14 days of the Chambers directions being made. All parties file memoranda regarding the issues, and specific direction is made either for an urgent hearing or for the case to be transferred to the "standard" track. An eight-week time frame is allowed for the process up to this point.

3.3.20 A half-day defended hearing then takes place within 42 days, including consolidated defended domestic violence proceedings if required. At the conclusion of the hearing, judges give specific directions for progression of the proceedings.

3.3.21 It is important to note that the same Family Court Judge deals with one case throughout its entire proceedings.

Questions:

6. Are the current case flow management arrangements successful?
7. Is it true that there is an accepted "culture of delay" in the courts when dealing with family disputes?
8. Should a time limit be set for cases dealing with children's matters? If so, what should the time frames be?
9. Should the same judge deal with a case throughout its entire proceedings?
10. What effect do delays in court proceedings have on the development of a child?
11. What effect does the proliferation of expert reports have on the pace of resolution of family law disputes?

3.4 Interim orders (Rule 43 of the Uniform Rules of Court)

a) Rule 43

3.4.1 Rule 43 of the Uniform Rules of Court[53] provides the means for an expeditious and inexpensive method of deciding a number of interlocutory matters that arise out of

[53] Rule 43 of the Uniform Rules of Court provides as follows:

matrimonial proceedings. These matters include the interim care of and contact with children, interim maintenance of spouses and children, and contributions towards costs. The rule refers only to pending matrimonial disputes, and has no application to any other action between spouses or any matrimonial dispute after the divorce has become final.[54]

3.4.2 Each party is given the opportunity to file a sworn statement in the nature of a pleading, in which the claims and answers to them are set out. Since the spirit of the rule is that the matter be dealt with as cheaply and speedily as possible, only a very brief, succinct statement by the applicant of the reasons why the relief is being claimed and an equally succinct reply by the respondent are required. The court is, however, entitled to refer an application for interim custody in terms of this sub-rule to the Family

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Rule 43 Matrimonial matters

(1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:

(a) Maintenance pendente lite;
(b) a contribution towards the costs of a pending matrimonial action;
(c) interim custody of any child;
(d) interim access to any child.

(2) The applicant shall deliver a sworn statement in the nature of a declaration, setting out the relief claimed and the grounds therefor, together with a notice to the respondent as near as may be in accordance with Form 17 of the First Schedule. The statement and notice shall be signed by the applicant or his attorney and shall give an address for service within eight kilometres of the office of the registrar and shall be served by the sheriff.

(3) The respondent shall within ten days after receiving the statement deliver a sworn reply in the nature of a plea, signed and giving an address as aforesaid, in default of which he shall be *ipso facto* barred.

(4) As soon as possible thereafter the registrar shall bring the matter before the court for summary hearing, on ten days' notice to the parties, unless the respondent is in default.

(5) The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision.

(6) The court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or the contribution towards costs proving inadequate.

(7) No advocate appearing in a case under this rule shall charge a fee of more than R80 if the claim is undefended or R170 if it is defended, unless the court in an exceptional case otherwise directs.

(8) No instructing attorney in cases under this rule shall charge a fee of more than R300 if the claim is undefended or R350 if it is defended, unless the court in an exceptional case otherwise directs.

54 Erasmus HJ ***Superior Court Practice*** Juta Law Online Commentary to Rule 43.

Advocate, in terms of section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987.[55]

3.4.3 The court may refuse to make an order, may strike the matter off the roll with costs, may strike out the whole document or portions thereof, or may make an adverse order as to costs, if it feels that the process is being abused by the filing of lengthy and voluminous affidavits.

3.4.4 Rule 43 governs procedure and does not affect substantive law.[56] An applicant's entitlement to relief must be determined according to common law principles, the Divorce Act, and the Children's Act.

b) Problems encountered with Rule 43

3.4.5 It has been argued that Rule 43 of the Uniform Rules of Court[57] is unconstitutional as it is stated too widely, has no guidelines or timelines, is indefinite, and is non-appealable.[58]

(i) Rule 43 stated too widely

3.4.6 The purpose of Rule 43 is stated as follows in ***Nilson v Nilson***:[59]

> Primarily Rule 43 was envisaged to provide temporary assistance for women, who had given up careers or potential careers for the sake of matrimony with or without maternity, until such time as at trial and after hearing evidence, maintenance claims and, if children had been born, custody claims, could be properly determined. It was not created to give an interim meal-ticket to women who quite clearly at the trial would not be able to establish a right to maintenance. The grey area between the two extremes causes problems.

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55 ***Terblanche v Terblanche*** 1992 (1) SA 501 (W) where the court declined to follow the decision to the contrary in ***Davids v Davids*** 1991 (4) SA 191 (W).

56 ***Harwood v Harwood*** 1976 (4) SA 586 at 588E; ***Jeanes v Jeanes*** 1977 (2) SA 703 (W) at 706F.

57 Rules found in the Annexure of Rules in the Supreme Court Act 59 of 1959 with effect from 15 January 1965.

58 Mr CHS Terezakis has approached the Western Cape Division of the High Court (Case 10825/2014) in terms of Rule 16 in this regard.

59 ***Nilsson v Nilsson*** 1984 (2) 294 (C) at 295F.

3.4.7 Since Rule 43 is intended to be an interim expeditious arrangement, it cannot be determined with the same degree of precision as would be possible in a trial where detailed evidence is adduced.

3.4.8 Since the Rules are so widely stated, their implementation may lead to abuse and manipulation of the divorce process for ulterior motives, such as –

a) the circumvention of the provisions of the ante-nuptial contract (ANC);
b) excessive, unmotivated and unaffordable awards in terms of the Rule, which leads to asset-stripping of one party;
c) asset-stripping also results in the status of the ANC becoming insignificant;
d) fanning the flames of conflict between the parties by some lawyers for their own personal financial gain, with great financial devastation to the family;
e) pre-judging issues more properly left to court, by giving rulings on credibility and drawing inferences rather than establishing facts.

(ii) No limitation

3.4.9 This form of interim relief regulates the position between the parties while the divorce is being finalised. Such finalisation can take months or even years, depending on the gravity of the disputes involved. A Rule 43 interim arrangement can drag on for years because there are no time constraints.

3.4.10 In ***MCE v JE***[60] Judge Makgoka stated as follows:

> Experience has shown that in some instances a party armed with an interim order, frustrates the finalisation of the divorce action with the full knowledge that the financial benefits derived in terms of the interim order, are unattainable at the divorce action.

(iii) No appeal

3.4.11 Section 16(3) of the Superior Courts Act 10 of 2013,[61] which was previously Section 20(7) of the Supreme Court Act 59 of 1959, provides that no appeal may be made on a Rule 43 determination.

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60 ***MCE v JE*** Case no 13495/2011 of 14 September 2011 North Gauteng High Court; [2011] ZAGPPHC 193.

61 Section 16(3) of the Superior Courts Act 10 of 2013 provides as follows:

3.4.12 In terms of Rule 43(6) the court may, however, once again in terms of Rule 43, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or if the contribution towards costs proves to be inadequate. This sub-rule is interpreted strictly.[62] It cannot be invoked merely when, subsequent to the order, fresh facts come to light that cast doubt upon the accuracy or completeness of the information before the court at the initial Rule 43 hearing.

3.4.13 In ***GS v GSS and the Sheriff Lenasia North,***[63] Judge Legodi stated as follows:

> … the applicant also seeks to challenge the application of Rule 48(6) insofar as it might be applied to say it relates only to "changed circumstances". Secondly, the applicant seeks to challenge section 20(7) of the Supreme Court Act 59 of 1959 insofar as it tends to prohibit an appeal for payment of interim maintenance and a contribution towards legal costs in terms of Rule 43. Perhaps put the issue differently this way, "What should a respondent under Rule 43(1) do when there are no changed circumstances, but he or she cannot under Rule 43(1), for financial reasons, afford to comply with an order for maintenance and a contribution towards legal costs?" Fortunately I do not have to deal with this issue in light of the undertaking which has now been made.

3.4.14 As far as maintenance is concerned, in terms of the Maintenance Act[64] a maintenance court has jurisdiction to substitute or discharge an order for the payment of maintenance *pendente lite* made under Rule 43. However, the maintenance court has to display caution in such circumstances, and cannot lightly change an order made in terms of Rule 43 in the absence of altered circumstances.

Questions:

12. Is Rule 43 an effective procedure to assist parties in a contested divorce?

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16. Appeals generally
16. (1)-(2)…
(3) Notwithstanding any other law, no appeal lies from any judgment or order in proceedings in connection with an application –
(a) by one spouse against the other for maintenance *pendent lite*;
(b) for contribution towards the costs of a pending matrimonial action;
(c) for the interim custody of a child when a matrimonial action between his or her parents is pending or is about to be instituted; or
(d) by one parent against the other for interim access to a child when a matrimonial action between the parents is pending or about to be instituted.

62 ***Grauman v Grauman*** 1984 (3) SA 477 (W) at 480C; ***Micklem v Micklem*** 1988 (3) SA 259 (C) at 262E-G; ***Maas v Maas*** 1993 (3) SA 885 (O) at 888C.

63 ***GS v GSS and the Sheriff Lenasia North*** Case No 20317/2009 dated 27 May 2011 North Gauteng High Court; [2011] ZAGPPHC 74..

64 Section 16 (1)(b) of the Maintenance Act 99 of 1998.

13. Should elements of Rule 43 be regarded as unconstitutional? If so, why?
14. How should Rule 43 be amended in order to address the criticism raised?

3.5 Technology

3.5.1 The future of the courts is greatly dependent on technology and how technology can improve their functioning. Modern communication devices should be viewed as an opportunity for imaginative and constructive use in furthering the goal of administering justice properly and promptly. Digitising the legal world would not only improve access but would also change the way litigators practise law.[65]

3.5.2 According to Jeff Aresty,[66] there are three general categories of changes in courtroom technology:

a) Technologies exist that legal representatives use to present evidence and arguments.
b) Electronic documents have fundamentally changed the discovery process.
c) Lawyers can use new technology outside the courtroom to start their cases, maintain their cases, and get word out about their cases. E-filing, social media and legal research have transformed the traditional work of lawyers.

a) Serving documents and notices electronically

3.5.3 The High Court Rules of South Africa have been amended,[67] so that since the end of July 2012, parties have been able to serve documents or notices on each other via facsimile or electronic mail. Before this change, documents had to be served at the other party's physical address or the physical address of the party's appointed attorneys.[68]

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65 Knoetze I "Courtroom of the Future – Virtual Courts, E-courtrooms,Videoconferencing and Online Dispute Resolution" 2014 ***De Rebus*** 28 (hereafter "Knoetze") at 28.

66 Aresty J "State Courts and the Transformation to Virtual Courts" 2013 39 ***Litigation*** 50 as referred to in Knoetze at 28.

67 The Amendment was published by The Department of Justice and Constitutional Development in the Government Gazette No. 35450 on 22 June 2012.

68 Smith PK ***The Dawn of Age for South African Electronic Litigation*** 14 July 2012 accessed at http://www.dingley.co.za/the-dawn-of-the-electronic-age-for-south-african-litigation/ on 4 August 2014 (hereafter "Smith").

3.5.4 This amendment[69] (Rule 4A) does not apply to the service of any documents that initiate proceedings, which must still be carried out by the Sheriff of the court. However, since July 2012, it has no longer been necessary to serve subsequent documents through the Sheriff of the court: these latter documents can now be e-mailed, faxed, hand-delivered, or posted by registered post.[70]

3.5.5 This amendment has improved the efficiency of litigation in South Africa. However, it remains to be seen what challenges might arise regarding the receipt or transmission, or timing of receipt, of documents sent by one of the methods of delivery. For example, e-mails may be blocked by anti-spam or anti-virus software, or may "bounce back" to the sender without being seen by the recipient. However, the Electronic Communications and Transactions Act, 2002, provides that a data message is regarded as having been received when the complete message enters into the information system.

b) Video- and teleconferencing and videotaped statements

3.5.6 Videoconference technology allows witnesses in both criminal and civil cases to testify at trial without being physically present in the courtroom.[71] It can also be used during online dispute resolution.

3.5.7 One of the greatest fears that some children have about testifying in court is of seeing the perpetrator again during an abuse trial or investigation.[72]

3.5.8 In Canada, videoconferencing technology has been used to receive witness testimony in civil trials for over a decade.[73]

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69 The new Rule 4(A)(3) ensures that Chapter III, Part 2 of the Electronic Communications and Transactions Act 25 of 2002 (ECTA) applies to service by facsimile or electronic mail. See also Rules 17 and 19.

70 Smith supra.

71 F Weber "Complying with the Confrontation Clause in the Twenty-first Century: Guidance for Courts and Legislatures Considering Videoconference Testimony Provisions" 2013 86 ***Temple Law Review*** 151 as referred to in Knoetze.

72 Bala N, Lindsay R & Mc Namara E "Testimonial Aids for Children: The Canadian Experience with Closed Circuit Television, Screens and Videotapes" 2001 44 ***Criminal Law Quarterly*** 461(hereafter "Bala, Lindsay & McNamara") at 463.

73 Salyzyn A "A New Lens: Reframing the Conversation about the use of Videoconferencing in Civil Trials in Ontario" 2012 50 ***Osgoode Hall Law Journal*** 431 as referred to in Knoetze.

3.5.9 Rule 1.08 of the Ontario Rules of Civil Procedure provides that a witness's oral evidence at a trial may be received by videoconference, if the parties consent to this. In the absence of consent, evidence may be received by videoconference upon motion or at the court's own initiative. The receipt of evidence through videoconference is subject to the discretion of the court.

3.5.10 According to Salyzyn,[74] the court, in exercising its discretion, takes the following factors into account:

a) the general principle that evidence and argument should be presented orally in open court;
b) the importance of the evidence to the determination of the issues in the case;
c) the effect of the telephone or videoconference on the court's ability to make findings, including determinations about the credibility of witnesses;
d) the importance in the circumstances of the case of observing the demeanour of a witness;
e) whether a party, witness or legal representative for a party is unable to attend because of infirmity, illness, or any other reason;
f) the balance of convenience between the party wishing the telephone or videoconference and the party or parties opposing; and
g) any other relevant matter.

3.5.11 It has been argued[75] that presentation of the testimony of expert witnesses through closed-circuit techniques or videoconferencing would be most helpful in South African courts, as it is a cheaper and more flexible way to receive expert testimony. This technology would also improve access to justice.[76]

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74 Op cit at 433.

75 Knoetze at 28.

76 Speaking at a meeting of the judicial heads of court in Johannesburg on 12 April 2015, Chief Justice Mogoeng Mogoeng announced the imminent digitisation of the court system: "We have seen courts in other countries facilitating access to justice by cutting down on expenses in relation to postponements and, most importantly, in relation to evidence-taking." The new system will allow out-of-town witnesses to give evidence via an audio-visual link, thus reducing travel costs and waiting periods. He said that the system would also prevent dockets from going missing as information "will be electronically secured". ***The Times*** **"**Courts to go digital soon – Mogoeng" 13 April 2015 at 9.

3.5.12 The use of a videotaped statement of an interview with a child allows the court to have an accurate record of the child's statements, made when the child's memory is relatively fresh and in a relatively non-threatening environment.

3.5.13 A number of American states have legislation that allows for the admission of such videotaped pre-trial depositions. The deposition occurs in the presence of counsel on both sides and the child is subject to cross-examination. The child can testify at a relatively early stage in the process, and then get on with his or her life without being involved in court proceedings that often drag on for months or even years. The child may then also have therapy - without the argument that this could "contaminate" the child's evidence.[77]

c) Online dispute resolution

3.5.14 Online dispute resolution (ODR) can be defined as any method by which parties attempt to resolve their disputes online. ODR uses technology, particularly the Internet, to augment ADR processes. The field of ODR has developed directly as an online extension of ADR.[78]

3.5.15 The main types of ODR are the following:[79]

a) Assisted negotiation – this is an online, computer-assisted negotiation in which technological tools enhance the probability of reaching an agreement. Owing to the absence of a human third party, technology assists the parties to find a solution, by asking questions, suggesting answers, and sending reminders.

b) Automated negotiation – this is a specific type of assisted negotiation, also called "blind-bidding" negotiation. This method is limited to monetary claims where money is the only variable in the dispute. The proceedings are conducted online without any human assistance. Each party makes a confidential bid at every round of the negotiations. If the system finds that an offer by the opposing party is equal to or less than the complainant's offer for a round, the case is automatically settled.

c) Online mediation and online arbitration – these two methods refer to a

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77 Bala, Lindsay & McNamara at 22.

78 Albornoz M "Feasability Analysis of Online Dispute Resolution in Developing Countries" 2012 44 ***Inter-American Law Review*** 43 at 43.

79 Op cit at 47.

> voluntary mediation proceeding or an arbitration proceeding that is conducted over the internet with the assistance of a human third party. In the case of online arbitration, the parties must have an express agreement to arbitrate.

3.5.16 In the USA, the Federal Mediation and Conciliation Service (FMCS) and the National Mediation Board (NMB) have both taken note of ODR. The FMCS pioneered the use of online tools to negotiate contracts, while the NMB has offered secure online tools in lengthy, complex negotiations among parties spread across the country. Private firms now offer flexible platforms that allow lawyers and other dispute resolvers to use online methods to complete work that traditionally required face-to-face meetings. This allows firms to expand their practices into unique areas in the new technology-rich environment.[80]

3.5.17 It has been argued[81] that advances in technology can improve the courts and the public's access to court services. Not only can new technology allow for greater access to courts, it can also improve the efficiency of the courts operating in difficult financial times.

3.5.18 Some of the greatest benefits of a "virtual court" are the cost savings and hours of service availability. Traditionally, courts are open to the public only on business days. This is restrictive, as many litigants who need to access the courts work on business days. Virtual courts can eliminate this barrier by allowing 24-hours-a-day, seven-days-a-week access to electronic filing and other on-line methods for case processing. In addition, litigants would be able to participate in trials by videoconference. Thus, virtual courts would save on overheads and costs associated with operating court facilities, thereby improving the public's access to justice.

3.5.19 To implement virtual court procedures and case processing, existing case-management systems would need to be modified or replaced to allow for new technology and remote access.

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80 Knoetze at 28.

81 Ibid.

3.5.20 The limitations of virtual courts should, however, be noted. Firstly, digital recording devices are sometimes unable to record people's statements because they are not spoken loudly or clearly enough. Secondly, legal representatives and the courtroom will continue to play the lead role, because cases are too difficult for computers to handle alone. Clients need understanding, responsiveness and advice that technology simply cannot provide.

d) Information Hub

3.5.21 Parental information is important to defuse family disputes between parties, both during and after a divorce or separation.

3.5.22 The Family Justice Review (Review Panel 2011) proposed that separating couples should go first to an information hub, where they could obtain easy access to a wide range of information and direction to further support as appropriate.[82]

3.5.23 An online information hub should offer support and advice in a single, easy-to-access point of reference. This could be accessed at the start of the process of separation or divorce, to enable people to make informed decisions about how best to resolve any issues they may have.[83]

Questions:

15. How can advancements in technology improve the courts and public access to court services?
16. Are on-line mediation services a viable option?

C. Alternative dispute resolution (ADR)

3.6 Introduction

a) What is ADR?[84]

82 Para 4.11.

83 Para 4.77.

84 This section draws on the South African Law Reform Commission's ***Alternative Dispute Resolution*** Issue Paper 8,1997.

3.6.1 “ADR” is the generally accepted acronym for alternative dispute resolution. In brief, ADR denotes all forms of dispute resolution other than litigation or adjudication through the courts. This definition of ADR, however, makes no mention of a vital consideration. That is, ADR provides an opportunity to resolve disputes through the use of a process best suited to particular disputes and conflicts. For this reason, many ADR practitioners prefer to use the same abbreviation to denote “*appropriate* dispute resolution”. Lately, the acronym has also been used to describe “African Dispute Resolution”.[85]

3.6.2 ADR thus involves not only the application of new or different methods to resolve disputes, but also the selection or design of a process which is best suited to the particular dispute and to the parties in dispute.

3.6.3 The field of ADR, therefore, covers a broad range of mechanisms and processes designed to assist parties in resolving disputes creatively and effectively. In so far as this may involve the selection or design of mechanisms and processes other than formal litigation, these mechanisms and processes are not intended to supplant court adjudication, but rather to supplement it.

b) Goals of ADR

3.6.4 The goals of ADR may be described as follows:

a) to relieve court congestion, as well as prevent undue cost and delay;
b) to enhance community involvement in the dispute resolution process;
c) to facilitate access to justice; and
d) to provide more effective dispute resolution.

3.6.5 ADR experts in the USA, where the practice of ADR is well advanced, have expressed some doubt as to whether ADR can ever fully relieve court congestion. Neither is there any evidence to show that this has been the case in South Africa. Undoubtedly, however, there are methods of resolving disputes which are less expensive and more expeditious than formal litigation. This fact is being borne out in the labour field.

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[85] See discussion below.

3.6.6 A second goal of ADR, namely to enhance community involvement in the dispute resolution process, is of particular importance in South Africa. South Africa's historical circumstances have resulted in amongst other things a significant section of the population being alienated from the formal court system. The development of appropriate forms of dispute resolution which encourage and enhance community involvement, and bear the stamp of legitimacy, is therefore crucial to see disputes and conflict effectively resolved.

3.6.7 The third goal of ADR, namely to facilitate access to justice, is perhaps ambitious. For example parties who, with the assistance of a mediator, are able to resolve their dispute might not regard themselves as having received justice, but might simply perceive that they have attained the more modest goal of settling their dispute. Undoubtedly, dispute resolution in its broadest sense does and will continue to, facilitate the resolution of disputes.

3.6.8 The most important goal of ADR is arguably the fourth goal stated above, namely to provide more effective dispute resolution. As already stated, the essence of the study and practice of ADR is to provide mechanisms and processes to resolve disputes more effectively than automatic recourse to litigation. Indeed, one of the most significant effects that dispute resolution practice has had in South Africa over the last decade is to challenge the view that adversarial litigation is the only means, apart from agreement, of resolving disputes.

c) Categories of dispute resolution

3.6.9 Three major categories of dispute resolution can be identified, as follows:

a) Dispute resolution processes involving private decision-making by the parties themselves. This category would include negotiation and mediation.

b) Dispute resolution processes involving private adjudication by third parties. Arbitration falls into this category.

c) Dispute resolution processes involving adjudication by a public authority. This category includes administrative decision-making and formal litigation before the courts.

d) State control versus State support

3.6.10 It is essential to recognise a fundamental difference between adjudication at the hands of public authorities and ordinary forms of ADR. Arbitration, mediation and other forms of ADR rely for their effectiveness on the willingness of the parties to submit to the process. They do so by agreement. By contrast, the compulsory jurisdiction conducted at the hands of the State relies for its effectiveness on the ability of one party to compel the other to submit to the jurisdiction of the State.

3.6.11 This distinction raises a fundamental issue about whether, or to what extent, ADR processes should be introduced into the formal and compulsory jurisdiction of courts administered by the State.[86]

3.6.12 An interesting development in the USA is the introduction under the auspices of the formal justice system of "multi-door court-houses". These are state institutions in which parties are directed to the most appropriate form of dispute resolution for their particular dispute - whether mediation, arbitration or adjudication. All processes are available under a single roof.

3.6.13 Another way to approach the introduction of ADR processes into South African communities would be to lend State support to private initiatives in the field.

e) Different forms of alternative dispute resolution[87]

Mediation

3.6.14 In the context of this paper, mediation is defined as a consensual process in which disputing parties engage the assistance of an impartial third-party mediator, who helps them to try to arrive at an agreed-on resolution of the dispute. The mediator has no authority to make any decisions that are binding on the parties. Instead, he or she uses certain procedures, techniques and skills to help them negotiate an agreed resolution of their dispute, without adjudication.[88]

Arbitration

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86 See also the discussion on court-connected mediation below.

87 Morris at 2.

88 Brown HJ & Marriott QC ***ADR Principles and Practice*** 3ed Sweet & Maxwell London 2011 at 154. See full discussion on mediation below.

3.6.15 Arbitration is an adjudicative process. In this paper, “arbitration” is regarded as a binding process. The impartial arbitrator's role is to make a decision for the parties, which decision is intended to be final, binding and enforceable. Some ADR processes are similar to adjudication, but are not binding; the non-binding nature of such processes means they are not “arbitration” (within the meaning of the term as used in this paper).

3.6.16 Additional forms of dispute resolution are as follows:[89]

a) Non-binding arbitration;[90]
b) Facilitation (Private case management);[91]
c) Collaboration;[92]
d) African Dispute Resolution;[93]
e) Court-annexed mediation;[94]
f) Family arbitration;[95]
g) Administrative financial arrangements (whereby the parties themselves simply reach an agreement directly and have it reflected in a consent order);
h) An agreement reached between the parties, but with some minimal assistance - such as information provided through an automated phone service, or online;
i) Nuptial agreements;
j) Early or third-party neutral evaluation;
k) Private financial dispute resolution (FDR); and
l) Negotiation.

3.7 Alternative Dispute Resolution in terms of the Children’s Act[96]

89 Ferguson at 119.

90 Non-binding arbitration can take various forms. It can be mediation with recommendations, or it can be a more formal hearing with evidence and arguments with recommendations. The result is not binding on the parties.

91 See discussion on Facilitation below.

92 See discussion on Collaboration below.

93 See discussion African Dispute Resolution below.

94 See discussion Court annexed mediation below.

95 See discussion Family arbitration below.

a) Introduction

3.7.1 The Children's Act 38 of 2005 came into operation on 1 April 2010. This Act marks a major change in the legal policy affecting children. The Children's Act encourages and mandates ADR processes and procedures in several key areas, although it assumes that the most appropriate forum to decide matters affecting children is the children's court.[97]

3.7.2 The different forms of ADR as a concept and as a method of dispute resolution is, however, merely mentioned in the Children's Act. The Act does not define these concepts, neither does it discuss or evaluate any of the ADR mechanisms. This is the lacuna that the current investigation will try to address.

3.7.3 The relevant objects of the Children's Act, as set out in its Section 2, are to[98]-

a) uphold the principle that the best interests of the child are of paramount importance;[99]

b) make provision for structure, services and means for promoting development of children;[100]

c) strengthen and develop community structures that can assist in providing care and protection for children;[101] and

d) generally promote the protection and well-being of children.[102]

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96 Mediation that will not be discussed in this Chapter refers to post-adoption agreements (section 234), surrogate motherhood agreements (section 292), mediation options concerning children in conflict with the law, victim offenders (Child Justice Act 75 of 2008), and employer-employee mediation (Labour legislation).

97 Department of Social Development ***Framework on Mediation for Social Services Professionals Mediating Family Matters - Mediation: An Alternative Dispute Resolution Programme and/or Programme to Prevent Family Disputes*** March 2012 at 85. (referred to as "DSD ***Social Services Professionals Mediation Framework***, 2012".

98 Schneider presentation at 8.

99 Section 2(b)(iv).

100 Section 2(d).

101 Section 2(e).

102 Section 2(i).

3.7.4 Section 7 of the Act relates to the "best interests of the child standard". This section is relevant with regard to mediation, as specific provision is made for considering the action or decision which "would avoid or minimize further legal or administrative proceedings in relation to the child".[103]

3.7.5 ADR in the Children's Act can be discussed by drawing a distinction between direct and indirect opportunities for ADR.[104]

3.7.6 Direct opportunities for ADR refer to instances where the Children's Act expressly makes ADR mandatory or discretionary, at the instance of the court. By contrast, indirect opportunities for ADR refer to provisions in the Children's Act where ADR is not contemplated but might be recommended, if one has regard to the aims and objectives of those provisions.[105]

b) Direct opportunities for ADR in the Children's Act

(i) Mandatory mediation: Section 21:[106] Parental responsibilities and rights of unmarried fathers[107]

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103 Schneider presentation.

104 De Jong M "Opportunities for Mediation in the New Children's Act 38 of 2005" 2008 71 ***THRHR*** 630 (hereafter "De Jong 2008 ***THRHR***") at 631; Paleker at 4; See also DSD ***Social Services Professionals Mediation Framework*** 2012 at 85.

105 DSD ***Social Services Professionals Mediation Framework*** 2012 at 86.

106 Section 21 of the Children's Act provides as follows:

Parental responsibilities and rights of unmarried fathers

21. (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 lived or is living 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 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.

(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 (l)(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.

3.7.7 Previously, to acquire parental rights, the father of an extra-marital child had to resort to the adversarial litigation system. The Children's Act, however, stipulates that if a father meets factual criteria as mentioned in subsection 1 of section 21, he is *ipso facto* entitled to enjoy full parental rights, which places him on the same footing as the mother and any other father. The father can insist on gaining access to his child, and if the mother refuses he can take action.[108]

3.7.8 Section 21(3)(a) of the Children's Act stipulates that when there is a dispute between the biological father and mother of a child as to whether the father fulfils the conditions of section 21(1), the matter must be referred for mediation to a Family Advocate, social worker, social service professional, or other "suitably qualified" person. The word "must" is peremptory and the parties are obliged to mediate their dispute first.[109] The parties can, however, approach a court for immediate and urgent interim relief pending the finalisation of mediation. Furthermore, the Act does not require the lodging of an application to court as a precursor to mediation. This means that such mediation is not only a court-sanctioned process but can also stand independently.[110]

3.7.9 The Children's Act stipulates in section 21(3)(b) that a mediation outcome "may" be reviewed by a court.[111] This means that if the parties undertake mediation which is not associated with the Office of the Family Advocate, the agreement emanating from the process can be registered with the Family Advocate without court intervention.[112]

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(4) This section applies regardless of whether the child was born before or after the commencement of this Act.

107 See discussion on unmarried fathers in Chapter 2 at par 2.5.

108 De Jong 2008 ***THRHR*** at 631; Paleker at 7. See also DSD ***Social Services Professionals Mediation Framework***, 2012 at 89.

109 Paleker at 8. See also Davel CJ & Skelton AM (eds) ***Commentary on the Children's Act*** Juta 2007 at 3- 12. See discussion on the possible unconstitutionality of these sections as discussed above in Chapter 2.

110 DSD ***Social Services Professionals Mediation Framework***, 2012 at 89: Mediation agreement may be reviewed by court. The agreement can be registered with the Family Advocate without court intervention. Thus, mediation could be court sanctioned or not.

111 DSD ***Social Services Professionals Mediation Framework***, 2012 at 90.

112 See discussion in Chapter 2 and below.

3.7.10 Paleker[113] views mediated agreements without court intervention as a policy shift. In other words, policy has shifted away from merely acknowledging the limitations of the adversarial litigation process towards recognising the integrity of mediation as an effective dispute resolution mechanism for family disputes.[114]

3.7.11 Whereas in the past the Family Advocate had sole official jurisdiction to conduct mediation-type proceedings, the legislature (in section 21) has now approved other persons and bodies to conduct mediations. The reference to "other suitably qualified person" makes provision for accredited mediators and mediating agencies to conduct such mediations.[115]

3.7.12 A number of issues have been identified by the DSD as far as section 21 is concerned:

(aa) Referral

3.7.13 Section 21(3)(a) provides that a matter must be referred for mediation. It is unclear who the person or institution is that has to make this referral. At the stage where there is a dispute between a father and mother regarding the acquisition of parental responsibilities and rights in terms of section 21, there is no formal organisation or State institution involved. There is, therefore, no trigger or responsible person who must refer. If the intention was to make mediation mandatory before the parties may proceed to court, the provision should state that "the parties must first attempt to mediate the dispute...".[116]

3.7.14 It could be useful to use the same language as section 33(2) of the Children's Act, where the onus is on the parties to first attempt to mediate before they may proceed to litigation.

(bb) Refusal of parties to participate

3.7.15 The question is posed whether an adverse decision can be made against a party who fails to attend mediation. The Office of the Family Advocate finds that some

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113 Paleker at 8.

114 DSD ***Social Services Professionals Mediation Framework***, 2012at 89.

115 De Jong 2008 ***THRHR*** at 632; Paleker at 8.

116 See discussion of proposal in DSD ***Recommendations in Respect of Final Draft*** 2013 at 24.

mothers ignore their notices to attend the Family Advocate's Office for mediation, and the unmarried father is then forced to engage in litigation that is extremely expensive for him.[117] However, in cases that involve abuse or allegations of abuse, the refusal to attend might be justified. An exception for these cases may be considered.

3.7.16 The Office of the Family Advocate proposes that it should be empowered to make a finding that the father does qualify in terms of section 21 if the mother fails to attend mediation, and the Office would then issue a certificate for the father so that he has physical confirmation of his parental rights. The mother would then have to go to court if she disputes the finding. A mere certification in terms of Form 7 that a person refused to attend mediation is not sufficient, because the father does not get the required relief and must still proceed to court.[118]

3.7.17 If an adverse decision can be made against the mother in the event that she refuses mediation, the process needs to be formalised to ensure the issuing of notices and so on. A recommendation has been made that the Act could include the possibility of an adverse decision against the mother and a parental rights certificate for the father. However, safeguards will have to be included to ensure that it is clear the mother was aware of the mediation, that she did receive notification, and that she was aware of the implications if she failed to participate in mediation.[119]

3.7.18 There must also be clarity that the Office of the Family Advocate must nonetheless have sufficient evidence from the unmarried father to make an informed decision, and there must be a consideration of whether the father does in fact qualify. The mere refusal by the mother to participate in mediation should not automatically lead to recognition of the father's rights. The new section should therefore include the phrase "after consideration of the evidence presented by the father" or similar words.[120]

(cc) Review of mediation

3.7.19 The concepts of "mediation" versus "review by a court" are not compatible. Mediation is generally an undocumented process that can be somewhat therapeutic in

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117 Supra at 21.

118 Supra at 22.

119 Ibid.

120 Ibid.

nature, and is aimed at resolving disputes between parties. Parties are encouraged to communicate openly and freely, and the proceedings are not recorded. It is therefore very difficult to formally review the outcome. Court review of the mediation process or results would discourage open communication and mediation in general. The purpose behind this section is to indicate that nothing in section 21 limits a party's right to approach the court to resolve the dispute, if they are unhappy with the outcome of the mediation.[121]

3.7.20 It has been proposed that section 21(3)(b) should be redrafted to take the above concerns into consideration, and to make it clear that any party may approach a court after mediation if they are unhappy with the outcome.

(dd) Link between mediation and parenting plan/parental responsibilities and rights agreement

3.7.21 It may be necessary to recognise that section 21 is not the end of the road, and to link section 21 with parenting plans or parental responsibilities and rights agreements.

3.7.22 If the father is successful in mediation then he is issued with a certificate. If disputes arise between the parties regarding the exercise of rights, then the parties must be referred to mediation in terms of section 33 to formulate a parenting plan. If the father is unsuccessful, he might still acquire rights by concluding a parental responsibilities and rights agreement with the mother, in terms of section 22; or he may approach the court if the mother is not willing to conclude an agreement.

Questions:

17. Who should refer a matter for mediation in terms of section 21(3)(a)?
18. Should a definition of "mediation" be included in the Children's Act?
19. How should legislation provide for the procedural aspects of mediation?
20. Should any adverse decision be made against a party who fails to attend a mediation? If so, what should this decision entail?
21. Can mediation be reviewed? If so, how?
22. What is the status of a mediation settlement?

(ii) Mandatory mediation: Section 33 of the Children's Act[122]

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121 Supra at 23.

122 Section 33 of the Children's Act reads as follows:

3.7.23 Although not specifically defined in the Act, a "parenting plan" refers to an agreement in which co-holders of parental responsibilities and rights make arrangements about how they intend to exercise their respective parental rights and duties.[123]

3.7.24 The Act stipulates in section 33(2) that in the event of a dispute about the exercising of parental rights and responsibilities, probably due to divorce proceedings or parental rights of the unmarried father, the co-holders of parental responsibilities and rights must first try to reach agreement on a parenting plan before they request the assistance of the court.[124]

3.7.25 Section 33(5) makes provision that the parental plan referred to in subsection (2) can either be negotiated with the assistance of the Family Advocate, or a social worker or psychologist, or can be mediated though a social worker or other suitably qualified person.[125]

3.7.26 A number of issues have been identified for discussion:

Contents of parenting plans

(1) The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.

(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.

(3) A parenting plan may determine any matter in connection with parental responsibilities and rights, including-

(a) where and with whom the child is to live;
(b) the maintenance of the child;
(c) contact between the child and-
(i) any of the parties; and
(ii) any other person; and
(d) the schooling and religious upbringing of the child.

(4) A parenting plan must comply with the best interests of the child standard as set out in section 7.

(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.

123 De Jong 2008 ***THRHR*** at 632; Paleker at 10. See also DSD ***Social Services Professionals Mediation Framework*** 2012 at 90.

124 DSD ***Social Services Professionals Mediation Framework*** 2012 at 90.

125 Section 34(3)9(b)(ii) provides that an application submitted in terms of section 33(2) for registration of a parenting plan must be accompanied by the statement contemplated in section 33(5)(a) to the effect that the plan was prepared after consultation with the Family Advocate, social worker or psychologist or after mediation in terms of section 33(5)(b) by a social worker or other appropriate person.

(aa) "Assistance" versus "mediation"

3.7.27 Paleker[126] highlights that the provision made for intervention differs from the provision made in section 21, where the mediation responsibility is shared between the Family Advocate and social workers and other suitably qualified persons. In this section the Family Advocate is only requested to assist and not to mediate.

3.7.28 It is not clear what is meant by "assistance" in section 33(5)(a), compared with "mediation" in section 33(5)(b). We submit that the concept of assistance is broader than mediation, and could include any of the following: simply telling the parties what the format is, referring them to a professional, or actually assisting in the mediation.

3.7.29 Having regard to the general tenor of section 33 read with section 34, and the overarching requirement for a parenting plan to comply with the best interests of the child standard, the Office of the Family Advocate cannot register a parenting plan for which that Office rendered assistance. Such a parenting plan must be made an order of court, so that the court can separately consider whether the plan is in the best interests of the child. But there is nothing precluding the Family Advocate, without the need for court intervention, to register a parenting plan that was agreed to by the parties upon completion of mediation.[127]

3.7.30 One must weigh considerations of costs and time in bringing an application to court against the costs and time of mediation – which may be either private, state-sponsored, or community-based. Given this consideration, it might make sense to refer a disputed parenting plan to mediation (as opposed to "assistance" by the Family Advocate). In that way, the parties would know that if they reach agreement, their parenting plan can simply be registered with the Office of the Family Advocate, without the need for the more costly and time-consuming route of having the agreement confirmed by an order of court. Parties, it is submitted, should be informed of these procedural ramifications.[128]

(bb) Intervention not successful

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126 Paleker at 13.

127 Paleker at 13.

128 Paleker at 13.

3.7.31 When a parenting plan is disputed and the parties are referred either for assistance by the Family Advocate, or for mediation, the final parenting plan must either be registered with the Family Advocate or be made an order of the court.[129] However, registration must happen only after considering whether the plan is in the best interests of the child or children.[130]

3.7.32 Paleker[131] submits that in cases where intervention is unsuccessful because a party refuses to participate in mediation or abuses the mediation process, the Minister should, by means of Regulations promulgated in terms of the Act, require a certificate of mediation to be furnished before the matter can be brought to court. Although this certificate should not reveal the content of communications that took place during the mediation process, such a certificate could be used to show the court that a party refused to participate in mediation, or abused the mediation process.[132] (See also the discussion on the court-annexed mediation rules below.)

3.7.33 It has been proposed that there should be a form to indicate the outcome of the assistance rendered in terms of section 33(2). This need can be solved by amending Regulation 8 and Form 6 to apply to section 33(2) and section 21(3).

(cc) Dual role of the Family Advocate

3.7.34 A question has been posed whether the Family Advocate's responsibility should be limited to registration of the parenting plan only, in terms of section 34. The proposal states that the Office of the Family Advocate is required to conduct mediation, draft a parenting plan, and review its own work for purposes of registration. This requires the Office to play a dual role – which may be unworkable and creates a conflict of interest.

3.7.35 If the complaint is that the Office of the Family Advocate should not play a dual role in trying to mediate between parents, and that "assistance" must be understood narrowly as merely providing forms and registering the parenting plan, then the proposal must be clarified by the Office of the Family Advocate.

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129 DSD ***Social Services Professionals Mediation Framework***, 2012 at 90.

130 DSD ***Social Services Professionals Mediation Framework***, 2012 at 90.

131 Paleker at 13.

132 DSD ***Social Services Professionals Mediation Framework***, 2012 at 90.

(dd) Suitably qualified person

3.7.36 "Suitably qualified person" in section 33(5)(b) should be defined in terms of both qualifications and experience. This term also needs to be defined for purposes of section 49(1), which discusses mediation by a suitably qualified person.[133]

3.7.37 Chapter 2 of this paper presents a discussion on the definition of "suitably qualified person". During the process of drafting the regulations to the Children's Act, there was a draft regulation regarding suitably qualified persons for purposes of section 33(5)(b). This draft regulation was not included in the final regulations because it was *ultra vires*. As stated above, because chapter 3 does not allow for regulations for the administration of the chapter, the section would have to allow for regulations. Section 33(5)(b) and 49(1)(a) could include, at the end, the phrase "as prescribed".

Questions:

23. What is the difference between "assistance" and "mediation" as used in sections 21 and 33 respectively?
24. Does the differentiation have a purpose?
25. How should an unsuccessful intervention be dealt with?
26. How should the dual role of the Office of the Family Advocate be dealt with?
27. Should regulations be formulated for sections 33(5)(b) and 49(1)(a)?

(iii) Discretion of court to refer matter to ADR

(aa) Section 49: Lay-forum mediation[134]

3.7.38 In accordance with section 49**,** a children's court hears all matters arising from the provisions of the Act. This includes issues pertaining to contact, care, guardianship,

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133 See also par 2.1 in Chapter 2.

134 Section 49 of the Children's Act provides as follows:
Lay-forum hearings
49. (1) A children's court may, before it decides a matter or an issue in a matter, order a lay forum hearing in an attempt to settle the matter or issue out of court, which may include-
(a) mediation by a family advocate, social worker, social service professional or other suitably qualified person;
(b) a family group conference contemplated in section 70*;* or
(c) mediation contemplated in section 71.

(2) Before ordering a lay forum hearing, the court must take into account all relevant factors, including-
(a) the vulnerability of the child;
(b) the ability of the child to participate in the proceedings;
(c) the power relationships within the family; and
(d) the nature of any allegations made by parties in the matter.

adoption, foster care, child abuse and neglect, as well as matters affecting the mental, physical, psychological and emotional well-being of the child.

3.7.39 The inherent processes and procedures of the children's court are largely adversarial. However, the Children's Act makes provision that a special measure could be adopted to cushion the child from the intimidating nature of adversarial litigation.[135]

3.7.40 In terms of Section 49, the presiding officer has the discretion, within the context of the general powers of children's courts, to refer matters for mediation where it is specifically mentioned in the Act, and in matters where mediation is envisaged to be conducted. Should mediation fail, court intervention will be necessary.[136]

3.7.41 Section 49 makes provision for the presiding officer to order a lay forum hearing before making a decision. The forum may include the following:

- mediation by a family advocate, social worker, social service professional or other suitably qualified person;
- a family group conference; or
- mediation as contemplated in section 71.[137]

(bb) Facilitation: Section 70: Family group conference[138]

3.7.42 In section 70, provision is made for a discretion for the court to set up a family group conference involving the parties to the matter, including any other family

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135 De Jong 2008 ***THRHR*** at 633; Paleker at 14; See also DSD ***Social Services Professionals Mediation Framework,*** 2012 at 92.

136 De Jong 2008 ***THRHR*** at 634; Paleker at 14; see also DSD ***Social Services Professionals Mediation Framework***, 2012 at 92.

137 DSD ***Social Services Professionals Mediation Framework***, 2012 at 92.

138 Section 70 of the Children's Act provides as follows:

Family group conferences

70. (1) The children's court may cause a family group conference to be set up with the parties involved in a matter brought to or referred to a children's court, including any other family members of the child, in order to find solutions for any problem involving the child.

(2) The children's court must-

(a) appoint a suitably qualified person or organisation to facilitate at the family group conference;
(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.

members of the child. The aim of the family group conference is to find solutions for any problem involving the child. The agreement needs to be captured in a prescribed manner in a report to be considered when the matter is heard. The family group conference would not be held on a "without prejudice" basis.[139] Should the family group conference be set up, the court is then obliged to appoint a suitably qualified person who will act as facilitator, determine the process to be followed, and consider the report emanating from the conference.

3.7.43 Section 70 refers to "facilitation" and not to "mediation". Since no definition has been provided, it is not clear what form of ADR is envisaged.

(cc) Section 71: Mediation by lay-forum or traditional authority[140]

3.7.44 Section 71 stipulates the provision that the children's court may, as part of its case management options, refer a matter brought or referred to a children's court to any appropriate lay-forum, including a traditional authority. The intention here is to attempt to settle the matter by way of mediation, out of court. However, in matters involving the alleged abuse or sexual abuse of a child, a lay-forum may not be held. The court needs to consider a report on the proceedings before the lay-forum, when the matter is heard.[141]

(dd) Section 69(1): Pre-hearing conference

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139 Schneider presentation at 7.

140 Section 71 of the Children's Act provides as follows:
Other lay-forums
71. (1) The children's court may, where circumstances permit, refer a matter brought or referred to a children's court to any appropriate lay-forum, including a traditional authority, in an attempt to settle the matter by way of mediation out of court.
(2) Lay-forums may not be held in the event of a matter involving the alleged abuse or sexual abuse of a child.
(3) The children's court may-
(a) 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
(b) consider a report on the proceedings before the lay-forum to the court when the matter is heard.

141 DSD ***Social Services Professionals Mediation Framework***, 2012 at 93.

3.7.45 Section 69(1)[142] determines that when a matter in the children's court is contested, the court may order that a pre-hearing conference be held with the parties. The aims would be

- to mediate between the parties;
- to settle disputes between them as far as possible; and
- to define the issues to be heard by the court.

3.7.46 The intention of the legislature regarding these pre-hearing conferences was clearly the mediation of all outstanding disputes.[143] Section 69(4)(a) provides that the court may prescribe how and by whom the pre-hearing conference should be set up and conducted, and who must attend. It has been argued[144] that the court would probably take note of the other prescriptions in the Act in this regard and refer the pre-hearing mediation to a family advocate, social worker, social service professional, or other suitably qualified person, or even to a lay-forum – which would include a traditional authority. It was also submitted that a multi-generational model of mediation, which involves the extended family and children, would probably be used.

Questions:

28. Since the traditional authorities use a process akin to arbitration, how should the mediation process prescribed in sections 49 and 71 be regulated?
29. Who would be regarded as a "suitably qualified person" to facilitate the discussion?
30. What does "facilitation" entail in terms of this section?

(c) Indirect opportunities for ADR in Children's Act

142 Section 69 of the Children's Act 38 of 2005 reads as follows:
Pre-hearing conferences
. **69.** (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.

143 De Jong 2008 ***THRHR*** at 634.

144 De Jong 2008 ***THRHR*** at 635.

(i) Section 6 (4) of the Children's Act[145]

3.7.47 In Section 6(4), general principles are set out to assist in implementing the legislation and guiding proceedings, actions and decisions concerning a child. The Act recommends that a confrontational approach and delays are to be avoided.[146]

3.7.48 In the Supreme Court of Appeal of South Africa judgment of ***S v J***,[147] Lewis AJ endorsed the views expressed by Brassey AJ in ***MB v NB***[148] that mediation 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 provide in matters concerning children, an approach conducive to conciliation and problem solving and a confrontational approach should be avoided.[149]

Question:

31. What does section 6(4) of the Children's Act entail in practice?

(ii) Section 29(5)(a) of the Children's Act[150]

3.7.49 Mediation is similarly envisaged in section 29, which relates to court proceedings. Section 29(5)(a) provides that a court may, for the purposes of a hearing,

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145 Section 6(4) of the Children's Act provides as follows:
General principles
6.(1)- (3)….
(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; and
(b) a delay in any action or decision to be taken must be avoided as far as possible.
(5)……

146 Schneider presentation at 7.

147 ***S v J*** (695/10) [2010] ZASCA 139 (19 November 2010).

148 ***MB v NB*** 2010 (3) SA 220 (GSJ) paras 52 to 59.

149 DSD ***Social Services Professionals Mediation Framework*** 2012 at 95.

150 Section 29(5)(a) reads as follows:

Court proceedings
29. (1)-(4)
(5) The court may for the purposes of the hearing order that –
(a) a report and recommendations of a family advocate, a social worker or other suitably qualified person must be submitted to the court;
(b)-(d)……

order that "a report and recommendation of the Family Advocate, social worker or other suitably qualified person must be submitted to the court". Therefore, should the parties reach agreement through the mediation process, the mediated agreement would be referred to and taken into consideration by the court.[151]

(iii) Section 46 of the Children's Act[152]

3.7.50 Chapter 4 refers to children's courts, and section 45 refers to matters which the Children's court may adjudicate.[153]

3.7.51 Section 46 refers to orders which the children's court may make. Specifically, section 46(1)(g) states that "the Court may make an Order subjecting a child, a parent or care-giver of a child, or any person holding parental responsibilities and rights in respect of the child to –

a) early intervention services;
b) a family preservation programme; or
c) both early intervention services and a family preservation programme".[154]

3.7.52 Similarly, section 46(1)(8) allows the children's court to make a child protection order. Such an order can include "instructing a parent or care-giver of a child to undergo professional counselling, or to participate in mediation, a family group conference, or other appropriate problem solving forum." The legislature has clearly envisaged that mediation must play a large role both in court applications, and particularly in children's courts, to ensure that the best interests of children are paramount, to avoid unnecessary delays, and to move the process away from an adversarial process towards a resolution-focused one.[155]

(iv) Section 72 of the Children's Act[156]

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151 Schneider presentation at 7.

152 Schneider presentation at 6.

153 Ibid.

154 Ibid.

155 Ibid.

156 Section 72 of the Children's Act reads as follows:
Settling of matters out of court

3.7.53 Section 72 relates to matters settled out of court, wherein a settlement which has been accepted by all parties and signed by all parties is submitted by the Clerk of the Court to the children's court for confirmation or rejection. The Court may confirm the settlement and make it an Order of Court; or, before deciding the matter, may refer the settlement back to parties for reconsideration of any specific issue; or may naturally reject the settlement.[157]

(v) Section 150 of the Children's Act[158]

3.7.54 An interesting section is section 150, which relates to a child in need of care and protection. Herein specific remedial provision is made whereby it is found, after investigation by a social worker, that a child who has been referred for investigation (in terms of sub-section 2) as a possible victim of child labour or in a child-headed household is in fact not a child in need of care or protection. In such cases, provision is

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72. (1) If a matter is settled out of court and the settlement is accepted by all parties involved in the matter, the clerk of the children's court must submit the settlement to the children's court for confirmation or rejection.
(2) The court must consider the settlement and, if it is in the best interests of the child, may-
(a) confirm the settlement and make it an order of court;
(b) before deciding the matter, refer the settlement back to the parties for reconsideration of any specific issues; or
(c) reject the settlement.

157 Schneider presentation at 6.

158 Section 150 of the Children's Act 38 of 2005 reads as follows:

Child in need of care and protection

150. (1) A child is in need of care and protection if the child—
(a) has been abandoned or orphaned and is without any visible means of support;
(b) displays behaviour which cannot be controlled by the parent or care-giver;
(c) lives or works on the streets or begs for a living;
(d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
(e) has been exploited or lives in circumstances that expose the child to exploitation;
(f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
(g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
(h) is in a state of physical or mental neglect; or
(i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

(2)-(3)…..

made for the social worker to take such measures necessary to assist the child, which could include mediation and various other services.[159]

(vi) Section 155 of Children's Act

3.7.55 Section 155 relates to decisions about whether a child is in need of care and protection. Herein a social worker must investigate the matter before the child is brought before the children's court, and must within 90 days compile a report on whether the child needs care and protection. It is open to the social worker to set out, in the report, measures recommended to assist the family which could include mediation.[160]

Question:

32. Are the indirect opportunities for mediation as set out above currently utilised in practice?

3.8 Mediation

a) Definition[161]

3.8.1 Mediation involves introducing a neutral third party into a dispute, to create a safe space within which parties are able to explore possible solutions to bring about a negotiated agreement acceptable to both.[162] It is a space where the parties are able to communicate their frustrations, insecurities, concerns, needs, dissatisfactions, wishes and desires.[163] Hence mediation is a quick and comparatively inexpensive process which is conducted on a without-prejudice basis, and is confidential in nature.[164]

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159 Schneider presentation at 6.

160 Ibid.

161 See discussion in Chapter 2 above.

162 Mayer BS **Beyond Neutrality** Jossey Bass 2004 at 124 and 125 as referred to in O'Leary states as follows: It can undermine the mediation process if mediators emphasise "win-win" solutions at a stage in the mediation when the participants are conscious only of loss. Only when they are generating options and solutions which could result in a resolution that is in fact in the interests of all direct and indirect participants would it be wise to use "win-win" language.

163 Mayer BS **Beyond Neutrality** Jossey Bass 2004 as referred to in O'Leary states as follows: Mayer argues that effective negotiation may be undermined or prolonged if the participants are prevented from strongly advocating things that they feel strongly about.

164 Schneider presentation at 2.

3.8.2 This definition implies that:

a) The disputants play an active role in reaching the agreement, and hence remain responsible for the agreement reached;

b) The mediator remains neutral and unbiased;[165] and

c) The mediator does not make decisions for the parties, but gets the disputants to negotiate and reach conciliation on issues.

b) Approaches to or models of mediation

(i) Facilitative or non-directive approach[166]

3.8.3 The facilitative or non-directive approach to mediation should not be confused with facilitation per se (as discussed below). The facilitative approach is frequently used in family and divorce mediation. The mediator guides the discussion and negotiations, without attempting to impose his or her will on the parties with regard to the content of the settlement agreement. The parties remain entirely responsible for the decisions reached, with the mediator merely keeping the negotiations and communication open.

3.8.4 The mediator gives the parties legal information but not legal advice. He or she is not necessarily a lawyer, psychologist or social worker, but must be a professional mediator. This approach involves helping the parties to identify issues they have in common and issues they are disputing. After giving the parties legal information, the mediator should guide them towards reaching an agreement, without intimidating or influencing them.

3.8.5 Problems encountered in the facilitative approach include that parties might have unequal bargaining power, or might be unaware of their legal rights. Cases involving domestic violence are also problematic in the facilitative framework.[167]

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165 Mayer BS **Beyond Neutrality** Jossey Bass 2004 at 117 as referred to in O'Leary states as follows: Most conflicts are in fact resolved by the provision of "third side" resources such as "provider, teacher, bridge builder, mediator, arbiter, equalizer, healer, witness, referee and peacekeeper". Mayer talks about "helping people to engage in conflict by serving as advocates, coaches, advisers, and representatives." These resources do not necessarily compromise impartiality.

166 This approach should not be confused with facilitation as discussed below.

167 Prof Elsje Bonthuys submission to SALRC, 2009.

(ii) Directive or evaluative approach

3.8.6 A directive approach to mediation is where the mediator offers the parties options to consider, or points out advantages and disadvantages of certain schemes to the parties. He or she will encourage the parties to reach a settlement. The extent of pressure the mediator can bring to bear upon the parties largely depends on the mediator's own character and background. In this sense, the mediator will take over the disputant's responsibility for the settlement reached. The mediator will assume some form of control over the outcome.

3.8.7 The character and position of the mediator is vital. In some cases, the mediator may indulge in some crude arm twisting, taking the form of persuading one party (often the less resolute) that he or she has little or no chance of winning his or her case. Here the power has shifted from the disputants to the mediator.[168]

3.8.8 An important question to consider is whether this approach could be susceptible to bias as far as gender and culture are concerned.[169] Could any agreement reached under this style of mediation be regarded as entirely voluntary?

(iii) Co-mediation

3.8.9 The ultimate mediation model is that of co-mediation. In this model, a mediator with a legal background collaborates with a mediator who has a professional background in mental health care, to bring about a holistic settlement.[170] It is believed that this model of mediation creates balance between the parties. It is also suggested that the mediators should have different genders, to enhance the balance within the mediating team and increase the trust of the parties.[171]

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168 Mowatt J G "Divorce Mediation – The Mediation in Certain Divorce Matters Act 1987" 1988 ***TSAR*** 1 (hereafter "Mowatt 1988 ***TSAR***") at 1.

169 Prof Elsje Bonthuys submission to SALRC, 2009.

170 Schneider presentation at 4.

171 Austria uses a co-mediation model. One mediator has a psycho-social background with the other having a basic legal training. All mediators must also have attended training specific to mediation. If co-mediation is departed from in any instance, authorisation from the ministry is required. Usually the co-mediation team must also comprise a man and a woman.

3.8.10 The mental health professional is able to assist the parties to communicate with each other, not only in respect of the children but also between themselves, and to develop a new manner of interaction – without being in a therapy environment. The professional is not interested in analysing or counselling the couple, but rather in mediating the dispute by alerting both parties to their problems or even possible pathologies, by dissipating their anger towards each other, and by identifying unproductive patterns of communication. This professional assistance helps to guide the parties emotionally and psychologically towards a resolution.[172]

3.8.11 The Office of the Family Advocate argues[173] that sole mediation (see next section) could work, but the ideal would be co-mediation, especially where there is high conflict. A co-mediation model allows for the perception of objectivity and impartiality as well as diverse backgrounds and experiences.

3.8.12 The major obstacle to the co-mediation model is cost. The cost of using two professional mediators rather than one is beyond the reach of the ordinary person. However, this is still cheaper than the adversarial approach, where each party is represented by his or her own lawyer.[174]

Questions:

33. Would co-mediation increase the costs incurred by parties and/or the State? Is this cost justified?
34. If we adopt a co-mediation model, how should the team be constituted?

(iv) Sole mediation

3.8.13 In the sole mediation approach, a single professional mediates the dispute. This model is arguably more cost-effective and practical than co-mediation. Parties might also find it easier to trust a single mediator, according to practising mediator and legal practitioner Charles Cohen. Cohen argues that parties might not open up or participate as freely if a second mediator is present.[175]

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172 Schneider presentation at 4.

173 Focus Group Forum.

174 Schneider presentation at 4.

175 Charles Cohen presentation.

3.8.14 Whether single or co-mediation should be allowed should depend on the circumstances of each case. The degree of conflict might determine whether a single mediator or co-mediators are needed. Where there is a single mediator but the mediator feels he or she needs extra expertise on a particular aspect, such as religion or culture, they should be allowed to call in another mediator who has the required expertise.

3.8.15 As mentioned above, mediation teams that include diverse genders and/or legal versus social science backgrounds are ideal. However, in rural areas this ideal might be difficult to achieve, and provision must be made to cater for these situations.

3.8.16 It can be concluded that a regulated family mediation stream with professionally trained family mediators is needed.

Questions:

35. What type of mediation should be adopted?
36. Should mediation be privately or publicly managed and funded?
37. Who should be family mediators?

(v) Transformative mediation

3.8.17 In transformative mediation, the mediator works with the parties to help them change the quality of their conflict interaction – from negative and destructive to positive and constructive – as they discuss possibilities for resolution.[176] Settlement is secondary to the healing of relationships, and is merely a welcome by-product of the process. This style of mediation is valuable where conflict has been ongoing and intractable for a long time.[177]

3.8.18 The legal effects of the solution to a family dispute can leave the parties feeling disempowered, perhaps even emotionally scarred, for many years to come. Therefore, mediation – specifically *therapeutic mediation*[178] — by a trained psychologist and/or social worker at the time of entering into the agreement (or

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176 De Jong M "Chapter 13: Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce" in Heaton (ed) 2014 (hereafter "De Jong Chapter 13") at 594.

177 De Jong Chapter 13 at 595.

178 Also referred to as transformative mediation.

even during and after the divorce or separation) might bring about dramatic emotional healing.[179]

3.8.19 One of the fallacies about ADR is that it is only relevant when disputes arise. But ADR is not just a cure for existing disputes; it can also serve as a preventative measure. *Transactional mediation* is used not to settle or manage existing disputes but to prevent disputes and problems from arising during the transactional process.[180] It could be very helpful in all court disputes, especially in respect of family matters.

(vi) Advocacy or activist mediation

3.8.20 This style of mediation is less neutral and confidential than more traditional styles. It attempts to ensure that the parties are protected in the case of an uneven playing field or unbalanced power relationships. The mediator may also intervene by involving members of the local community, or by referring the parties for therapy or counselling.[181]

(vii) Multi-generational mediation

3.8.21 Multi-generational mediation entails mediation with the extended family. The discussion on African dispute resolution later in this paper is relevant to this topic. In all cultures, grandparents may play an important role in their grandchildren's lives, and are often involved in multi-generational conflict these days. Children can also be involved in the mediation process in this type of mediation.[182]

(viii) Shuttle mediation or caucusing

3.8.22 Shuttle mediation or caucusing is another option that may be used where there are signs of domestic violence or unbalanced power relationships between parties. The mediator literally shuttles between the two parties, who are seated in separate rooms,

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179 Folger JP & Bush RB "Transformative Mediation and Third Party Intervention: Ten Hallmarks of Transformative Approach to Practice" 1995 ***Mediation Quarterly*** 263; Dewdney M "Transformative Mediation: Implications for Practitioners" 2001 12 ***ADRJ*** 20.

180 Boulle L ***Mediation: Principles, Process, Practice*** 2ed Lexis Nexis Butterworths Chatswood 2005; 3ed Lexis Nexis Butterworths Chatswood 2011.

181 De Jong Chapter 13 at 595.

182 De Jong Chapter 13 at 597.

during the mediation process.[183] Mediation may also be conducted by telephone. See the discussion on the influence of domestic violence and sexual abuse on the resolution of care and contact disputes in Chapter 2 earlier in this paper.

c) Advantages of mediation

3.8.23 In essence, the mediator's role is to provide sensitive and unobtrusive assistance.[184] The object of mediation is the commitment to reach an agreement through co-operative means, rather than by way of a confrontation. It is believed that this much-needed intervention holds advantages for the divorcing parties, the children affected by the divorce, and also for the judicial system.[185]

3.8.24 Mediation minimises the hurt to children and families going through a divorce, by giving parents a chance to settle their differences with the help of a third party who is neutral.[186] Research has shown that upon divorce, mediated settlement agreements include far more advantageous provisions regarding the interests of children, compared with agreements or orders made in terms of the adversarial system.[187]

3.8.25 Because parties are able to make decisions regarded as fair and right within their particular cultural and moral frame of reference, they are more likely to honour these mediated agreements.[188] Mediation also spares divorcing couples the experience of contentious courtroom battles. In the most successful cases, mediation also provides couples with a method for resolving possible future conflicts.

3.8.26 A preponderance of the literature indicates that mediation is associated with relatively high levels of satisfaction for divorcing couples, and better co-parenting of the

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183 De Jong Chapter 13 at 596.

184 Mowatt J G "Divorce Mediation – The Mediation in Certain Divorce Matters Act 1987: News but Nothing New" 1987 ***De Rebus*** 198 (hereafter "Mowatt ***De Rebus***") at 198.

185 De Jong M "Judicial Stamp of Approval for Divorce and Family Mediation in South Africa" 2005 68 ***THRHR*** 95 (hereafter "De Jong 2005 ***THRHR***") at 96-98.

186 Ibid. See also the various discussions in this regard throughout the paper.

187 De Jong 2005 ***THRHR*** at 98 with reference to Kelly "Mediated and Adversarial Divorce Resolution Processes" 1991 ***Family Law Practice*** 386-387.

188 De Jong 2005 ***THRHR*** at 97.

children post-divorce.[189] In ***G v G,***[190] it was indicated that divorce mediation is seen by participants as significantly more satisfactory than the normal adversarial process.

3.8.27 Mediation improves communication between divorcing parties. Constructive communication in turn improves the level of cooperation between the parties during the divorce process and the period thereafter. Unlike litigation, mediation is not restricted solely to legal issues, and allows the parties to deal with many facets of divorce.[191] One study showed that compared with families who had litigated their custody issues, non-residential parents who had been through mediation were more involved in many areas of their children's lives, maintained better contact with their children, and had greater influence in co-parenting, twelve years after the resolution of their custody disputes.[192]

3.8.28 Proponents also contend that mediation is more effective and efficient than litigation. The average litigated divorce costs 66% more than the average mediation-plus-attorney-fees. Mediation may save divorcing parties a considerable amount of money.[193]

3.8.29 Not only is mediation less costly to divorcing individuals, it places less of a burden on the courts since many cases are dealt with outside the court process. Mediation also has a positive effect on the behaviour of lawyers, as it may subtly change the dynamics of the negotiation, making adversarial and combative tactics less acceptable.[194]

d) Disadvantages of mediation

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189 Johnson, Sacuzzo & Koen at 1024.

190 ***G v G*** 2003 (5) SA 396 (Z).

191 De Jong 2005 ***THRHR*** at 97.

192 Emery RE, Laumann-Billings L, Waldron MC, Sbarra DA & Dillon P "Child Custody Mediation and Litigation: Custody, Contact and Co-parenting 12 Years After Initial Dispute Resolution" 2001 69 ***Journal of Consulting and Clinical Psychology*** at 323. Assessments were conducted approximately 12 years after the families reached a settlement either in mediation or through adversary procedures. It was found that 30% of non-residential parents who mediated saw their child weekly or more vs 9% who litigated. See also Collett presentation for a discussion of this article.

193 De Jong 2005 ***THRHR*** at 97.

194 De Jong 2005 ***THRHR*** at 99.

3.8.30 Not all cases are suitable for mediation.[195] In some scenarios, the parties might be emotionally incapable of or unwilling to commit to an informal dispute resolution process facilitated solely by a neutral mediator.[196]

3.8.31 The principal disadvantage of mediation is that it is manifestly unsuitable in instances where one party is stronger than the other (eg. where one party is perceived to be stronger in terms of negotiating ability), so that the "full, frank and honest" disclosure required by a court process would not be forthcoming.[197] In a House of Commons Debate on this issue in 2012, Baroness Deech suggested that mediation is valuable "… provided that the parties meet on equal terms."[198] Writing extra-judicially, Lady Hale further expressed concern about the possibility of compulsory mediation in terms of "… the power imbalances between the parties. Unless it is very professionally conducted, there is plenty of scope for the strong to bully the weak into agreeing to a solution which is against their best interests."[199] As discussed earlier in this paper, complex emotional and economic interdependencies in families can create dynamics that are more complicated and susceptible to power abuse than the dynamics between commercial disputants.[200] Critics of family mediation see it as a process that is prejudicial to women, because women are generally in an inferior situation economically, psychologically and socially; this fact is easily overlooked by mediators. Such critics believe women have unequal bargaining power and are in a disadvantaged position to negotiate. Since mediation is a private and informal process where all disclosures by the parties are confidential, feminists are also concerned that abusers might have an opportunity to reinforce and exacerbate their control and domination over their victims, and may avoid criminal sanctions for their actions.[201] It has to be questioned, then, whether the mediator should remain neutral where such an

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195 See De Jong 2010 ***TSAR*** at 522.

196 Price NI "Binding Arbitration, Voluntary Trial Resolution, and Med-arb Proceedings in Family Law" 2012 86 ***The Florida Bar Journal*** 48 (hereafter "Price").

197 Stowe M "Family Law Arbitration: A New Dawn for ADR?" accessed at http://www.marilynstowe.co.uk/2011/11/30/family-law-arbitration-a-new-dawn-for-alternative-disputeresolution/ on 21 August 2014.

198 House of Commons Debate 19 November 2012, col. 1704.

199 Ferguson at 125.

200 Morris at 10.

201 De Jong M "International Trends in Family Mediation – Are We Still on Track?" Paper presented at South African Law Reform Commission Focus Group Forum Pretoria 2008; 2008 71 ***THRHR*** 454.

imbalance becomes apparent. Or does he or she attempt in some way to redress the imbalance, thereby risking the loss of professional neutrality?

3.8.32 In many jurisdictions, like some states in the USA, wherever there is a hint of domestic violence or abuse, people cannot be compelled to attend a mediation session. In other jurisdictions, it is argued that the mere presence of domestic violence does not necessarily permit the non-attendance of mediation. This topic was discussed more fully in Chapter 2.[202]

3.8.33 Mediation may delay resolution of a dispute because there is no requirement to achieve an outcome. There is never any certainty of outcome. Even when the couple have reached an agreement, it may then be unwound because the truth of one party's real financial position emerges, or they might have reached an agreement without fully appreciating their position in law – and then having consulted lawyers, may change their minds before the agreement is made into a court order.

3.8.34 A failed mediation adds to the overall cost. The financially stronger party has the advantage because he or she can prolong the process to exhaust the other party's legal resources. Or one party may simply decide to string the other along and "outgun" him or her financially.[203] It has been argued that the wish to retain children may lead to giving up financial advantages.[204] In practice, mediation often tends to increase the costs of a case because so many referrals fail and mediation simply becomes another step in the legal process.[205]

3.8.35 The report of the Multiculturalism and Dispute Resolution Project of the University of Victoria Institute for Dispute Resolution presents findings from immigrant groups. The report states as follows:

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202 See para 2.6.

203 Mayer BS **Beyond Neutrality** Jossey Bass 2004 as referred to in O'Leary states as follows: This may not be helpful language – the inequalities outside of the mediation process have a great impact on what happens in the process, particularly in relation to confidentiality, equality and safety. For example, a participant may have been advised to enter into mediation with the deliberate intention of abusing the process to gain a strategic advantage. If it becomes apparent that this is happening it may be very difficult for a mediator to address this problem effectively if too much emphasis has been placed on the notion of level playing fields in a situation where the playing fields are clearly not level.

204 Elsje Bonthuys submission to SALRC 2009.

205 Dingwall at 109.

> [Where] traditional conflict resolution methods have been identified, the parties may not wish to use them, nor to participate in processes into which they have been incorporated, because the methods are often not compatible with Canadian practices and values that they may prescribe to. Examples include the traditional male, elder-driven processes used in some cultures... there is a need to find processes which will respect the values of disputants without importing features of processes they cannot now accept.[206]

3.8.36 It has been argued that the US courts have, in effect, created machinery for the efficient processing of mass civil litigation and the production of settlements at a lowered cost to the legal system. In so doing, the courts have lost sight of the original mission of ADR, which is to expand the options for settlement and to increase the creativity of solution-seeking so as better to fit the needs of litigants.[207] According to this view, the push for mediation is not driven by a humane aspiration for better quality services. The use of mediation is merely driven by the desire to reduce costs to the public purse – the "better and cheaper" way.

3.8.37 The arguments in favour of mediation assume that mediators can be neutral, unbiased facilitators. However, it is argued that judges inevitably bring their experience and ideals into the courtroom. Is it possible to apply the same principle to mediators?[208] In child custody disputes, mediators are also often faced with situations that require an interventionist approach.[209]

3.8.38 Harvard Law School offers a course on dispute resolution and facilitation. One of their speakers, Professor Menkel-Meadow, highlights the four central issues confronting the dispute resolution professional, as follows:[210]

- the difficulties of remaining neutral;
- dealing with our own emotional reactions to one or both parties;
- listening to a disputant whose views are drastically different from our own; and
- responding constructively to someone we dislike.

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206 Morris at 10 with reference to Lund B, Morris C & LeBaron M ***Conflict and Culture: Report of the Multiculturalism and Dispute Resolution Project*** Victoria: University of Victoria Institute for Dispute Resolution 1994 at 33.

207 Dingwall at 113.

208 Elsje Bonthuys submission to Commission, 2009.

209 Johnson, Sacuzzo & Koen at 1028.

210 Craig Scneider submission to SALRC referring to Professor Menkel-Meadow.

Further possible pitfalls in respect of matters referred to mediation have been identified as follows:

- longer delays;
- possible abuse of the mediation process;
- failure to resolve issues; and
- most important of all, unskilled mediators meddling in matters for which they are not qualified**.**

3.8.39 Critics of mediation argue that very little can be done to redress a power imbalance between the parties. It is inevitable that parties will approach mediation with their relative strengths or weaknesses.[211] The mediator must bear in mind that legal issues are being decided. Neither party to the mediation should be allowed to sacrifice their legal rights on the altar of a quick and amicable divorce.[212] Thus where an inequitable settlement may result, the mediator has a duty to halt the proceedings for mediation, and can be of no further use; the matter should then be referred to the courts. Another view is that the mediator should attempt to redress an imbalance between the disputants by imposing his or her own status and personality on the parties to ensure that the outcome of the mediation is equitable. This tactic may or may not be acceptable to the disputants.[213]

3.8.40 Uninhibited communication is one of the core reasons for using ADR. Parties should be able to speak freely, make admissions, and offer concessions. However, where mediators have to report to a court, mandated child mediations are generally not confidential.[214] It has therefore been argued that the mediation model simply does not fit the needs of family law disputants.[215]

e) Types of mediation

3.8.41 This section discusses various types of mediation, with a focus on mandatory versus voluntary mediation. Views across countries are divided on whether mediation

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211 See discussion on domestic violence and sexual abuse in Chapter 2.

212 Mowatt *1988* ***TSAR*** at 1.

213 Refer to the discussion above on approaches to mediation.

214 Zaal FN "Children's Courts and Alternative Dispute Resolution in Care and Protection Cases: An Assessment of the Legislation" 2010 73 ***THRHR*** 353 (hereafter "Zaal") at 364.

215 Nancy 2005 at 1028.

should be mandatory or voluntary. On the one hand, it is felt that mediation – by its very cooperative nature – should be voluntary and not forced upon parties. On the other hand, research has indicated that where mediation is not compulsory, it is under-utilised.

(i) Mandatory mediation[216]

(aa) Introduction

3.8.42 Mandatory mediation consists of court-mandated mediation and statutory mediation. This type of mediation compels parties to come together in an attempt to reach an agreement in a non-hostile, non-adversarial manner. Parties are not forced to reach an agreement through the mediation process, but are merely compelled to attend a mediation session and to attempt to reach a mutual agreement.

(bb) Court-mandated mediation

3.8.43 Formal court-mandated mediation is where the court makes an order that refers the matter to mediation. In this instance, parties are compelled to go home and attempt to resolve the matter through mediation. The order can indicate a date on which the first mediation session should occur, how many mediation sessions should be held, what issues should be mediated, how a mediator should be chosen, and so on.[217]

(cc) Statutory mandated mediation

3.8.44 This is where legislation compels parties to attempt mediation. Over the years, there have been clear indications of the South African legal system embracing mediation as a method of ADR. This shift can be seen in tax legislation, environmental legislation, and labour legislation. Although the Mediation in Certain Divorce Matters Act 24 of 1987 established the Office of the Family Advocate, it has been argued that this Office does not in fact mediate, which renders the name of the Act confusing and misleading.[218] However, the Children's Act 38 of 2005 provides for compulsory

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216 See discussion below on court connected mediation.

217 ***Townsend-Turner v Morrow*** 2004 (2) SA 32 (CPD); ***Van den Berg v Le Roux*** *[*2003] 3 All SA 599 (NC); ***FS v JJ*** 2011 (3) SA 126 (SCA).

218 See discussion below in Chapter 4.

mediation in sections 21, 33 and 34. This indicates that the importance and influence of mediation has spread to the ambit of family law as well.[219]

(dd) Mandatory versus voluntary mediation

3.8.45 Empirical data from Europe provide supportive evidence that mandatory mediation is much more effective than a purely voluntary process.[220]

3.8.46 A contrary view is expressed by some experts,[221] who point out that in some instances, mediation is not only inappropriate but actually has no chance of resulting in settlement.[222] To compel spouses in these circumstances to mediate would be a total waste of time and effort. Far more constructive would be to popularise the concept as being cheaper and likely to end in a more acceptable result, so that members of the public can, of their own volition, choose mediation.[223]

3.8.47 The question of whether it would be constitutional to make attendance at an initial mediation session mandatory is being debated. One view is that parties cannot be forced to mediate, because mediation should be voluntary due to its very nature. However, the opposite view is that the Constitution provides that the interests of the child are paramount, and hence forced attendance would not be unconstitutional. If a party does not attend mediation or disrupts the mediation process, this will be noted, and the presiding officer hearing the divorce case can draw whatever inference he or she chooses and a cost order against the non-attending party may be made. (See also the discussion in Chapter 1 regarding the delay that can be caused by compulsory mediation, as well as the discussion of the Lufuno case.)

3.8.48 The Office of the Family Advocate has submitted that only in instances where parties have attended a parent information programme, yet a dispute regarding contact

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219 See discussion in Chapter 2 on the impact of domestic violence and child abuse on family mediation and the possibility that these sections may be unconstitutional since they do not make provision for an exception in so far as possible abuse is concerned.

220 Casals MM ***Divorce Mediation in Europe – An Introductory Outline*** University of Girona Spain 2005 at 1.

221 Eg. Charles Cohen. See discussion below.

222 See the list of circumstances where mediation is not appropriate above.

223 Cohen CH "Strategies for the Development of Family Divorce Mediation in South Africa" Paper presented at South African Law Reform Commission Focus Group Forum Pretoria 2008.

and care arrangements remains, should those parties be obliged to attend a mandatory mediation session.[224] Where there is no dispute and parties have concluded a parenting plan, there is no need for mediation.

3.8.49 The Focus Group Forum was divided on the question of when the mediation process should commence, and no consensus was reached. Some participants felt that mediation should be started as soon as summons was served and notice of intention to defend was lodged. Others felt that before summons was served, people should attend mediation and file their attendance certificate with their summons. Yet others felt that lawyers should be under a legal duty to tell their clients about the option of mediation; there should be a standardised procedure. Still other participants believed that people should go for mediation only when they are ready.

3.8.50 Should mediation be made mandatory by way of statute in all contact and care disputes, it would be necessary to strategise on how the currently unregulated and under-capacitated family mediation stream would effectively manage the thousands of contact and care disputes that would require mediation. It is inevitable that the Office of the Family Advocate would not be able to carry the workload by itself. Hence, a well-trained and regulated private family mediation stream will be necessary.[225]

3.8.51 Despite efforts by the National Accreditation Board for Family Mediators (NABFAM)[226] to regulate private mediation, in South Africa the mediation stream remains mostly unregulated. The constitution of a mediation profession is in progress, and universally accepted standards for the practice of family mediation are being supported.[227]

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224 Focus Group Forum. See also Section 60I of the Australian Family Law Act 59 of 1975 (as inserted in 2006) for a similar prescribed process.

225 For further discussions on whether mediation should be privately or publicly managed and executed refer to questions below.

226 National Accreditation Board for Family Mediators (NABFAM) ***National Standards for Family Mediation*** 11 November 2011. The Board adopted standards for accreditation requirements for mediators; training programme and assessment requirements for mediators; continued accreditation requirements for mediators; national standard for CPD point allocation; code of professional conduct for mediators; criteria for accreditation of NABFAM member organisations; minimum standards for accreditation of trainers; and minimum standards for accreditation as assessors.

227 The International Mediation Institute is a non-profit organisation registered in the Hague, that develops global, professional standards for experienced mediators, advocates and others involved in collaborative dispute resolution and negotiation processes. See https://imimediation.org/imi-in-a-nutshell.

3.8.52 The Office of the Family Advocate is of the opinion that legislation regarding the process involved in determining care and contact of children should be written in a completely new Act, because of the new procedures envisaged.[228]

3.8.53 It is of interest that courts in the UK impose cost sanctions on parties who unreasonably refuse or fail to mediate. In the US, mediation is more firmly embedded in the litigation process, with courts applying various degrees of coercion to encourage parties to mediate.[229] In Canada, lawyers are required to certify that they have complied with their duties to discuss dispute resolution options with their clients prior to starting a proceeding in court. This policy promotes the informed use of out-of-court processes to resolve family law disputes.[230]

3.8.54 In 2009, in the case of ***MB v NB,***[231] the South Gauteng High Court in Johannesburg expressed its displeasure with attorneys who failed to advise their clients in family matters to mediate before venturing to court. Brassey AJ limited the costs that such attorneys could recover from their clients to costs they could tax on the party and party scale, and thus deprived them of their full attorney and client fees.

3.8.55 The court noted that one of the matters that must be considered at a pre-trial (Rule 34) conference is whether the dispute should be referred for possible settlement by mediation. In that case, the attorneys had no hesitation in answering this question in the negative or flat rejection. The legal profession in South Africa has, however, virtually ignored the ***MB v NB*** decision with regard to sanctions on parties who unreasonably refuse or fail to mediate.[232]

3.8.56 Reference has been made to the fact that in the Labour Law processes, it is not possible to obtain a date for trial either in the Labour Court or for an arbitration hearing, unless and until such time as the parties have attempted conciliation through the Commission for Conciliation, Mediation and Arbitration (CCMA).[233] Only once the

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228 If regulations were drafted, they would have to be drafted for the Mediation in Certain Divorce Matters Act and the Children's Act which would be problematic.

229 Joubert J "Mediation Rules Finally Signed by Minister of Justice but Require Judicial Activism to Get the System Going" ***Legal Brief Today*** 28 January 2014.

230 British Columbia Family Law Act [SBC 2011] Chapter 25 Assented to November 24, 2011.

231 ***MB v NB*** 2010 (3) SA 220 (GSJ).

232 Joubert supra.

233 Schneider presentation at 4.

parties have attempted to conciliate the matter, and a Certificate of Outcome is issued (which either sets out the agreement reached or states that an agreement could not be reached) is a party able to apply to the CCMA, for a date for arbitration or for referral to the Labour Court.

Questions:

38. Who should be responsible to provide mediation to the public?
39. Who should qualify to be family mediators?
40. How long and what sort of training should mediators undergo?
41. Should there be a regulated fee structure for mediators?
42. What model and approach must mediators use in family matters?
43. A responsible regulatory body is needed to manage all these issues so that the public is protected and is provided with an effective service. How should this body be constituted?
44. Should mediation be compulsory? If so, in which circumstances, and when should mediation begin?
45. Should parties seeking an order of divorce who have minor children, and unmarried parties seeking an order confirming access and custody arrangements for minor children, attend mediation?
46. Should attendance at a mediation session be mandatory, irrespective of whether or not parties have reached agreement on a parenting plan?
47. Should attending a mediation session be mandatory only in matters where parties have not entered into a parenting plan?
48. Should the question of whether parties must attend a mediation session or not be determined at the discretion of the Office of the Family Advocate?
49. Should parties be given information on the availability of mediation as 'Annexure A' which accompanies the divorce summons, instead of making mediation mandatory?
50. In what legislation should the mediation provisions be framed?
    a) Should it be included in the Divorce Act, The Mediation in Certain Divorce Matters Act, the Children's Act, or any other existing Act as an amendment?
    b) Should it be framed in new legislation, because of the diverse nature of the issues and the parties affected?
    c) Should we distinguish between family counselling and legally-oriented mediation? "Mediation" and "conciliation and negotiation" are often used interchangeably in the context of family disputes.
    d) Should in-court conciliation be seen as mediation, for the purposes of this discussion?
51. Should a process similar to the CCMA process be instituted, in terms of which a trial date may be granted or allocated in family law procedures only if the Registrar or Judge is in possession of a certificate which sets out that the parties have participated in mediation but failed, or which sets out the issues as determined by the mediator?

52. In answering the above question, should the fact that the context in family law is unlike that of labour law be taken into consideration?
53. How can the ADR process address the unequal bargaining positions of parties, where this inequality becomes evident?

(ii) Voluntary mediation

3.8.57 The term "voluntary mediation" is self-explanatory. It means parties can, of their own volition, choose to employ the services of a mediator. This person may be practising as a mediator in the private sector, or in the Office of the Family Advocate or any community-based or non-governmental organisation that offers a mediation service. Voluntary mediation is also important in the context of court-annexed mediation. See discussion below.

f) Public mediation versus private mediation

3.8.58 In South Africa, mediation services are currently primarily offered by private persons and professionals, non-governmental organisations, court-connected institutions, and community-based organisations. It needs to be established whether mediation in family law matters should become a regulated process, and whether it should be managed privately, publicly, or through a public-private partnership.

3.8.59 The only public institution that currently "mediates" in contact and care disputes is the Office of the Family Advocate.[234] At the Focus Group Forum, it was indicated that the Office of the Family Advocate is inundated with holding enquiries in terms of the Mediation in Certain Divorce Matters Act, and that the Office is experiencing immense difficulty in also conducting mediations in terms of sections 21, 33, and 34 of the Children's Act. The Cape Town Office of the Family Advocate outsources matters to a private association of mediators to conclude matters expeditiously and effectively.[235]

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234 There is a debate about the nature of the "assistance" that the Office of the Family Advocate is providing. See discussion in Chapter 4.

235 South African Law Reform Commission Focus Group Forum April 2008 Cape Town. Paleker at 25 suggests that unless there is a fundamental change to the Office of the Family Advocate, mediation under the Children's Act, it is submitted, should be left to 'other suitable qualified persons' as contemplated in the Act.

3.8.60 The court-connected mediation service which is offered by the Office of the Family Advocate is limited, and has many capacity and resource constraints.[236]

3.8.61 If South Africa were to focus on a publicly regulated family mediation service, it is essential that the capacity, powers, functions, competencies, and character of the Office of the Family Advocate be drastically increased, expanded, and transformed; or alternatively that a Family Justice Centre be established. (See discussion in Chapter 4.) This may require an injection of funding by the State.

3.8.62 Professor James Mowatt rightly notes that the State should retain some form of control over the welfare of all children. All consensual agreements are to be subject to some form of curial surveillance.

3.8.63 The alternative approach suggests that divorce is essentially a private matter. It argues that the introduction of no-fault divorce has given parties the right to decide whether or not to stay married; logically therefore, this right should be extended to decide post-marital issues arising from their divorce. Inherent in this approach is that the parties should be entitled to turn for help to an independent third party of their choice rather than one provided by the State. According to the proponent of this argument, it is essential that the parties retain responsibility for their own decisions rather than accept arbitrarily imposed decisions with which they may be less than satisfied. A further indirect advantage of this approach is that it is, from the State's point of view, a relatively inexpensive process as it does not require the manpower or facilities needed for mediation.[237]

3.8.64 There are currently some trained practising mediators in the private sector, especially in affluent urban areas. South Africa has various voluntary associations to which mediators are affiliated, namely Family Association of Mediators of the Cape (FAMAC), South African Association of Mediators (SAAM) in Gauteng, and KAFAM in Kwa-Zulu Natal. Accreditation requirements are being set by the Dispute Settlement Accreditation Council (DiSAC) under the auspices of the African Centre for Dispute Resolution at the University of Stellenbosch and the National Accreditation Board for Family Mediators (NABFAM). Note should be taken of Rule 86(1), which makes provision for the determination of accreditation practices in respect of court-annexed

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236 See full discussion on Family Advocate's Office in Chapter 4.

237 Mowatt 1987 ***De Rebus*** at 198.

mediation (see also the section on court-annexed mediation below). Although court-annexed mediation is a government initiative, parties still have to make use of private mediators.

3.8.65 Private mediation services based in urban areas are mainly utilised by affluent members in society. Private mediation is still criticised for its lack of formality, in that negotiations take place behind closed doors with no formal procedures or records being kept. In the same vein, the mediator may apply his or her own standards for what is equitable or not, and the mediator is not answerable to anyone for such decisions.

3.8.66 ADR has been practised in rural communities for centuries in South Africa. It is part of the culture of the rural population to seek the services of a traditional leader, a chief, or an elder in the community to "mediate" in personal and business disputes. The concern raised by the Office of the Family Advocate with this form of dispute resolution, as it relates to contact and care matters, is that very often the elders and chiefs who act as mediators do not play a facilitative role but act using a directive approach. Further, they are guided by cultural practices, beliefs and customs rather than the South African Constitution. In many instances, decisions are made without the best interests of the child being paramount, and with women being in an unequal or inferior position relative to men. In most instances, the rural population view the mediator as an authority figure whose decision they must abide by, whether they believe it is in the best interests of the child or not.[238]

3.8.67 Mediation services are also offered by non-governmental organisations like Family Life and FAMSA. Although these organisations offer mediation services free of charge or at a minimal cost, they have problems – the main one being budgetary constraints. They do, however, offer a valuable service and require more funding and trained family mediators.[239]

3.8.68 Overall, one cannot ignore the important role that both public and private mediation services play in South Africa. Our population is diverse in terms of race, culture, and class. While part of the population may be totally reliant on the State for assistance, another sector may feel more comfortable seeking the services of a non-

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238 South African Law Reform Commission Focus Group Forum Pretoria 2008 and Focus Group Forum with Family Advocates February 2008. See also the discussions on traditional courts in Chapter 4 below and lay forums appointed in terms of the Children's Act above, respectively.

239 The position of mediators in rural areas are uncertain and should be investigated.

governmental organisation; another sector may wish to go to a traditional leader, and yet another group might prefer to consult a mediator in private practice.

3.8.69 Different countries have different policies and legislation on who should be allowed to mediate in family law matters. In some countries an inclusive approach is taken, where any person with family law experience can mediate. In other countries, only lawyers and psychologists are allowed to mediate.

3.8.70 According to the Children's Act, any suitably qualified person can mediate when determining contact and care arrangements for children. Although the Act mentions various persons who could be mediators, it is also limiting in the types of persons identified, and is silent as to what training people should receive to qualify as family mediators. Certain stakeholders feel that traditional leaders, teachers, and respected members in the community who have adequate training should qualify as mediators.[240]

3.8.71 In light of South Africa having such a diverse population, with different cultural, religious, racial and customary backgrounds, it is necessary that the net of who should be allowed to mediate be cast wide enough to ensure that the interests of all people and children are protected. However, because the focus in care and contact disputes is primarily on the interests of the children, it is essential that persons who act as mediators have the necessary expertise, training, and experience to conduct such mediations.

3.8.72 The question has been raised whether mediation should be inclusive of the child and the extended family; furthermore, whether lawyers acting for their clients in a legal capacity should be allowed to attend the mediation. The lawyers' role is uncertain. Clients should be entitled to consult with their attorneys, but should this consultation occur during the mediation itself?

g) Funding: Public versus private funding

3.8.73 Most South Africans cannot afford to employ the service of private mediators and would require assistance from the State. Indeed, all states globally are confronted with making policy trade-offs in the face of limited financial and human resources – a scenario that requires contributions from private, community, and non-governmental

[240] South African Law Reform Commission Focus Group Forum April 2008 Cape Town.

sectors. All these sectors urgently need to be developed in South Africa, as budgetary constraints would clearly hamper a totally state-funded mediation service.

3.8.74 The Office of the Family Advocate is of the opinion that all mandatory mediations might be funded by the State, and such mediation might be conducted by the mediation stream of the Office of the Family Advocate.[241] Family Advocate offices need to be given more capacity if they are even to attempt to carry this workload. However, where parties do not want to wait for the service offered by the Family Advocates' Office, they should have the choice to attend a mediation session with a private accredited mediator. Where the workload becomes too heavy for the Family Advocate's Office, the Office should have the discretion to outsource matters to private mediators.

3.8.75 Hence, the extent of funding for mandatory mediation encompasses the increased human resources required, increased office space, and the establishment of offices in outlying areas. Where private mediators are used, there should be a specified range with regard to the fees mediators are allowed to charge. This regulation would prevent mediators from taking advantage of parties because of their need for a certificate indicating that they have attended a mediation session.

3.8.76 The first point of entry would be private mediation, unless the parties are unable to afford it.[242] The family advocate must conduct a means test to determine whether parties qualify for state-funded mediation in whole or in part, or whether the parties should fund the mediation themselves.

3.8.77 It has been argued that because South Africa is still a largely third-world country, the extension of public mediation services would be challenging. Therefore, we should perhaps rather concentrate on improving and expanding private and community mediation services.[243]

3.8.78 "First prize" would be if the State could make funds available for the creation of mediation agencies, which can offer mediation in its intended form. Alternatively,

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241 Focus Group Forum.

242 De Jong 2005 ***TSAR*** at 44.

243 De Jong M "International trends in Family Mediation – Are We Still on Track?" Paper presented at South African Law Reform Commission Focus Group Forum Pretoria 2008.

existing mediation agencies, such as FAMAC, SAAM, KAFAM and FAMSA (to name a few of the established private family mediation service providers), should be bolstered with appropriate funding. It may be argued that it is not viable for the government, on account of limited resources, to fund such institutions. However, two observations have been made in this regard. The government expressly made provision for mandatory mediation in the Children's Act. It is therefore argued that the government has a responsibility, as a matter of principle, to make the process worth the paper it is written on. Furthermore, experience has shown that international donor funding is frequently available to support projects which foster access to justice and dispute resolution in developing countries (such as South Africa). While it is often difficult for private individuals to tap into such funds, governments generally experience fewer obstacles in this regard. It is a question of taking the initiative to look for new funding sources.[244]

3.8.79 The proposal should be that persons who can afford to pay for mediation services will have to do so. Persons who cannot do so must have public, community-based, or non-governmental organization (NGO) mediation services available to them. If these services are unavailable, private mediation services must be utilised at the expense of the State for persons who cannot afford to pay for mediation themselves. (See also the discussion on funding in Chapter 4 par 4.4(c)(ii) dealing with the People's Family Centre.)

h) Matters that may be mediated on

3.8.80 The Office of the Family Advocate submitted that there needs to be a mind-shift, as South Africa has implemented a fractured law. The complexity of dealing with maintenance and matrimonial property matters is unnecessarily magnified, and is therefore seen as a burdensome task. Issues related to matrimonial property distribution and the payment of maintenance affects decisions about the wellbeing of the child. Hence, matters that require mediation should not be limited to issues of care and contact. Rather, mediation should be holistic and should include issues of maintenance and matrimonial property.

3.8.81 Holistic mediation prevents the determination of issues in a piecemeal fashion. A piecemeal approach often results in already-decided issues being stonewalled if other issues become problematic later on. Mediators would have to use their discretion

[244] Paleker at 25.

to determine whether all or certain issues cannot be mediated and negotiated. After this decision, in the instance of care and contact, the matter will be referred to the assessment stream of the Office of the Family Advocate; or in the case of maintenance and matrimonial property, the matter will be referred to court. This sort of holistic mediation will help parties to save some of the costs of drawn-out litigation. However, the question of holistic mediation will only arise if matters related to contact and care are referred for mediation.

i) Process

3.8.82 The most important issues to ensure successful mediation are as follows:[245]

a) procedural fairness - each party must feel that they have been given the right to be adequately heard;

b) full and open disclosure of financial issues;

c) mediator impartiality;

d) confidentiality of discussions - a safe space is to be created and held so that all aspects necessary to bring about a resolution can be explored;

e) freedom to terminate the mediation at any time;

f) the skill of the mediator;

g) parties being properly prepared and advised for mediation;

h) parties understanding their right to contract advisors of their choice during the process eg. lawyers, counsellors, therapists and financial or spiritual advisors;

i) possible power imbalances in power between the parties.

Questions:

54. Should mediation be a voluntary or a mandatory process?
55. Should mediation be privately or publicly managed and funded?
56. Should a facilitative or directive approach be taken when mediating in contact and care disputes?
57. Should a national regulatory body be required to manage training, accreditation, and a uniform code of ethics for mediators?
58. What model of mediation should be used by family mediators?
59. Should fees charged by mediators in the private sector be pegged (limited) for family matters?
60. What role, if any, should Family Advocates play in light of the mediation provisions of the Children's Act?

[245] Schneider presentation at 5.

61. In cases that do not involve any minor children, would it be preferable to *not* require mediation?

62. What process should be used when mediation fails?

63. What should the scope of mediation be – that is, which matters should be mediated?

64. Should mediation be funded solely by the State?

65. Should mediation be funded by the parties themselves, with the State only funding mediation for parties who cannot afford it (as determined by a means test)?

66. Should mediation be funded by the State, with parties given the option of choosing to engage the services of a private mediator whom they must pay themselves?

67. Should mediation be restricted to access and custody matters only, or should it be holistic and extend to all areas of a divorce or separation case?

68. If a holistic mediation model is adopted, are there implications for the question of who should be allowed to mediate in divorce specific matters?

69. What are the advantages and disadvantages of holistic mediation?

70. Will there be problems with the practical implementation of holistic mediation – that is, extending mediation to include issues of maintenance and matrimonial property?

71. Who should be allowed to attend the mediation sessions?

72. How should mediators screen for domestic violence?

73. If there is suspected domestic violence, should these cases be mediated?

74. If cases of suspected domestic violence are mediated, what measures should be implemented to ensure the safety of spouses and children?

3.9 Arbitration of family law disputes

3.9.1 Section 2(a) of the Arbitration Act, 1965[246] (the Act) prohibits arbitration in respect of "any matrimonial cause or any matter incidental to any such cause". This position has been confirmed by the courts.[247]

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246 Section 2 (a) of the **Arbitration Act** 42 of 1965 reads as follows:

2. Matters not subject to arbitration

2. A reference to arbitration shall not be permissible in respect of –
   (a) any matrimonial cause or any matter incidental to any such cause; or
   (b) any matter relating to status.

247 In ***Ressell v Ressell*** 1976 (1)SA 289 (W) at 292A Davidson J in discussing section 2 of the Arbitration Act, 1965 stated as follows: "the intention of the statute, as was the intention of the common law hitherto, was to reserve jealously for the court control of this and the right to determine what was good or what was not good for a child in a matrimonial dispute, whether the dispute was before or after the divorce. In my view there is nothing to be said for the proposition that this is a fit subject for arbitration." In ***Pitt v Pitt*** 1991(3) SA 863 (D) at 864I in respect of an oral agreement to appoint an arbitrator to go into the proprietary rights in relation to the furniture of divorced parties it was stated: "….I have no doubt that it points in the direction that the Arbitration Act would not countenance the reference to arbitration of a dispute of this nature."

3.9.2 In 2001, the South African Law Reform Commission (SALRC) recommended that the Act should be amended to permit arbitration in matrimonial property disputes which do not affect the rights of the spouses' children.[248]

3.9.3 In determining the scope of the proposed new exception, it was argued that awards or settlements regarding matrimonial property, where there were minor children involved, needed to be subject to a degree of court control on the merits. The court would exercise its power after considering a report by the Family Advocate. The test on review would, therefore, be "Is the award in the best interests of the minor children?" This would involve an unrestricted power of review on the merits, something that would be unacceptable in terms of arbitration law. However, by implementing the exception, as suggested, the court's inquiry would be limited to whether the award would affect the interests of a child, which is therefore a jurisdictional matter. [249]

3.9.4 The SALRC acknowledged that its proposal might be difficult to implement in practice. Where a marriage is dissolved and minor children are involved, disputes about matrimonial rights will indeed either affect the rights of the children, or could be presented in a way that this at least appears to be the case.[250]

3.9.5 Critics of this proposal therefore argued that, statistically, arbitration in terms of this exception in matrimonial cases would be limited to childless couples or couples whose children are all majors.

3.9.6 On 12 August 2013, the SALRC together with the Department of Justice and Constitutional Development (DOJCD) hosted an experts' meeting to discuss, inter alia, the review of the proposed Domestic Arbitration Bill, developed previously by the SALRC.

3.9.7 During this meeting, Mr Charles Cohen raised the question of whether the preclusion of matrimonial issues from arbitration in South Africa is justifiable. He

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248 South African Law Reform Commission ***Domestic Arbitration*** Report Project 94 2001 (hereafter "***SALRC Project 94 2001 Report***") paras 3.28-3.30. Clause 5(1) of the proposed draft Bill reads as follows:

> Arbitration is not permissible in respect of any matrimonial cause or any matter incidental to any such cause, except for a property dispute not affecting the rights or interests of any minor child of the marriage.

249 ***SALRC Project 94 2001 Report*** par 3.29 at 28.

250 Ibid.

followed his oral submission with a written submission,[251] dated 3 September, 2013, (hereafter referred to as the Cohen submission) strongly advocating the use of arbitration in family law disputes. These views were also supported by Prof M De Jong in a presentation made at the SAAM Conference on 30 July 2014 and later published.[252]

3.9.8 With regard to the trends in foreign jurisdictions, two main approaches are evident:

a) England[253] and Australia[254] limit the use of arbitration to property and spousal maintenance matters, while excluding most or all children's issues.

b) Canadian states (except Quebec)[255] and some states in the United States of America,[256] make provision for the referral of all matters incidental to divorce or family breakdown, including children's issues, to arbitration.

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251 With supporting documentation provided by Mr Charles Mendelow, and B Clark (Clarks Attorneys). Mr Cohen had already raised these arguments in 1993 in Cohen CH "The Many Faces of Arbitration…..Why not Use it for Property Disputes in Divorce?" 1993 ***De Rebus*** 642.

252 De Jong 2014 ***PER/PELJ*** at 2356.

253 Arbitration became available for the resolution of financial or property disputes upon relationship breakdown on 22 February 2012 under a new scheme established by the Institute of Family Law Arbitrators (IFLA). IFLA was formed by the Chartered Institute of Arbitrators, the Family Law Bar Association and the family lawyers' group, Resolution, in association with the Centre for Child and Family Law Reform. The family arbitration scheme (IFLA Scheme) is governed by the Arbitration Act 1996 and the Family Arbitration Rules, which together form a self-contained code for family arbitrations of financial disputes. However, also see the Private Members' Bill, the Arbitration and Mediation Services (Equality) Bill [HL] 2010-13 that does not support this initiative.

254 Arbitration was introduced in family law matters, together with mediation, as additional methods of alternative dispute resolution by the Courts (Mediation and Arbitration) Act 1991, which inserted new provisions into the Family Law Act 1975. This scheme never became a practical reality. In 2000, further amendments were made to the Family Law Act to provide for consensual private arbitration as an option for resolving matrimonial property and financial disputes. Voluntary arbitration under the Family Law Act has, however, not been embraced as a mainstream dispute resolution mechanism by litigants, the legal profession and the courts and it appears that qualified arbitrators have had little work to do until now. The Family Law Council of Australia was subsequently asked to look at changes to court processes or other changes that could be made to promote voluntary arbitration in family law property proceedings.

255 See for eg the Ontario Family Statute Law Amendment Act 2006 and the Arbitration Act 1991 and the British Columbia Family Law Act. Criticism has been that the legislation erodes existing arbitration policy which prioritises a party's right to select the process, the expert and the applicable law. Family arbitration is more regulated than other domestic arbitration legislation.

256 The American Academy of Matrimonial Lawyers published a Model Family Law Arbitration Act (Model Act) in March 2005. See also ***Dick v Dick*** 534 N.E.2d 185 (Mich.Ct.App.1995) and ***Fawzy v Fawzy*** 199 N.J. 456 (2009); Brown HJ and Marriot QC ***ADR Principles and Practices*** 3ed Sweet & Maxwell London 2011 at 132.

3.9.9 In attempting to determine whether arbitration should be available for matrimonial disputes in South Africa, it is important, at the outset to determine what the basis of this discussion should be. Should the arbitration option effectively move individuals out of litigation, or only out of other forms of ADR?[257] It therefore needs to be determined whether one should evaluate family arbitration by contrasting it with a final court hearing, or, alternatively, with one or more particular other forms of private ordering.

3.9.10 There may also be situations in which the parties are indeed good candidates for mediation, but they are unsuccessful in reaching agreement on some or all of the issues in dispute during the mediation process. In such cases, arbitration can be a useful adjunct to mediation to help the parties move past the impasse.[258]

3.9.11 It has been argued that ADR, which would include arbitration, generally, offers a number of distinct advantages as an alternative to litigation.[259] The reasons put forward are as follows:[260]

a) avoidance of adversarial proceedings;
b) avoidance of delays and the rigours of the court process;
c) reduction of costs;
d) preservation of privacy;
e) procedural and evidentiary flexibility;
f) choice of mediator or arbitrator who reflects the values of the disputants and is available throughout the whole process;
g) public interest: overloaded court system;
h) party autonomy; and
i) choice of law to be applied.

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257 Ferguson at 117.

258 Price at 50. For example, the arbitration of a single or preliminary issue such as the valuation of business assets or shares could be of benefit in that once the value of the property or shares has been determined the likelihood of settlement is increased. Arbitration may also prove to be a satisfactory last port of call when compromise proves to be elusive for parties in the mediation process.

259 See the discussion on the adversarial nature of litigation above. See also the discussion above on case managers; facilitation; expert evidence/determinations and international arbitration and mediation.

260 Morris at (iv).

However, these advantages can all break down if ADR is resisted by one or both parties, becomes protracted, or ends up being reviewed by a court. [261]

3.9.12 In the following discussions the question whether these advantages are more prominent when using arbitration rather than other forms of dispute resolution, will also be considered:[262]

a) Avoidance of adversarial proceedings

3.9.13 Avoidance of adversarial proceedings is said to favour the idea of both mediation and arbitration. Arbitration, however, is not necessarily consensual (non-adversarial) by the time parties are involved in it. Arbitration can be every bit as bitter and contentious as litigation, as case law illustrates. There has been a good deal of litigation by parties attempting to avoid arbitration agreements they entered into earlier, or to overturn the outcomes of arbitration.[263]

b) Avoidance of delays and the rigours of the court process

3.9.14 A frequently cited advantage of arbitration is that it can significantly speed up the process, as there are no long waiting periods for a court date (with the attendant courtroom, calendar, or tactical delays).[264] The availability of arbitrators is also important, as parties do not have to wait for a place in the over-burdened court roll.[265]

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261 In their Matrimonial Survey 2012, Grant Thornton asked 139 family lawyers whether or not they believed that family arbitration would become a significant form of private ordering in the next five years. Forty-eight per cent thought that it would whereas 52% thought that it would not (p. 5). Speed and confidentiality for wealthy and celebrity clients were cited as reasons by those who thought it would grow (p. 5). Those who thought it would not grow significantly believed that it would have little attraction 'in the provinces' and for the 'average client' (p. 5). family arbitration might thus appear as privatised, luxury dispute resolution whilst the majority must either make do with a less expensive form of private ordering, sometimes lacking in such expert guidance or, more rarely, become self-represented litigants in court proceedings.

262 The difference between arbitration and mediation was set out in Brown at 121 as follows:
a) Arbitration is enforced by the courts whereas ADR agreements are not;
b) The object of arbitration is the rendering of a final and binding award;
c) Arbitration is subject to an extensive statutory regime;
d) Arbitration proceedings have the advantage over courts of informality but are constrained by the rules of natural justice; and
e) The basis upon which decisions are made differs. Brown at 3 states that the arbitrator hears the parties whereas the mediator facilitates negotiation.

The difference between non-binding arbitration and mediation should also be noted: On the surface it would seem as though the role of the arbitrator and the mediator is the same. However, the principal difference is that whereas the mediator assists and encourages the parties to reach an agreement, the arbitrator makes a determination (even though it is not binding).

263 Morris at 5.

264 De Jong 2014 ***PER/PELJ*** at 2356 and references made therein.

c) Reduction of costs

3.9.15 Closely linked to the advantages of flexibility and an expedited process is the claim that arbitration is less costly than litigation. Parties can streamline the process and avoid the delays that may occur in the formal court process. Although arbitration may involve a lot of extra costs (arbitrator's fees, venue hire, and the cost of a transcription service if required), the time saved in combination with the other advantages of arbitration may justify the money spent on these extras. Costs can be minimised by holding arbitrations at inexpensive venues, such as the arbitrator's office or chambers or a community centre.[266]

3.9.16 However, it should be noted that the appropriate comparator might not be the cost of proceeding to a final hearing. Couples might have resolved their disputes through the usual out-of-court lawyer-led negotiations or mediation. If so, that is the accurate comparison. In the absence of evidence as to the appropriate comparator, it is much more difficult to assess the value of this stated benefit.[267]

3.9.17 The comments of one lawyer-arbitrator suggest that arbitration may often be used in what he terms “high end” cases. These are cases involving a lot of family assets, where the desire for confidentiality is a high motivator for the use of binding arbitration or mediation-arbitration.[268]

d) Preservation of privacy

3.9.18 The fact that arbitration is a private and confidential process is also regarded as a plus. No possibility of media access exists, and parties do not have to worry about exposing their matrimonial disputes, faults, and finances to the public gaze. Arbitration is a private and flexible procedure which is intended to avoid the formalities, delays,

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265 B Clark, Clark Attorneys submission dated 8 August 2013.

266 De Jong 2014 ***PER/PELJ*** at 2356.

267 Ferguson at 123.

268 Morris at 5.

expense, and irritation of routine litigation. As such, it is far less traumatic and antagonistic, and more user-friendly, for disputing parties.[269]

3.9.19 However, confidentiality in family arbitration is best viewed as a key benefit for at least one party but not necessarily for both. Subject to any need to obtain a consent order or opportunity to appeal, there might not be any judicial oversight over the "award" made in family arbitration. Hence, confidentiality may hide potential injustice to one party.[270]

3.9.20 Privacy will also only be maintained if the matter turns out to be final. Otherwise the parties could end up in public court anyway. In addition, some people – particularly feminists – who are working to move family life from the "private" sphere (where anything can happen, including coercion and abuse) to the "public" sphere (where there is more social accountability) consider privacy to be detrimental.[271]

3.9.21 Courts generally use initials to protect children's privacy, rather than to create secrecy. The principle of open justice is articulated in ***Scott v. Scott***,[272] in which Lord Shaw of Dunfermline stated that "publicity is the very soul of justice." Open courts guard against corruption and ensure that judges are held to account.[273]

3.9.22 Policy questions have therefore been raised about how private and confidential arbitration should be, where concern about private judgments is made on matters of public importance. While judges are publicly appointed and accountable, private arbitrators are one step removed from public accountability.

e) Procedural and evidentiary flexibility

3.9.23 Another very important advantage of arbitration is the flexibility of the process.[274] Firstly, the parties may select the issues to be arbitrated. Secondly, the parties are able to retain control of the proceedings by deciding when, where and how

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269 De Jong 2014 ***PER/PELJ*** at 2356 and references made therein.

270 Ferguson at 122.

271 Morris at 6.

272 ***Scott v Scott*** [1913] AC 417 (HL).

273 Morris at 34.

274 ***SALC Project 94 2001 Report*** at para 1.04.

the issues are to be dealt with by the arbitrator. Hearings can be scheduled at a time of day that suits people in terms of their business or family commitments, and at an easily accessible venue. Parties can determine the level of formality of the proceedings and what rules of evidence should apply.[275]

3.9.24 Procedural flexibility may, however, also be seen as a disadvantage, as the parties are not protected by formal discovery rules and sanctions. A lack of formal rules of evidence means that evidence of varying quality can be admitted by the arbitrator.[276]

f) Choice of arbitrator who reflects the values of the disputants and is available throughout the whole process

3.9.25 It is an advantage that the parties themselves, guided by their legal representatives (if they are represented), can select the person who they wish to arbitrate their dispute – someone with experience and expertise in family law matters, and especially experience and expertise in the particular controversy or conflict being presented. The parties can appoint one and the same arbitrator to deal with the dispute from start to finish. This will result in continuity and an informed and holistic approach by the arbitrator to all the different issues that might arise from a dispute.[277]

3.9.26 Judges of the High Court are usually generalists with no specialised training, interest, or experience in family law.[278] Different judges may also be assigned to different matters arising from one and the same family law dispute over a period of time.[279]

3.9.27 However, while judges are publicly appointed and accountable, private arbitrators are one step removed from public accountability.[280]

3.9.28 A key issue in arbitration is the threshold level of family law knowledge, arbitration law knowledge, and process knowledge required for competence as a family

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275 De Jong 2014 ***PER/PELJ*** at 2356.

276 Morris at 6.

277 De Jong 2014 ***PER/PELJ*** at 2356.

278 De Jong 2014 ***PER/PELJ*** at 2356 and references made therein.

279 Singer P "Arbitration in Family Financial Proceedings: The IFLA Scheme: Part 1" 2012 **Family Lawyer** (Part 1) 1353 at 1359.

280 Morris at 33.

law arbitrator. The same applies to drafters of arbitration clauses for family law disputes.[281]

g) Public interest: overloaded court system

3.9.29 Over-crowded dockets and the resulting pressure on courts to deal with cases expeditiously make it difficult for judges to examine their cases thoroughly. It may therefore be in the public interest to use arbitration to help to relieve pressure on our overloaded court system.[282] If used effectively, arbitration could also substantially relieve the cost to society of resolving complex family disputes in court, thus permitting a better allocation of public resources.[283] The fact that arbitration implies a final decision distinguishes it from other forms of ADR.[284]

h) Party autonomy

3.9.30 In the UK, it has been argued that arbitration is in line with the principle which underpins the Children's Act of 1989, namely that the primary responsibility for children rests with their parents; and that parents should be entitled to raise their children without the intrusion of the State, save where children are suffering or are likely to suffer significant harm.[285] It is up to parents to agree on how their children should be brought up, and if they cannot agree, they should be entitled to choose how their disagreement will be resolved without State intervention. That is, unless one or both parents invoke the help of the court, or where the children are suffering or are likely to suffer significant harm as a result of their parents' actions.[286]

3.9.31 However, one might imagine that the empowerment aspects of mediation differ from the respect for autonomy in the adjudicatory features of arbitration. As a result,

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281 Morris at 49.

282 Thorpe M "Statutory Arbitration in Ancillary Relief" 2008 ***Family Law*** 26 at 27; Butler D "South African Arbitration Legislation – The Need for Reform" 1994 27 ***CILSA*** 122.

283 ***SALC Project 94 2001 Report*** at para 1.03.

284 Ramsden P ***The Law of Arbitration: South Africa and International Arbitration*** Juta Claremont 2009 at 162 states in its interpretation of section 28 of the Arbitration Act 1965 that unless the arbitration agreement provides otherwise, an award is final and not subject to appeal on a point of law. The appeal may also only be to an umpire or another arbitration tribunal.

285 ***AI v MT*** 2013 EWHC 100 (Fam) decided on 30 January 2013 at para 32. This principle in turn is in line with Art 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), which provides that everyone has the right to respect for private and family life, and the concept of personal autonomy which underpins that right.

286 ***AI v MT*** 2013 EWHC 100 (Fam) at para 32.

whereas mediation and family arbitration *appear* to intersect in terms of respect for autonomy, in fact they might not do so. The policy concerns around contractual freedom and decision-making autonomy are particularly alive in family law disputes. ADR processes have been implicated in concerns about coercion, unequal power, and family violence.[287]

3.9.32 It is also argued that these risks which are perceived to be part of mediation could be exacerbated in binding arbitration processes. This risk might be particularly high if such mediation is conducted through religious tribunals, where the norms favour traditional (customary) gender-based understanding of family entitlements and obligations. This potential use of arbitration clauses is worrying when one considers cases in which women could be urged to sign ante-nuptial arbitration agreements that specify traditional religious or culture-based dispute resolution processes, or that name particular arbitrators who hold these values. Women in conflict could also be urged to participate in informal dispute resolution processes without giving their fully autonomous consent.[288]

3.9.33 However, it has also been argued[289] that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of the parent.

i) Choice of law to be applied

3.9.34 Concerns about "boutique law" have been raised. For example, should every minority group have its disputes decided according to its own traditions or religion, for example by Sharia law? Or should everyone living in South Africa be required to have disputes adjudicated according to South African law? The right to individual and group autonomy needs to be weighed against important public policy issues, for the protection of vulnerable persons.[290]

j) Status of the award: finality versus *parens patriae* jurisdiction

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287 Morris at (vii).

288 Morris at 38.

289 ***RB v Children's Aid Society of Metropolitan Toronto*** [1995] 1 S.C.R. 315 (SCC) as referred to in Morris at 27.

290 Morris at (viii) and 40. For example, Islamic women's groups have raised concerns about the possible application of *sharia* law in arbitration. In this regard it is also important to note the concerns of women's groups about indigenous forms of dispute resolution.

3.9.35 The aspect of arbitration that distinguishes it from other forms of ADR is that the award is final and binding.[291] Proponents of family arbitration regard the finality of an award in the case of binding arbitration as a real benefit to parties. In the event of an impasse, arbitration is to be preferred to obtaining the opinion of a jointly instructed neutral expert – an opinion which one or both parties might not accept, leaving them back at the starting point. If both parties are prepared to agree to be bound by the award of an arbitrator on a matter of impasse, matters can then be finalised and there will be no gnawing anxiety and prolonged uncertainty, which can drain both parties.[292]

3.9.36 The question, however, is whether the (family) court can or should be bound by an agreement made between the parties.

3.9.37 Three approaches, with variations, can be identified worldwide. Family arbitration awards may be –

a) not binding at all;
b) binding, but with various standards of review or appeal rights; or
c) binding on the courts without reservation.

3.9.38 Because divorce is viewed as a *per se* harmful event for children, some courts feel justified in assuming the position of final protector of children upon divorce, and in restricting the rights of parents to arbitrate children's issues privately or to submit any such issues to binding arbitration. Other concerns are that the best interests of children could be given short shrift in ADR proceedings such as arbitration, which are by definition closed, unguided by the rule of law, and expeditious; or where there is no properly regulated group of well-trained and highly competent family law arbitrators. Overall, it is simply assumed that the court is in the best position to protect the best interests of the child. The decision to intervene in parental decisions to submit their parenting disputes to an arbitrator seems to be based on the idea that a lack of consensus between the separating parents raises questions about their ability to act in the best interests of their children, even in their appointment of an arbitrator.[293]

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291 Appeal only possible to umpire or other arbitral tribunal if agreed by parties.

292 De Jong 2014 ***PER/PELJ*** at 2356 and references made therein.

293 De Jong 2014 ***PER/PELJ*** at 2356 and references made therein.

3.9.39 Internationally, the various legal positions are as follows:

(i) Canada[294]

3.9.40 Canadian courts have been reluctant to give up their *parens patriae* jurisdiction to arbitrators. However, some Canadian courts may stay court proceedings pending compliance with arbitration agreements, even in matters of child support.[295] On the question of certainty and finality, the following summary describes the situation in Canada:

- Property division: almost always final and binding, with limited review and appeal rights;
- Spousal support: almost always final and binding, with limited review and appeal rights;
- Child support: sometimes final and binding with review and sometimes *de novo* review, and limited appeal rights;
- Access and visitation: sometimes final and binding with review and sometimes *de novo* review;
- Custody: rarely final and binding.

(ii) United Kingdom

3.9.41 In the UK, the arbitral award is enforceable by leave of the court. It is binding subject to review or appeal. Since the jurisdiction of the court cannot be ousted, it may be argued that the court will not be bound to make an order which mirrors the award. However, it does seem unlikely that a judge would exercise judicial discretion in a way which departs from an award.[296]

3.9.42 Singer sets out the legal relationship between arbitration "awards" and the surrounding family law context. Singer notes that "It is beyond dispute that the jurisdiction of the court may not be ousted." Similarly, Howell explains that only the court has the jurisdiction to make a final financial remedy order dismissing claims. Accordingly, only the court can provide finality; therefore, on entering into arbitration,

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294 Ferguson at 129.

295 Morris at 21.

296 Timothy Scott QC "Family Arbitration: An Introduction" http://www.familylawweek.co.uk/site.aspx?i=ed90447 accessed on 22 August 2014.

the parties must specifically agree to make an application for a consent order in the terms of the award. The basis for this technical position lies in the Arbitration Act, 1996. Ahmed and Calderwood Norton explain that "…most family law matters cannot be resolved through arbitration … because the Act preserves certain matters to be governed by the common law. Moreover, the jurisdiction of civil family courts cannot be ousted by contractual agreement."[297]

k) Conclusion

3.9.43 What is clear at this stage is that private ordering is complex, and that the interplay between private ordering and court-led adjudication is in turn very complex. One should be wary of categorisations and points of comparison constructed without good empirical evidence.[298]

3.9.44 The following points may be taken into consideration:[299]

- the need for finality and enforceability of the award;
- predictability and certainty in the law;
- clear limits on judicial involvement by way of appeal;
- clear time limits for appeals or reviews including harmonisation with other relevant statutes; and
- clarity as to procedure, e.g. appeal, or judicial review or both.

3.9.45 All family dispute resolution legislation should contain clear policy guidelines for appropriate balances between court supervision, family autonomy, safeguards for those entering into family arbitration agreements, and safeguards for vulnerable persons.[300]

3.9.46 Measuring success is not always easy. Evaluation criteria should be built into policy and programme design. Whatever model is chosen, it would need to have clearly defined goals, including definitions of success, and should present methods for

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297 Ferguson at 128.

298 Ferguson at 121.

299 Morris at 16.

300 Morris at (ix). Possible models include the North Carolina *Family Law Arbitration Act* and the Australia *Family Law Reform* Act plus a trained arbitrator roster.

measuring or evaluating the outcomes. For example, success could be evident in improvements in several areas, such as speed of resolution, level of cost, enforceability of outcome, quality of outcome, level of client autonomy, whether the process is considered to be respectful, and the achievement of social equality and justice. Some of these policy goals might not be entirely compatible with each other. There is much speculation that mediation and arbitration, and various combinations of these processes, will improve the court system. Wade has pointed out that questions about the success of particular processes are too often "answered by vague and inaccurate gossip." Clear evaluation criteria should be built into the design in order to prevent anecdotal reports becoming the source of policy decisions.[301]

Questions:[302]

75. Which matters should be arbitrated? The options are:
    a) blanket exclusion of any matter incidental to a matrimonial cause;
    b) clause 5 of the SALRC Domestic Arbitration Bill position;
    c) property and spousal maintenance matters; or
    d) all matters arising from divorce or family breakdown.
76. Who should act as arbitrators?
77. Should family arbitration be evaluated by contrasting it with litigation or with other forms of ADR?
78. Should family arbitration be voluntary or compulsory?
79. Should family arbitration comply only with substantive law?
80. Is family arbitration a useful adjunct to unsuccessful mediation?
81. What should the court's role in the family arbitration process be?
    a) awards confirmed, corrected, vacated;
    b) review by court on the merits of dispute, de novo review;
    c) review regarding procedural and jurisdictional issues; or
    d) review on manifest errors of law which will be contrary to public policy.
82. Should family law arbitration be regulated by the existing *Arbitration Act* or by a separate statute with specialised rules for family matters?

3.10 African dispute resolution (AfDR)

a) Introduction: African social order in terms of the customary law

3.10.1 AfDR is relevant to the discussion on the resolution of all family disputes. However, issues relating to customary law and culture should also be taken into account when discussing AFDR. A large number of African children are regulated by customary law rather than by common or statutory law.

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301 Morris at 49.

302 As identified by De Jong supra.

3.10.2 In customary law, the terms “custody and care” and “access and contact” (or combinations thereof) are hardly ever used. The emphasis is on deciding which family a child is affiliated with.[303] In ***Madyibi v Nguva,***[304] the rules of affiliation are stated. By nature, a child would accrue to his or her maternal grandfather’s group and be a member of his group for religious and political purposes. These rights and duties are transferred to another group only on contraction of a valid customary marriage, whereby the woman’s group receives “lobolo” from the other group and transfers the natural rights to the woman’s reproductive power, and her existing children, to the group that gave the lobolo.[305]

3.10.3 One should also take cognisance of the fact that many children are the subject of social parentage. Children are sometimes, for practical reasons, placed with someone other than the biological parent.[306] Children retain their original legal status, family name, and rights and duties acquired by birth in their father’s home, but in fact they are under the care and control of a foster parent.[307]

3.10.4 Children of an unmarried woman belong to the mother’s male guardian, namely her maternal grandfather or his successor.[308] A vast number of children are born to unmarried women (see chapter 1 for an exposition of the number of children born out of wedlock in South Africa.) The principle that unmarried women and their children are under perpetual guardianship did not change with the implementation of the Customary Marriages Act 120 of 1998.

3.10.5 The principle of patrilocal residency is supported. Spouses and the children born to them would be obliged to live in the husband’s family home.[309] It would be

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303 Bekker JC “Commentary on the Impact of the Children’s Act on Selected Aspects of the Custody and Care of African Children in South Africa” 2008 ***Obiter*** 395 (hereafter “Bekker 2008 ***Obiter***”) at 396.

304 ***Madyibi v Nguva*** 1944 NAC (C&O) 36.

305 Biological parents do not necessarily have custody/care of their children. However, affiliation always affords the children security. Even if both biological parents pass away the child would not be an orphan in the western sense of the word.

306 Where parents live and work away from home, someone back home undertakes the role of foster parent. This person could also be a peer. There are also parentless children. Other family members then take over the role by necessity.

307 Bekker 2008 ***Obiter*** at 395 .

308 Ibid.

309 The question has been posed whether this is still the position in practice.

absurd to ignore this principle when deliberating about the care and contact of children.[310] However, economic considerations usually dictate who will actually bring up the child.

3.10.6 There is a mistaken belief that customary law favours men as custodians of children. This is not the whole truth. Although fathers may be the heads of family, mothers mostly are the *de facto* custodians. In terms of the customary law the father's right to the care and guardianship of his children was absolute. The court, as the upper guardian of all minors, has, however, modified customary law in this respect by emphasising that the best interests of the children are decisive.[311]

3.10.7 Moreover, in terms of the Recognition of Customary Marriages Act,[312] all customary marriages must be dissolved by a competent court. The court may make an order with regard to the custody or guardianship of any minor child of the marriage.[313] The Mediation in Certain Divorce Matters Act[314] and section 6 of the Divorce Act[315] are applicable to the dissolution of a customary marriage.[316] These laws equate the position of children born of customary marriages with those born of civil marriages.[317]

3.1.0.8 However, the court order or mediation report will be guided by the best interests of the child.[318] In determining the best interests of the child the court or mediator should take African cultural values and belief systems into account, for example the child's link with their ancestors.[319]

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310 Bekker JC & Van Zyl GJ "Custody of Black Children on Divorce" 2002 ***Obiter*** 116 (hereafter referred to as "Bekker 2002 ***Obiter***") at 124.

311 ***Hlophe v Mahlalela*** 1998 (1) SA 449 (T); Rautenbach C & Bekker JC ***Introduction to Legal Pluralism in South Africa*** 4ed Lexis Nexis 2014 at 112.

312 Recognition of Customary Marriages Act 120 of 1998.

313 Section 8 (4) (d).

314 Mediation in Certain Divorce Matters Act 24 of 1987.

315 Divorce Act 70 of 1979.

316 Section 8(3) of the Recognition of Customary Marriages Act 120 of 1998.

317 Rautenbach & Bekker at 112.

318 Bekker 2002 ***Obiter*** at 124.

319 Rautenbach & Bekker at 112.

b) Western mediation versus African mediation

3.10.9 Alternative dispute resolution may be described as a pluralistic system of dispute resolution, in which one of several processes may be selected as an expedient mechanism for resolving a particular type of dispute.[320]

3.10.10 Western mediation is a process with ancient roots – a process that has been re-engineered to suit the needs of highly industrialised urban societies and has discarded the social context that originally underscored it.[321] According to Faris,[322] Western mediation serves the needs of "self-existent, individual and autonomous societies" that are "equipped with the service of a complex commercial sector and court system". With court-annexed mediation (which seems to be rising in popularity and success), community mediators find their work institutionalised within the very processes for which those mediators are supposed to offer an alternative.[323]

3.10.11 Western mediation as it is currently practised in South Africa is a service profession, but has also been established as an academic discipline.[324] Mediators need to be accredited by a professional body, and mediation generally occurs in a formal setting. Usually the person who is the mediator has no prior relationship with the disputants. There is generally a mediation agreement that states the "ground rules" for the mediation process, and sets out the roles and responsibilities of the parties to the mediation. There are recognisable stages that occur during the mediation process. The objective of Western mediation is that consensus is reached and that this gives rise to a settlement agreement.[325]

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320 Faris JA "Alternative Dispute Resolution (ADR) and African Dispute Resolution (AfDR): Critical Comparisons" Paper presented at the Cardozo School of Law, New York on 27 February 2013 at 2.

321 Faris JA "From Alternative Dispute Resolution to African Dispute Resolution: Towards a New Vision" Paper presented at the 5th Caribbean Conference on Dispute Resolution Jamaica 28-30 April 2011 at 1 (hereafter "Faris Jamaica Paper") as referred to by Boniface AE "African-Style Mediation and Western-style Divorce and Family Mediation: Reflections for the South African Context" 2012 15 ***PER/PELJ*** 378 (hereafter "Boniface 2012 ***PER/PELJ***").

322 Faris Jamaica Paper at 1.

323 Crampton A "Addressing Questions of Culture and Power in the Globalisation of ADR: Lessons from African Influence on American Mediation" 2006 27 ***Hamline Journal of Public Law and Policy*** 229 (hereafter "Crampton") at 234.

324 Faris JA "Alternative Dispute Resolution (ADR) and African Dispute Resolution (AfDR): Critical Comparisons" Paper presented at the Cardozo School of Law, New York 27 February 2013 (hereafter "Faris Cardozo Paper") at 1.

325 Faris Jamaica Paper at 1.

3.10.12 Three mediator roles are generally found in Western-style divorce and family mediation:

- Firstly, there are individual mediators who do not have a prior relationship with the parties and help the parties to settle their disputes on grounds that are mutually acceptable to the disputing parties. This model of individual mediators is found most often in Western-style divorce and family mediation in South Africa.
- Secondly, authoritative mediators are persons who are in authority over the disputing parties, for example managers.
- Thirdly, there are social network mediators. These are mediators who have existing relationships with the parties, and are usually respected members of the community. They are not "neutral" but are seen as being fair. These mediators are concerned with maintaining long-term social relations and may even participate in the implementation of the agreement. Peer or social pressure may be used to enforce the agreement.[326]

3.10.13 Factors that could strongly influence the accessibility of mediation are whether the necessary infrastructure exists, the availability of mediators, language and cultural barriers, and the cost of mediators.[327]

3.10.14 In African mediation, conflicts are seen in their social context. They are not seen as isolated events; all relevant background information is covered during mediation. During mediation, not only the consequences for the parties are looked at but also the consequences for other people in the respective families. Family ties and community networks are respected, maintained, and strengthened. Africans' emphasis on relationships may be regarded as unique. The traditional objectives of African mediation are to soothe hurt feelings and to reach a compromise that can improve future relationships. The values that are upheld in African mediation are African humanistic values.[328]

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326 Moore C ***The Mediation Process: Practical Strategies for Resolving Conflict*** Jossey-Bass San Francisco 1996 at 43 as referred to in Boniface 2012 ***PER/PELJ*** on 381.

327 De La Harpe S "Mediation in Family Law: Access to Justice or Inferior Justice?" Paper presented at the SAAM Conference Johannesburg on 31 July 2014 (hereafter "de La Harpe") at 4.

328 Boniface 2012 ***PER/PELJ*** at 382.

3.10.15 The African model can only be fully understood within the context of Ubuntu or Botho, or any of the other names for this concept in various African languages. Ubuntu is generally understood as the African rationale for humaneness, and is central to the African ethical system. Personhood is expressed in the solidarity of reciprocal relationships with others, such as “a person is a person through other people”. The ultimate objective of mediation then is to restore social equilibrium.[329]

3.10.16 In family disputes, the assistance of an uncle or a respected person in the family or an elder in the community fulfils the role and function of a mediator.[330]

3.10.17 In brief, the Western approach assumes a confrontational model of dispute resolution, whereas the African harmony model presupposes social harmony, which needs to be restored when disrupted by conflict and dispute.[331]

c) AfDR and the Children’s Act

3.10.18 The principles of African group mediation have influenced South African legislation. For example, the Children's Act, 2005 contains some elements similar to AfDR. The Act provides for mediation as a method of dispute resolution, particularly with regard to disputes involving parental responsibilities and rights. It specifies that in any matter that concerns a child, an approach that is conducive to problem-solving and conciliation should be followed, and a confrontational approach should be avoided.[332] Various sections of the Children's Act provide for compulsory mediation.[333] If the mediation succeeds, the parties may have the parenting plan registered with the Family Advocate or made an order of court.[334]

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329 Faris Cardozo Paper at 3.

330 De la Harpe at 4. De la Harpe at 8 states that in so far as standards have to be complied with an interesting possibility exists in Australia namely accreditation as an “experienced qualified” mediation practitioner. They are candidates who have been assessed by an accreditation body as demonstrating a level of competence by reference to the competencies expressed in practice standards. An experienced qualified mediator must be resident in a linguistically and culturally diverse community for which specialised skills and knowledge are needed and/or from a rural or remote community where there is difficulty in attending a mediation course or attaining tertiary or similar qualifications.

331 Faris Cardozo Paper at 4.

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

333 Sections 21 and 33(2) and (5).

334 Section 34(1)(b) of the Children’s Act, 2005.

3.10.19 Before a children's court decides on a matter, the court may order a lay-forum hearing in an attempt to settle the matter. This may include mediation by a family advocate, social worker, social service professional, or other suitably qualified person; or a family group conference[335] or mediation at a lay-forum, including a traditional authority.[336] If a matter brought to the children's court is contested, the court may order that a pre-hearing conference be held with the parties in order to mediate between the parties, to settle the disputes between the parties, and to define the issues to be heard by the court.[337] The Children's Act further provides that a court may make use of intervention services, which include mediation.[338] The Children's Act also contains provisions that imply that mediation should take place.[339]

3.10.20 Bekker, however, states that the Children's Act has not really taken account of customary law and issues relating to custom and culture.[340]

d) Proposals

3.10.21 ADR comes to Africa with some "baggage" – its own historical narrative, power dimensions, and methods of process and considerations of policy. In effect, a dominant dispute resolution system is being imposed as an alternative to an existent and traditionally embedded system of dispute resolution. How does this affect the integrity of ADR? Surely globalisation should entail the recognition and integration of the plurality of knowledge systems?

3.10.22 Both ADR and AfDR have their strengths and weaknesses. This topic could be the starting point for the exchange and integration of knowledge in order to develop a globally relevant system of dispute resolution.[341] Best practice intervention tools will not

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335 Section 71 of the Children's Act, 2005.

336 Section 49 of the Children's Act, 2005.

337 Section 69 of the Children's Act, 2005.

338 Section 155(8) of the Children's Act, 2005.

339 Section 22(1) of the Children's Act, 2005.

340 See the discussion in Bekker ***Obiter*** 2008 395 and further on the definition of a child, social parentage, adoption, the acquisition of parental rights and responsibilities by unmarried fathers, child participation and parenting plans.

341 Faris Cardozo Paper at 5.

take root in local contexts unless they are either created from within those social contexts, or are modified or even partially dismantled by those who use them.[342]

3.10.23 Various proposals have been made for the improvement of Western-style mediation for divorce and family disputes by incorporating AfDR (for example, by also extending and clarifying the provisions of the Children's Act in this regard):[343]

a) All members of the community should be entitled to participate in the mediation circles, which should not be "closed".[344]

b) The process should be non-adversarial, with the emphasis being on a value-based, restorative outcome which benefits the whole community.[345] The objective of negotiation in mediation should be to promote the common good.[346]

c) The extended family should be included in the mediation process. For example, two "elders" from either side of the family could fulfil the role of investigators and go-betweens, if this accords with the beliefs of the parties in mediation.[347]

d) Mediation should be multi-generational where possible; story-telling must take place; mediation must allow for the venting of anger and the release of emotions; emotional and spiritual spheres may be integral to the mediation; and parties must be seen as consisting of body, mind and soul (spirit).[348]

e) Social contexts must be part of a broader mediation process, which may include visits to individuals' or families' homes. Hence mediators may become more personally involved with the parties than would normally be accepted in Western-style mediation. Within a holistic system, disputes

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342 Crampton at 241.

343 Velthuizen A Institute for Dispute Resolution in Africa (IDRA) at UNISA states that IDRA believes indigenous knowledge systems can be creatively and innovatively applied to current conflicts and challenges, as well as in an attempt to devise African solutions for African problems – especially at a community level. (Sunday Independent).

344 Boniface 2012 ***PER/PELJ*** at 391.

345 Ibid.

346 Faris JA "African Dispute Resolution: Reclaiming the Commons for a Culture of Harmony" Paper presented at the Lawyers as Peacemakers and Healers: Cutting Edge Law Conference Phoenix School of Law Arizona 22-24 February 2013 (hereafter "Faris Phoenix Paper") at 10.

347 Boniface 2012 ***PER/PELJ*** at 392.

348 Brigg M "Mediation, Power and Cultural Difference" 2003 ***CRQ*** 287 at 302 as referred to by Boniface 2012 ***PER/PELJ*** at 392.

are not seen as separate from the socio-economic conditions of the disputants and their extended communities.[349]

f) Elements of African group-style mediation are currently being applied in restorative justice in South Africa, particularly in the form of family group conferencing for juvenile offenders. This principle of African group-style mediation could also be used within the spheres of mediation provided for by the Children's Act. This can be done by incorporating elements of African group mediation in mediation sessions mandated by the Children's Act. These elements should also be successfully included in private divorce and family mediations that take place in South Africa, as well as in court-mandated mediation.

g) Mediation must also allow for the participation of children, in order to comply with international and South African legislation.

h) A client-centred approach requires the deepest respect for the client's culture and language.[350]

Questions:

83. Should Western-style family mediation be improved by incorporating African dispute resolution concepts?
84. If so, how should this be done?

3.11 Court-annexed mediation

a) Existing initiatives

(i) Amendment of the Magistrates' Rules

3.11.1 The Rules Board for the Courts of Law published an amendment of the Magistrates' Courts Rules on 18 March 2014, to provide for the procedure for the voluntary submission of civil disputes to mediation in selected magistrates' courts.[351] The Rules apply to the voluntary submission by parties to mediation of disputes prior to the commencement of litigation; and disputes in litigation which has already

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349 Faris Phoenix Paper at 9.

350 Ibid.

351 Department of Justice and Constitutional Development ***Rules Board for Courts of Law Act, 1985 (Act No 107 of 1985): Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa*** R 183 Government Gazette 37448 on 18 March 2014.

commenced as contemplated in Rules 78 and 79. Court-annexed mediation in terms of the Rules became available as part of a pilot project on 1 December 2014.

3.11.2 Rule 70 states the objective of the Rules is, inter alia, to give effect to section 34 of the Constitution.[352] This section guarantees everyone the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum.[353] It is also stated in the preamble that the Rules are made under sections 6(1) and 6(2)[354] of the Rules Board for Courts of Law Act, 1985[355] read with sections 9(6)(a) and 9(6)(b)[356] of the Jurisdiction of Regional Courts Amendment Act, 2008.[357]

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352 Section 34 of the Constitution provides as follows:
Access to courts
34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

353 See, however, ***Lufuno Mphaphuli & Associates (Pty) Ltd vs Andrews*** [2009] ZACC 6***;*** 2009 (4) SA 529 (CC). Although mediation is regulated by law and the fairness principle in the Constitution, section 34 cannot be invoked since the mediation is not held in public, the dispute is not always resolved by the application of the law (mediators are not necessarily lawyers), the State does not provide the forum (the parties choose their own mediators and pay them), and the parties may decide to choose a mediator even though he/she may not be completely independent or impartial, if they trust him/her.

354 It has been argued that the general provisions in section 6(1)(t) of the Rules Board for Courts of Law Act do not purport to give the Board powers to make rules to create an alternative dispute resolution mechanism outside the court system, since such an action would go well beyond the scope of the enabling statute. See Van Loggerenberg AJ in ***Computer Brilliance CC v Swanepoel*** 2005 (4) SA 433 (T) at 442C who stated as follows: "[36] In my view, s 6(1) of the Rules Board for Courts of Law Act 107 of 1985 does not give the Rules Board and the Minister of Justice any power to make any incursion into the common law. The Rules framed by the Rules Board for Courts of Law constitute subordinate legislation."

355 Rules Board for Courts of Law Act 107 of 1985.

356 Section 9 (6) (a),(b) and (c) of the Jurisdiction of Regional Courts Amendment Act, 2008, contains transitional provisions providing that the Rules Board must, within six months after the commencement of the Act (which commenced on 9 August 2010), review and amend the existing rules of the magistrates' courts in order to ensure that the regional divisions can exercise their jurisdiction effectively and efficiently. The rules must be submitted to Parliament. These rules are in place. The current amendments are, however, not covered time-wise and the rules have also not been submitted to Parliament as prescribed in section 9(6)(c). The purpose of the rules envisaged in the 2008 Act is to ensure that courts of regional divisions can exercise their jurisdiction effectively and efficiently and that access to the courts (as opposed to "access to justice" as stated in the Mediation Rules) must be enhanced. Section 9(6)(a) and 9(6)(b) of the Jurisdiction of Regional Courts Amendment Act, 2008 can, therefore, not provide the legal basis for the Mediation Rules.

357 Jurisdiction of Regional Courts Amendment Act 31 of 2008.

3.11.3 The Rules encompass the following points: definitions; the application of the proposed rules; referral to mediation by the courts and by litigants; related procedures; the role, functions and duties of a dispute resolution officer and a mediator; the representation of parties at mediation proceedings; the suspension of time limits pending mediation; settlement agreements; partially unsettled disputes; and fees payable to mediators.

3.11.4 Notices have also been published in the *Gazette* relating to fees payable to mediators, and the qualifications or standards and levels of mediators,[358] as well as the implementation sites of the pilot project.[359] The Minister has determined the qualifications and standards of fitness of mediators to conduct mediations referred to in the draft Rules.

3.11.5 The DOJCD has issued an invitation to persons who meet the requirements to submit applications to be listed in the panel of mediators. As of 30 January 2015, approximately 200 mediators had been accredited for enlistment in the panel as required by the Mediation Rules.[360] Training by DOJCD of mediation clerks has also taken place.[361]

3.11.6 The Minister of DOJCS has appointed a Mediation Advisory Committee to oversee the implementation of the Mediation Rules. The DOJCD's EXCO has also directed that the State Attorney in each province must oversee the operationalisation of the court-annexed mediation project. Claims against the State will be the focal point during the pilot phase.

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358 Department of Justice and Constitutional Development ***Rules Board for Courts of Law Act, 1985 (Act No 107 of 1985): Fees Payable to Mediators, Qualifications, Standards and Levels of Mediators*** R854 Government Gazette 38163 on 31 October 2014. The fees payable for time spent in mediation to level 1 and 2 mediators are R225,00 per half hour/R4500 per day and R300,00 per half hour/ R6 000,00 per day, respectively. Preparation of a report is R450 per hour/maximum R1350,00 and R600,00/maximum R1800,00 respectively.

359 Department of Justice and Constitutional Development ***Rules Board for Courts of Law Act, 1985 (Act No 107 of 1985): Districts and Subdistricts for Implementation of Rules on Mediation*** R855 Government Gazette 38163 on 31 October 2014. The Rules were implemented at twelve magistrates' courts in the Gauteng (Johannesburg, Soweto, Randburg, Krugersdorp, Kagiso, Pretoria North, Soshanguve, Palmridge and Sebokeng) and North West Provinces (Mmabatho, Temba and Potchefstroom).

360 See list of accredited mediators at http://djini/C15/Mediation/Lists/Accredited%20Mediators/AllItems.aspx accessed on 3/18/2015.

361 See the initiative of Patrick Mkize on 30 October 2015 to form a court-annexed mediation association.

3.11.7 Mediation adopts a flexible approach compared with the rigid and tedious legal processes, which typically require the services of a lawyer who must be present before court. The need is recognised for formal dispute resolution within the courts to be supplemented by ADR mechanisms, in the interest of expeditious and cost-effective resolution of disputes. The new mediation provisions have therefore generally been welcomed by the mediation fraternity.

(ii) Short Process Courts and Mediation in Certain Civil Cases Act, 1991

3.11.8 The Short Process Courts and Mediation in Certain Civil Cases Act, 1991,[362] commenced on 17 July 1992. The Rules for short process courts and mediation[363] were published by the Minister of Justice in terms of section 13 of this Act on 31 July 1992 and came into operation on 1 September 1992.[364] The Rules contain detailed

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362 Short Process Courts and Mediation in Certain Civil Cases Act 103 of1991. The developments that led up to this Act are set out in the DOJCD Annual Report 1July 1991-30 June 1992 RP 40/1993 in par 1.66-1.69 at 17, as follows: During 1987 the Minister of Justice convened a conference at Jan Smuts Airport (at the time) to examine an alternative method of dispute resolution. The conference was attended by various prominent lawyers and many inputs were made on the subject. A draft Bill, which was drafted by the Department, served as a working document for the conference. After the conference liaison was maintained on a continuous basis with the organised legal professions in order to promote the aims of the project. The joint effort eventually resulted in the promulgation of the Act.

363 Rules for Short Process Courts and Mediation Proceedings, 1992, R2196 published in the Government Gazette No 14188 on 31 July 1992.

364 **13. Power of Minister to make rules**
(1) The Minister may make rules regulating the following matters in respect of courts and mediation proceedings:
(a) The practice and procedure in respect of an interview with and investigation by a mediator contemplated in section 3;
(b) the practice and procedure of the court, including the procedure when the proceedings are taken under review;
(c) fees and costs;
(d) the payment by the State of remuneration and allowances to a mediator and an adjudicator for services rendered, the method of calculation of such remuneration and allowances, and the recovery or partial recovery by the State of such remuneration and allowances from a party or parties in mediation proceedings or a case in respect of which the services of a mediator or an adjudicator have been so rendered;
(e) the duties and powers of mediators and adjudicators;
(f) the duties and powers of officers of the court;
(g) the establishment, functioning, duties and powers of one or more boards to advise the Minister regarding the functioning of courts and mediation proceedings;
(h) any matter which may or shall be prescribed in terms of the provisions of this Act;
(i) any other matter which he may deem necessary or expedient to prescribe for carrying out the provisions of this Act or the attainment of the objects thereof.
(2) Different rules may be made under subsection (1) in respect of different classes of cases.
(3) No rule relating to State revenue or State expenditure shall be made under subsection (1) except with the concurrence of the Minister of Finance.
(4) No rule and no amendment or repeal of a rule shall come into operation unless it has been published in the *Gazette* at least 30 days before the day upon which it is declared to come into operation.

instructions in respect of the practices and procedures for mediation proceedings, fees and costs, and the remuneration of adjudicators and mediators, as set out in 28 Rules.

3.11.9 The Act makes provision for the establishment of an alternative adjudication forum, namely a short process court, in respect of civil cases which would otherwise be adjudicated in the magistrates' court.[365] Although a short process court is deemed to be a magistrates' court under the Act, the procedure in such a court differs substantially from that in a normal magistrates' court as it focuses on the informal and expeditious adjudication of disputes. For example, there is no legal process, except the summons. The DOJCD indicated at the time that adjudicators would be appointed from the ranks of retired magistrates, attorneys, and advocates to preside in the short process court.[366]

3.11.10 In addition to establishing short process courts, the Act provides for a mediation procedure to encourage and assist the parties to reach a settlement out of court, with the intervention of a mediator. Besides the conciliatory function which the mediator will perform, the proceedings before the mediator will also be directed, if a settlement cannot be reached, and by way of agreement between the parties, at providing advice to the parties as to the necessary steps the parties should follow to expedite the ensuing trial. Mediators are appointed on the same basis as adjudicators, and a person will be able to hold both positions.

3.11.11 Another characteristic of the proceedings before both the adjudicator and a mediator is that juristic persons may participate in the proceedings, and the parties are entitled to legal representation. The proceedings in all cases only apply if the parties have agreed to submit their dispute to resolution. The short process court may waive the application of any rules of the law of evidence, and order a deviation for the normal procedure for adducing evidence.

3.11.12 In contrast to the small claims courts, remuneration is paid to mediators and adjudicators from the Treasury in terms of the Rules. However, half of this payment, or at least R50, may be recovered from a party or parties. The proceedings may take place after normal business hours.[367]

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365 Sections 4-7 of the Short Process and Mediation in Certain Civil Cases Act 103 of 1991.

366 DOJCD ***Annual Report*** 1 July 1990 – 30 June 1991 RP 42/1992 par 1.20 at 5.

367 Rules 22-25.

3.11.13 Short process courts were established at Pretoria and Pretoria North with effect from 1 September 1992. The provisions relating to mediation proceedings came into effect at the same time.[368] In 1994, the DOJCD reported that the institution of further pilot projects would receive attention after the promotion of further legislative amendments aimed at increasing the utilisation of these courts.[369] Chapter 4 of this paper presents a discussion of the Magistrates' Courts Amendment Act, 1993,[370] which makes provision for, inter alia, the expansion of the court structures of lower courts through the establishment of family and civil courts, to create a division that would improve the accessibility of justice at reduced costs. This Act has not yet been implemented.

3.11.14 Note should also be taken of the Small Claims Courts Act, 1984,[371] which created the opportunity for disputes to be adjudicated in a speedy and effective manner where the cost of litigation would otherwise make litigation undesirable.

(iii) SALRC Projects: ADR

3.11.15 The South African Law Reform Commission is in the process of developing legislation to deal with ADR.[372]

b) Problems identified

(i) Voluntary versus mandatory court-annexed mediation

3.11.16 The current Mediation Rules for Magistrates Courts favour voluntary mediation.[373] Some commentators have argued that this results in litigation as usual in Magistrates Courts, unless there is judicial activism to encourage parties to mediate their disputes.[374]

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368 DOJCD ***Annual Report*** 1 July 1991 – 30 June 1992 RP 40/1993 in par 1.69 at 17.

369 DOJCD ***Annual Report*** 1 July 1992 -30 June 1993 RP 137/1994 in par 1.108 at 31.

370 Magistrates' Courts Amendment Act 120 of 1993.

371 Small Claims Courts Act 61 of 1984.

372 SALRC Project 94 ***Alternative Dispute Resolution*** as well as the current investigation, SALRC Project 100 ***Contact and care of children (incorporating family dispute resolution).***

373 Rules 72, 74, 75 etc.

374 Joubert J "Mediation Rules Finally Signed by Minister of Justice but Require Judicial Activism" ***Legal Brief Today*** 28 January 2014.

3.11.17 There are numerous obstacles to the implementation of court-annexed mediation. These include –

a) lack of awareness of the mediation process by the disputing participants, and by family law practitioners and their colleagues;
b) lack of knowledge of the process by Presiding Officers;
c) lack of information as to what constitutes mediation;
d) attorneys being fearful of the process, because if a matter can be resolved in mediation it could mean that the attorney is deprived of some income and possibly a lucrative day in court.

3.11.18 It has been proposed that specific provision should be made for mediation to be court mandated, prior to parties being entitled to apply for a trial date.[375] (See the discussion on mandatory mediation versus voluntary mediation earlier in this paper.)

3.11.19 Although the current Rules for the Magistrates' Court have no mechanism to ensure the constructive engagement by a party invited to mediation, the mandate of the Civil Justice Review Project indicated mandatory court-annexed mediation.[376] The constitutionality of mandatory mediation will, however, have to be determined in light of current case law in this regard.[377]

3.11.20 At present, the flat rejection or silence in the face of an invitation to mediate may therefore not have consequences for a party who fails to attend mediation.[378]

(ii) Costs

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375 Schneider presentation at 10.

376 Cabinet approved the Terms of Reference for the Civil Justice Review Project on 5 May 2010, which includes the introduction of an alternative dispute resolution mechanism, being a mandatory court-based mediation.

377 ***Lufuno Mphaphuli & Associates (Pty) Ltd vs Andrews*** [2009] ZACC 6***;*** 2009 (4) SA 529 (CC).

378 See however ***MB v NB*** 2010 (3) SA 220 (GSJ); Rycroft A "What Should the Consequences be of an Unreasonable Refusal to Participate in ADR? 2014 ***SALJ*** 778 at 786 states that where public policy unambiguously requires parties to engage in ADR and practical issues are at stake, such as use of the court's resources in lengthy litigation, courts should take into account a refusal to participate in ADR as a factor when awarding costs.

3.11.21 Questions regarding government responsibility for the costs involved in mandatory mediation need to be considered.

3.11.22 It is interesting to note that the Short Process Act makes provision that the State would be responsible for half of the costs incurred during a mediation or short process procedure, even though this was a voluntary process.[379]

3.11.23 It has been argued that mediation cannot be made mandatory if parties have to fund it themselves. In addition, most other countries make provision for State funding of some sort.

3.11.24 See the discussion on State versus public funding above.

Questions:

85. Should mediation in terms of the Mediation Rules be mandatory?
86. Should the State bear some or all of the responsibility for the funding of mediation? If so, how should the funding work?
87. What should the consequences be of an unreasonable refusal to participate in ADR?
88. Should the Short Process Courts and Mediation Act be implemented or revoked?

3.12 Collaborative dispute resolution

3.12.1 Divorce is often a client's first encounter with the judicial system. The encounter comes at a time when most people are experiencing intense stress, which impairs their ability to cope with the confusing and frightening experience of litigation. They may bring unrealistic expectations – both positive and negative – to the process, based on gossip and the media.[380]

3.12.2 Collaborative Divorce is arguably regarded as the most advanced dispute resolution process currently available anywhere in the world. It is a preferred choice for parties who wish to avoid the costs and stress of litigation, who value creative options unavailable to judges, and who prioritise being able to provide high-quality parenting for their children during and after the divorce.

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379 See discussion above.

380 Wright JK "Connect with J. Kim Wright on Linked In" accessed at www.linkedin.com/in/jkimwright/ or www.JKimWright.com. on 24 May 2013.

3.12.3 Collaborative Divorce offers spouses the support, protection, and guidance of their own lawyers, without going to court. It is not about "fairness", since what is "fair" for one person may not be "fair" to the other, but about "equality". Parties should walk away feeling equal. It is also not about the differing "positions" of the parties but rather about their interests.[381]

3.12.4 In terms of Collaborative Divorce, both spouses and their attorneys pledge in binding written agreements (the Collaborative Practice Participation Agreement) not to litigate during the pendency of the process, but to work together constructively and respectfully to settle the case by agreement. The agreement stipulates that attorneys are engaged for the sole purpose of negotiating the divorce settlement; if a settlement cannot be reached, the attorneys agree to step out of the picture and the parties may consult other attorneys if they need to litigate. This is known as the "collaborative commitment". The collaborative process is client-centred, relatively predictable, and allows the parties to contain their costs.[382]

3.12.5 Multidisciplinary teams are assembled to assist clients in resolving the parenting, financial, and personal issues that inform the circumstances of their divorce.[383] Parties can engage the services of specially-trained neutral financial analysts, child specialists, and psychologically-trained coaches to work with them and their attorneys as a team. This approach allows for deeper and more durable resolution than was possible in family law matters before the advent of Collaborative Divorce.

3.12.6 Legal counsel, financial professionals, mental health practitioners, divorce coaches, and child specialists all work together as a team, rather than on behalf of one spouse or the other.

3.12.7 Collaborative Divorce is not the same as mediation. Certain circumstances are ideal for mediation, whereas in others, spouses may experience intense, overwhelming emotions that may impair their ability to engage in long-term thinking and self-interested problem solving. Clients may delay, obstruct, become angry and uncivil

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381 Kopping-Pavars N "Collaborative Family Law" Paper presented at SAAM Mediation Conference Johannesburg 30-31 July 2014.

382 For more information about the international Collaborative Divorce movement, see http://collaborativepractice.com/. Collaborative Review is the official publication of International Academy of Collaborative Professionals (IACP).

383 Mendelow invitation 23 July 2014.

toward one another, seek revenge, and generally behave in ways that make resolution difficult and the role of the mediator impossible. In these cases, allowing the parties to have their own lawyers can be more effective.[384] The collaborative law movement draws on mediation theory and practice, but adds its own unique feature – lawyers who are focussed on reaching settlement because they are disqualified from handling litigation if negotiations fail.[385]

3.12.8 The benefits of collaborative dispute resolution are stated as follows by the UCLA Task Force:[386]

a) Collaborative dispute resolution is highly successful in resolving most cases. 87% of collaborative divorce cases settle in the collaborative process and an additional 3% result in reconciliation.

b) In family law cases, out of court settlements have been shown to have significant benefits to families:

(i) conflict is lessened;

(ii) children benefit by reduced conflict;

(iii) costs are probably reduced;

(iv) co-parenting relationships are supported.

c) Children are often given a voice in the process using a safe, neutral venue. Research shows that parenting plans where children have had a voice are more durable and developmentally responsive to the children.

d) Parties are more vested in the outcome and satisfied with the process when they are part of the dispute resolution process, as in the case of collaborative divorce, than if the outcome were imposed upon them by a third party decision-maker.

e) Families in collaborative cases gain experience in successfully resolving conflict which aids them in resolving conflict post-divorce. Where they

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384 Schepard A "Editorial Notes – Special Issue: Collaborative Practice" 2011 49 ***Family Court Review*** 207 (hereafter "Schepard") at 208.

385 For more information about the international Collaborative Divorce movement, see http://collaborativepractice.com/. Collaborative Review is the official publication of International Academy of Collaborative Professionals (IACP).

386 IACP UCLA Task Force ***UCLA - Proposed Talking Points for Communications to Those Interested in the UCLA*** 9 September 2009 accessed at http://uniformlaws.org/Acts.aspx. on 15 September.

cannot resolve post-divorce conflict, families have a network of professionals from their collaborative case to help them deal with the dispute (parties are probably less likely to go back to court if they participate in a collaborative case as opposed to litigation).

f) Collaborative dispute resolution reduces court dockets and the burden on courts, benefits society and is good public policy.

3.12.9 According to Webb and Ousky, additional benefits of the collaborative model are as follows:[387]

a) Each party is represented by an attorney of his/her choice.
b) Lawyers are focussed in the settlement mode without the "threat of going to court" lurking around the corner.
c) The continuity between settlement and processing of the final dissolution. In mediation lawyers do not always like the mediated settlement.
d) Lawyers are free to use their real lawyer skills ie analysis, problem solving, creating alternatives, tax and estate planning etc.
e) A four-way conference provides high potential for clients to provide their inputs.

3.12.10 The primary global collaborative organisation is the International Academy of Collaborative Professionals (IACP), which was founded in the 1990s in the USA.

3.12.11 Collaborative Divorce has been practised in North America, the UK, and Australia for roughly 15 years.[388]

3.12.12 In the USA, the Uniform Collaborative Rules/Act (UCLR/A) was adopted in 2009 (and amended in 2010) by the Uniform Law Commission, and thereby became available to individual American states to enact as law. It standardises the most important features of collaborative law practice while ensuring ethical safeguards for

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387 Webb S & Ousky R "History and Development of Collaborative Practice" 2011 49 ***Family Court Review*** 213 at 214.

388 Collaborative practices have also spread to countries such as New Zealand, Germany, Austria, Switserland and the Netherlands. See De Jong Chapter 13 at 625.

the process. It enjoys broad support and has so far been enacted in eleven states[389] and introduced in five more.[390]

3.12.13 The UCLR/A, inter alia, creates minimum standards for a collaborative law participation agreement; creates a privilege for communications made during the process; provides that the filing of a notice of a collaborative process operates as a stay of any pending legal proceedings; mandates full disclosure during the collaborative process through use of informal discovery; requires the prospective collaborative attorney to obtain informed consent from the prospective client, prior to entering into a participation agreement; and requires the collaborative law attorney to "screen" for domestic violence, prior to beginning as well as during the collaborative process.

3.12.14 In the UK, Lord Kerr of Tonaghmore became the first member of the Supreme Court to publicly endorse collaborative law, in October 2009 in an address to London family lawyers.[391]

3.12.15 A significant development in the collaborative movement was when it shifted from a lawyer-only method to an interdisciplinary model. The concept of interdisciplinary collaborative practice implies a partnership between mental health professionals and collaborative attorneys.[392]

3.12.16 The challenges faced by the collaborative law movement are as follows:

a) Dealing with domestic violence;

b) Few couples actually understand the process and/or are even prepared to give it a try. Parties want a lawyer to accompany them on the journey - otherwise why take care to choose the right lawyer in the first place if the

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389 Alabama, District of Columbia, Hawaii, Maryland, Michigan, Nevada, New Jersey, Ohio, Texas, Utah and Washington.

390 Florida, Illinois, Massachusetts, Oklahoma, and South Carolina.

391 The Times – Senior Judge says 'collaborative' approach can be extended (http://business.timesonline.co.uk/tol/business/law/article6866885.ece.)

392 Webb S & Ousky R "History and Development of Collaborative Practice" 2011 49 ***Family Court Review*** 213 at 216.

lawyer might become lost in a collaborative process?;[393] and

c) To date, collaboration has been accessible mostly to high- and upper-middle-income families that have two incomes. Diversifying its models of service delivery to accommodate the needs of people who cannot pay for many professionals should be investigated.[394] A possible solution to ensure that low-income families would also have access to this form of dispute resolution is the unbundling of legal service delivery by offering components "a la carte" – that is, tailored to each client's needs.[395]

Question:

89. Should South Africa make legislative provision for collaborative dispute resolution? If so, how?

3.13 Facilitation (private case management)

a) Definition and purpose

3.13.1 A facilitator is a neutral third party who has decision-making authority, and who intervenes to help the parties reach a common decision or goal. The impartial facilitator guides the process, manages conflict, identifies and solves problems, and makes decisions. More specifically, the facilitator assists parents in implementing their parenting plan by helping to resolve their disputes in a timely manner, by educating parents about children's needs, and by making decisions within the scope of the court order. In the event of the parties being unable to reach agreement with the assistance of the facilitator, the facilitator is entitled to issue a directive in respect of such issue, which shall be binding upon the parties until a court of competent jurisdiction orders differently.[396]

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393 Stowe M "Family Law Arbitration: A New Dawn for ADR?" accessed at http://www.marilynstowe.co.uk/2011/11/30/family-law-arbitration-a-new-dawn-for-alternative-disputeresolution/ on 21 August 2014.

394 Schepard at 208.

395 Banks L, Bigsby L, Conroyd M, First C, Griffen C, Grissom B, Lancaster B, Millar D, Perry A, Scudder K & Shushan J "Hunter-Gatherer Collaborative Practice" " 2011 49 ***Family Court Review*** 251.

396 Schneider presentation at 10.

3.13.2 Facilitation differs from mediation in many respects. Mediation does not involve any decision-making by the mediator, whereas facilitation may involve limited decision-making by the facilitator. Mediation is generally confidential, whereas facilitation is not. Facilitation involves much more intensive case management than does mediation.[397]

3.13.3 “Facilitation” is the term used most often in the Western Cape, whereas it is sometimes referred to as “case management” in Gauteng. Prof Leentjie de Jong[398] has proposed that both these terms should be replaced by the term “parent coordination”, a term used in the USA and Canada.[399] In this section of the issue paper, the terms “facilitation” and “case management” are used interchangeably.

3.13.4 Mediation seems to be ineffective for the most chronically conflicted co-parents.[400] Such parties are unwilling to compromise and are inclined to triangulate their children into their conflict.[401] It may therefore be best to move highly conflicted co-parents into “parallel co-parenting”, which is characterised by low engagement between the parents.[402] The realistic goal of the facilitation process is therefore not to resolve the underlying parental psychopathology, but to manage intense conflict.[403] The primary purpose of facilitation is therefore to reduce the negative effects of divorce and family separation on children, and to protect and sustain safe, healthy, and meaningful relationships between each parent and his or her child or children.[404]

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397 De Jong M “Suggested Safeguards and Limitations for Effective and Permissible Parenting Coordination (Facilitation or Case management) in South Africa” 2015 18 ***PER***/***PELJ*** 150 Hereafter “De Jong 2015 ***PER/PELJ*** “) at 163 fn 92 with references therein.

398 De Jong ***PER*** 2015 at 164.

399 See, however, the discussion and recommendations in this regard, below.

400 De Jong 2015 ***PER/PELJ*** at 167 defines parties as “high-conflict" where they have demonstrated "… their longer-term inability or unwillingness to make parenting decisions on their own, to comply with parenting agreements and orders, to reduce their child-related conflicts, and to protect their children from the impact of that conflict", or "… a pattern of ongoing litigation, anger and distrust, verbal abuse, physical aggression or threats of physical aggression, difficulty in communicating about and cooperating in the care of their children …".

401 De Jong 2015 ***PER/PELJ*** at 154 with reference to Belcher-Timme *et al* 2013 ***Family Court Review*** 651; Fieldstone *et al* 2012 ***Family Court Review*** 441; Fieldstone *et al* 2011 ***Family Court Review*** 808.

402 De Jong 2015 ***PER/ PELJ*** at 155 with reference to Sullivan 2013 ***Family Court Review*** 59.

403 De Jong 2015 ***PER/PELJ*** at 156 with reference to Sullivan 2013 ***Family Court Review*** 59.

404 De Jong 2015 ***PER/PELJ*** at 188.

b) Legal nature of facilitation

(i) Does facilitation amount to arbitration?

3.13.5 The question has been posed whether the facilitation process itself is contrary to Section 2 of the Arbitration Act of 1965.[405] The question arises because decision-making by the facilitator relates to a matter incidental to a matrimonial cause.

3.13.6 FAMAC argues[406] that facilitators, as understood in these decision-making orders, act as experts and not as arbitrators. An individual appointed as an expert is not subject to the Arbitration Act, and the nature of the appointment is such that the facilitator does not act in a quasi-judicial capacity. Reasons provided for this argument are that –

a) the facilitator is not required to afford the parties a hearing before issuing the directive – his or her directive is based on his or her own experience and expertise, research, discussions with fellow-professionals, meetings with all parties concerned and the assistance of a co-facilitator if there is one;
b) contrary to arbitration, the directive is not final and binding in the same sense that an arbitration award is – the directive is binding on the parties until set aside by a court.

3.13.7 It should, however, be noted that –

a) Paragraph 1.5 of the FAMAC model clause[407] is important when considering the underlying principles of the facilitation concept. It states that the

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405 Section 2 (a) of the **Arbitration Act** 42 of 1965 reads as follows:

> **2. Matters not subject to arbitration**
> A reference to arbitration shall not be permissible in respect of –
> (c) any matrimonial cause or any matter incidental to any such cause; or
> (d) any matter relating to status.

406 O'Leary JA "A Critical Reflection on Mediation and Facilitation Practice" Paper presented at the Miller du Toit Cloete Family Law Conference Cape Town May 2009.

407 The FAMAC model clause reads as follows:

> 1.5 The facilitator shall, when required to issue directives, do so based on his/her professional opinion and shall not act in a quasi-judicial capacity nor shall he/she act as an arbitrator. The facilitator is not appointed as psychotherapist, counsellor or legal representative for the children or either of the parties. The parties record that they are aware of their right to consult appropriate professionals in these fields as and when necessary.

facilitator is not appointed as psychotherapist, counsellor or legal representative for the children or either of the parties. The parties have the right to consult appropriate people as and when necessary. The paragraph makes it clear that when the facilitator has to issue a directive, he or she does so based on his or her professional opinion and shall not act in a quasi-judicial capacity nor shall he or she act as an arbitrator. It is, however, not clear what "profession" it is that would inform the "professional opinion" of the "expert" referred to above.

b) In some instances, facilitation is explained as partly mediation, where decision-making is introduced only where mediation has failed.

3.13.8 Nonetheless, it is correct to distinguish "arbitration" from "facilitation" based on the finality of the award.

(ii) Is facilitation authorised in terms of current South African law?

3.13.9 Even if it can be argued that facilitation is not unlawful due to it being a form of arbitration, the question can still be posed whether it is authorised in terms of current South African law.

(aa) No specific provision for facilitation in legislation

3.13.10 The notion of a "facilitator" or "case manager" derives from the practise of the courts,[408] and is not a term used in the Act.[409] The question that can be posed is whether provision needs to be made in legislation for this form of ADR.

(bb) Indirect opportunities in legislation for facilitation

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408 As part of her PhD studies Ms Astrid Martalas compared court files in the Western Cape High Court during the period 2008 to 2013 and found that facilitation as an ADR mechanism has grown in the Western Cape from around 35% of all divorces involving minor children issued in the Western Cape High Court in 2008 to between 68 and 70% in 2012 and 2013.

409 ***H v H*** (GSJ)(unreported case no 2012/06274), 12 September 2012 case referred to above at par [7].

3.13.11 The question is whether indirect opportunities exist in the Constitution and the Children's Act which may provide a basis for facilitation. Different views have been noted in this regard, as follows:

- It has been argued[410] that the inherent authority of the High Court as upper guardian of all children to ensure the best interests of children, read with section 28(2) of the Constitution and section 9 of the Children's Act (both of which oblige courts to apply the standard that the child's best interest is of paramount importance) could sustain the concept of facilitation.[411] Section 38 of the Constitution has also been mentioned in this regard, as it addresses the need for a court to craft a remedy for every right the Constitution confers.

- In an opposing view in a Gauteng South judgment (***H v H***),[412] the idea that a "case manager" may find its inspiration in section 33(5) of the Children's Act was investigated. Section 33(5) provides for the obligation on parties preparing a parenting plan to seek the assistance of a family advocate, social worker, or psychologist; or alternatively, to engage in mediation through a social worker or other suitably qualified person.[413] In ***H v H***, however, it was found that the scope of intervention in section 33(5) is to render assistance to the parents, not to make decisions for them.[414] In general the court stated that it does not have the jurisdictional competence to appoint a third party to make decisions about parenting for a pair of parents who are holders of parental responsibilities and rights in terms of sections 30 and 31 of the Children's Act 38 of 2005.[415] The

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410 De Jong 2015 ***PER/PELJ*** at 162.

411 The best interests of the child could be determined with reference to section 2(d), section 6(2)(a), section 6(4)(a) and section 7 (1)(n). It should, however, be noted that section 7(1)(n) was considered in a Gauteng South case in this regard, but rejected.

412 Judge Sutherland in ***H v H***, par [7].

413 Section 33(5) of the Children's Act reads as follows:

(1)-(4)…….
(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.

414 ***H v H*** at par [8].

415 ***H v H*** at par [13] and [6]. In this case a case manager (facilitator) was previously appointed by the divorce court, with the consent of both parties, to assist in concluding a parenting plan. Despite the case manager's intervention, the parties did not conclude a parenting plan and a clash of opinion on an appropriate nursery school for the child gave rise to the father's application.

appointment of a decision-maker to break deadlocks would be an impermissible delegation of the court's powers.[416]

- It has also been argued[417] that section 23(1) of the Children's Act,[418] read with subsection (b), provides for a non-parent to be clothed with the right to take "care" of the child and section 1 defines "care" very widely to include the decisions a "case manager" may be called on to make. Section 23(2) read with sub-section (e) gives the court very wide powers to consider the suitability of the appointment of a "case manager" and the desirability of such an appointment. Section 23(4), however, provides that the appointment of the so-called third parent does not affect the parental responsibilities and rights of a parent invested with such rights. However, a case manager's appointment does affect these rights. Section 30(3) and (4) of the Children's Act[419] provide that a co-

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416 Section 165 (1) of the Constitution provides that judicial authority vests in the courts.

417 Goldstein E "Facilitation – Did Hummel v Hummel do Children Any Favours" Clarks Attorneys 1st Annual Johannesburg Family Law Conference 2-3 October 2014 (hereafter "Goldstein").

418 Section 23 of the Children's Act reads as follows:
Assignment of contact and care to interested person by order of court
23. (1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary-
(a) contact with the child; or
(b) care of the child.
(2) When considering an application contemplated in subsection (l), the court must take into account-
(a) the best interests of the child;
(b) the relationship between the applicant and the child, and any other relevant person and the child;
(c) the degree of commitment that the applicant has shown towards the child;
(d) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and
(e) any other fact that should, in the opinion of the court, be taken into account.
(3) If in the course of the court proceedings it is brought to the attention of the court that an application for the adoption of the child has been made by another applicant, the court-
(a) must request a family advocate, social worker or psychologist to furnish it with a report and recommendations as to what is in the best interests of the child; and
(b) may suspend the first-mentioned application on any conditions it may determine.
(4) The granting of care or contact to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child.

419 Section 30 of the Children's Act reads as follows:
Co-holders of parental responsibilities and rights

30.(1) More than one person may hold parental responsibilities and rights in respect of the same child.
(2) When more than one person holds the same parental responsibilities and rights in respect of a child, each of the co-holders may act without the consent of the other co-holder or holders when exercising those responsibilities and rights, except where this Act, any other law or an order of court provides otherwise.
(3) A co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights to another co-holder or any other person, but may by agreement with that other co-holder or person allow the other co-holder or person to exercise any or all of those responsibilities and rights on his or her behalf.

holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights to another co-holder or any other person, but may, by agreement, allow another co-holder or person to exercise any or all of those responsibilities on his or her behalf. Such an agreement does not, however, divest a co-holder of his or her parental responsibilities and rights, and that co-holder remains competent and liable to exercise those responsibilities and rights. This section does not, therefore, provide a basis for a third person to make binding decisions for the co-holders. Section 28 of the Children's Act[420] may, however, provide a solution to this problem, since section 28(1) enables the "suspending", "terminating" and "circumscribing" of the parents' responsibilities and rights and, significantly, sub-section (2) specifically provides that an application in terms of section 28 may be combined with one in terms of section 23. Together these sections are wide enough to encompass the court's power to appoint a third person *in loco parentis* with decision-making powers.[421] Such a decision will, however, not be taken lightly.

(cc) Common law or contract

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(4) An agreement in terms of subsection (3) does not divest a co-holder of his or her parental responsibilities and rights and that co-holder remains competent and liable to exercise those responsibilities and rights.

420 Section 28 of the Children's Act, 2005 reads as follows:

Termination, extension, suspension or restriction of parental responsibilities and rights

28. (1) A person referred to in subsection (3) may apply to the High Court, a divorce court in a divorce matter or a children's court for an order-

(a) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or

(b) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.

(2) An application in terms of subsection (1) may be combined with an application in terms of section 23 for the assignment of contact and care in respect of the child to the applicant in terms of that section.

(3) An application for an order referred to in subsection (1) may be brought -

(a) by a co-holder of parental responsibilities and rights in respect of the child;

(b) by any other person having a sufficient interest in the care, protection, well-being or development of the child;

(c) by the child, acting with leave of the court;

(d) in the child's interest by any other person, acting with leave of the court; or

(e) by a family advocate or the representative of any interested organ of state.

(4) When considering such application the court must take into account-

(a) the best interests of the child;

(b) the relationship between the child and the person whose parental responsibilities and rights are being challenged;

(c) the degree of commitment that the person has shown towards the child; and

(d) any other fact that should, in the opinion of the court, be taken into account.

421 Goldstein supra.

3.13.12 The court may also delve into the common law to achieve an appropriate outcome. Such examples are, however, likely to be rare. If the conduct of parents reaches a point where the power to make decisions cannot safely be left to them, one or both are at risk of a court withdrawing that power and conferring it on another. This would only be done in exceptional circumstances.[422]

3.13.13 The possibility has also been mentioned that the power of facilitators to make binding decisions in any dispute may be included in a settlement agreement. This would be a self-imposed restraint, not an exercise of judicial power.[423]

3.13.14 From the court's discussion of other cases in which case managers were appointed in the South Gauteng High Court, it appears that Sutherland J was of the opinion that a case manager can be appointed only where the parties agree to this, and not on application by one parent only.

3.13.15 The contract is only valid between the parties and not against third parties.

(iii) Should legislation provide for facilitation?[424]

3.13.16 The final determination would therefore be whether facilitation should now be included in the possible ADR methods approved by legislation.

c) Appointment of facilitator

3.13.17 Currently, the basis of a facilitator's appointment is either a court order (either with or without the consent of the parties), or a parenting plan or settlement agreement

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422 Hummel at [14].

423 Hummel at [10.1]

424 Note should be taken of guidelines referred to as "Draft Guidelines on the Practice of Parenting Coordination in South Africa" that are currently being developed by a Drafting Committee constituted for this purpose.

between the parties that has been made an order of court.[425] There is not yet agreement in the courts in respect of this issue.[426]

3.13.18 In some divisions of the High Court, a facilitator is appointed as a matter of course in divorce matters in which children are involved. In other divisions, a facilitator is appointed only in matters that are chronically litigious and difficult to manage.[427]

3.13.19 It has been argued that facilitation (parenting coordination) should not be overused. A facilitator should be appointed only where the parties have clearly demonstrated a long term inability or unwillingness to make parenting decisions on their own; to comply with parenting agreements and orders; to reduce their child-related conflicts; and to protect their children from the effect of that conflict.[428]

3.13.20 Domestic violence cases might not be suitable for facilitation. A facilitator should routinely screen prospective cases for domestic violence, and decline to accept such cases if he or she does not have specialised expertise and procedures to effectively manage domestic violence issues. Such cases inevitably involve imbalances of power, and issues of control and coercion.[429]

3.13.21 A facilitator is appointed by the parties jointly to facilitate mutual decision-making where joint decisions are required. In the event of the facilitator being unable to continue as facilitator, he or she must appoint a new facilitator to take over the role. Alternatively, a replacement facilitator can be appointed by the chairperson of a dispute resolution body such as FAMAC (in the Western Cape). The facilitator is entitled, in his

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425 See discussion above.

426 See in this regard the case of ***Hummel v Hummel*** (SGJ) unreported case no 06274/2012 of 10 September 2012 contrasted with ***Schneider NO and Others v AA and Another*** 2010 (5) SA 203 (WCC) and ***CM v NG*** 2012 (4) SA 452 (WCC).

427 Facilitation appointments are commonly adopted in consent papers which are made orders of court in the Western Cape Division of the High Court. The typical clause provides for the appointment of a facilitator to resolve post-divorce disputes. The facilitator is generally required to be a psychologist, mediator, retired judge, lawyer or social worker with at least three years' experience. The clause usually provides for the facilitator to be appointed by agreement between the parties and if the parties cannot reach agreement on the identity of the facilitator then provision is made for the facilitator to be appointed by the chairperson for the time being of a mediation association active in the area for the Family Mediators Association of the Cape (FAMAC). See also De Jong M " Is parenting coordination arbitration?" 2013 ***De Rebus*** (hereafter "De Jong 2013 ***De Rebus***") at 38 and John O'Leary "A critical reflection on mediation and facilitation practice" Miller du Toit Cloete Family Law Conference March 2009.

428 De Jong 2013 ***De Rebus*** at 38.

429 De Jong 2013 ***De Rebus*** at 38. See also the discussion on family violence in Chapter 2.

or her sole discretion, to appoint such other person as may be necessary to make a decision in respect of the issue in dispute. This includes the right to co-opt a facilitator if he or she deems it appropriate or necessary.[430]

3.13.22 Facilitation is often child-focussed, and issues are referred to a mental health or legal professional to assess and make recommendations. However, mental health experts have expressed their discomfort with a role where they have to step outside a mediating function into a facilitative and directive function, namely providing referrals for advice and recommendation.[431] Two facilitators from different disciplines may be a possibility.[432]

3.13.23 At present there are no national accreditation requirements for facilitators. However, the role should fall to someone who is deemed to be suitably qualified by training, experience, and education. Facilitation should not be seen as one of the more familiar ADR processes but rather as a legal–psychological hybrid.[433]

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430 Schneider presentation at 11. See also the first reported case dealing with parenting coordination (facilitation) ***Schneider NO and Others v AA and Another*** 2010 (5) SA 203 (WCC). This case concerned disputes about the schooling, maintenance and other matters affecting the best interests of two children born of unmarried parents. In the judgment, Davis J placed the judicial stamp of approval on facilitation by ordering that any dispute with regard to the payment of any medical expenses for the children or with regard to contact between them and their deceased father's family should be referred to a FAMAC-appointed facilitator, who would be entitled to facilitate these disputes and make rulings that were binding on the parties, unless the rulings were varied by a competent court or by the facilitator following a separate review. The court further ordered that the facilitator's costs should be shared equally between the parties unless the contrary was directed by the facilitator. Through this order, a great deal of authority was assigned to the facilitator – not only was the facilitator authorised to make directives on the children's issues, but he or she was also given the authority to vary his or her rulings and to make decisions on how the facilitator's costs were to be apportioned between the parties.

In another judgment of the Western Cape High Court, Gangen AJ, in ***CM v NG*** 2012 (4) SA 452 (WCC), ordered that a facilitator be appointed after the separation of same-sex partners, to assist them with joint decision-making, as well as the drafting of a parenting plan in respect of their child. The court provided for a FAMAC-appointed facilitator when the parties could not agree on one, and ordered that the facilitator's costs should be shared equally between the parties unless directed otherwise by the facilitator. All disputes between the parties concerning the child's best interests were to be referred to the facilitator in writing and the facilitator's decisions were to be binding on the parties in the absence of a court order to the contrary.

431 See Martalas A for statistics compiled for purposes of a PhD thesis at University of South Africa, that are indicating that the Western Cape High Court is increasingly (30% of divorces in 2008, 70% of divorces in 2013) referring parties to facilitation as an alternative dispute resolution mechanism.

432 Schneider presentation at 9.

433 De Jong 2015 ***PER/PELJ*** at 154 and references made in fn 23.

3.13.24 In addition to ordinary mediation training, a facilitator should therefore preferably have specific training in the facilitation process – specifically for parenting coordination.[434]

3.13.25 As far as experience is concerned, a facilitator should have extensive practical experience with high-conflict families.

d) Powers of the facilitator

3.13.26 Parties, legal practitioners and the courts should be cautious about giving too much power to a facilitator, especially a person who is not suitably qualified.[435]

Questions:

90. Should facilitation be regulated in legislation?
91. Is facilitation an inappropriate delegation of the judicial function, a denial of due process, and an impediment to court access?
92. What qualifies a person to make personal family and child-rearing decisions about other people?
93. How can the success of facilitation be measured?
94. What facilitation process should be used?
95. Are there certain disputes that are more amenable to facilitation than others?
96. Should limitations be imposed on facilitators?
97. What are the advantages and disadvantages of facilitation?
98. Should a judge be able to appoint a facilitator without the parents' consent?
99. Should facilitators be appointed before or after the court has made an order (this relates to the implementation of existing court orders or parenting plans?)

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434 • The various functions of the facilitator and how to switch between these;
• issues that are appropriate and inappropriate for parenting coordination;
• characteristics of individuals who are suited and those who are not suited to participation in the parenting coordination process;
• when to refer parties to child protection services;
• how to draft, monitor and modify parenting plans;
• appropriate techniques for handling high-conflict parents, child alienation and domestic violence issues;
• when and how to use outside experts effectively;
• when and how to interface with the court system;
• grievance procedures; and
• possible ethical dilemmas.

435 De Jong 2013 ***De Rebus*** at 38.

100. Should provision be made for a judicial review of the process or a proper full hearing de novo appeal?

D) Information, Advice and Justice

3.14 Better information and education for parents

3.14.1 Parents' lack of insight is often a result of a lack of correct information. At the national Focus Group Forum, the Office of the Family Advocate debated whether all parties seeking a divorce order, or an order determining care and contact arrangements, should be compelled to attend a parent information programme.

3.14.2 After deliberations, the Office of the Family Advocate concluded that when a party serves summons for an order of divorce, or a notice of motion applying for care and contact arrangements to be determined, prior to any order being granted, irrespective of whether parties have concluded a parenting plan or not, it should be compulsory for parties to attend a parent information/education programme.

3.14.3 The educational programme should last for 60 to 90 minutes, and should include a video, short lecture, and literature. The content should educate parents about the advantages and availability of mediation; information about parental alienation; the best interests of the child principle; concepts of care, residency, and contact; and so on. These information or education programmes should be uniformly implemented across the country, to ensure that all persons receive equal service and quality of service.

3.14.4 The service should be developed, coordinated, and managed by the Office of the Family Advocate. Because the programme is mandatory and given the capacity constraints of the Office of the Family Advocate, the presentation of the programme should be outsourced to NGOs and other community organisations or offices. Only once parents have attended the programme should they be allowed to proceed with the next step, and this will depend on whether or not they have reached agreement on a parenting plan.

3.14.5 The mandatory information or education programme for parents should be funded by the State. No provisions regarding funding need to be provided in the new legislation, as funding for early intervention and development is discussed in chapter 8 (sections 143 and 144) of the Children's Act 38 of 2005. The provisions and programmes that the State has to fund are very broad in this chapter, and information or education programmes would, to all intents and purposes, fall into this category.[436] All parents should attend this session and there should be no "escape" clause for parents to rely on.

3.14.6 Parties will have to attend the session in person. Co-parents do not have to attend the programme jointly.

3.14.7 Certificates should be given for attendance at both the information programme and mediation. There must be a prescribed form for this. Reasons why mediation failed (if it did) do not have to be written on the certificate.

3.14.8 The Family Advocates' Offices in the Western Cape and Johannesburg are currently holding parent education and information programmes, and these are proving to be very successful. The Offices are mediating and reaching more agreements with such a programme in place, as people are equipped with information to enable them to make informed decisions.

3.14.9 A minority view was that people might get frustrated with so many mandatory procedures and programmes. Instead of having complicated protocol to follow, wide public media coverage should be used to make the public aware of processes and concepts such as mediation. The whole issue of parenting within the South African context is understood in different ways by different people. A mechanism needs to be devised to determine how a uniform parent information programme could be effective. In addition, there are modern ways of accessing information, such as the internet.

3.14.10 In British Columbia, some mandatory processes are being used successfully. For example, most parents must attend a Parenting After Separation programme before their first appearance in a provincial family court.[437]

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436 Refer to chapter 4 for further details

437 BC Justice Review Task Force ***Family Justice Reform Working Group*** 2002-2007 accessed at **http://www.bcjusticereview.org/working_groups_/family_justice/ on** 4 March 2013.

3.14.11 In the UK, the Family Justice Review[438] proposed that there should be three main "stages" of dispute resolution in family cases. First, would be an "information hub" comprising an online resource and telephone helpline.[439] The second stage would be "dispute resolution services", and the third and final stage would be the "court process".

3.14.12 As useful as these methods are, it has been argued[440] that they do not provide a continuing relationship in which advice is given about the available choices, or assistance in carrying out those choices (eg drafting or writing letters and presenting evidence). Merely providing information will not necessarily ensure justice.

Questions:

101. Should attendance at information programmes be compulsory for all parents who are confirming their custody and access arrangements, or only for those who are involved in custody and access disputes?
102. Who should manage and coordinate parent information programmes?
103. Where should parent information programmes take place?
104. How should parent information programmes be constituted?

3.15 Enforcement of rights

a) Introduction

3.15.1 Arrangements that are in the best interests of the child are contingent on the way the parents behave towards each another. The outcome desired is, however, often frustrated by the failure of one parent to follow the decision of the court or the agreement made between the parties. The question arises how these orders and agreements can be enforced. Using standard legal methods of enforcement unfortunately risks causing greater harm to the child, giving rise to the so-called enforcement paradox.[441]

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438 Family Justice Review Panel UK Ministry of Justice, Department of Education & Welsh Assembly Government ***Family Justice Review*** Final Report November 2011 at par 4.70.

439 See discussion on the use of technology above.

440 Eekelaar J & Maclean M ***Family Justice: The Work of Family Judges in Uncertain Times*** Hart Publishing Oxford 2013 (hereafter "Eekelaar & Maclean") at 194.

441 Eekelaar & Maclean at 178.

3.15.2 In the UK, the Children and Adoption Act, 2006 introduced a number of new penalties for breaches of contact orders. These include having to perform unpaid work as a form of community service, or paying compensation to the other parent for any financial loss. The Family Justice Review (Review Panel 2011) also indicated[442] an attempt to strengthen the enforcement powers that are currently available, including suspension of drivers' licences and passports, the use of curfews (enforced through electronic tagging), and increased use of orders to reverse residence.

3.15.3 The Review also recommended that where an order is breached, the case should go straight back to court – to the same judge – and be heard within a certain number of days. Parties should also be required to attend a mediation assessment (MIAM) again, with a view to further mediation where appropriate.[443] It was argued that this step could be the key to breaking the underlying cycle of conflict between the parents.[444]

b) Current position in South Africa

3.15.4 Section 35(1) of the Children's Act[445] provides that any person in whose care a child is, who refuses or prevents another person who has the right to contact with the child, to exercise this contact, contrary to a court order or a responsibility and rights agreement, is guilty of an offence and liable (on conviction) to a fine or to imprisonment for a period not exceeding one year.[446]

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442 Supra at par 4.152.

443 Supra at par 4.155.

444 Eekelaar & Maclean at 181.

445 Section 35(1) of the Children's Act, 2005 reads as follows:

> (1) Any person having care or custody of a child who, contrary to an order of any court or to a parental responsibilities and rights agreement that has taken effect as contemplated in section 22 (4), refuses another person who has access to that child or who holds parental responsibilities and rights in respect of that child in terms of that order or agreement to exercise such access or such responsibilities and rights or who prevents that person from exercising such access or such responsibilities and rights is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

446 It should be noted that section 35 erroneously still uses the terminology of the Child Care Act.

3.15.5 Section 45(2) of the Children's Act, 2005[447] provides that a children's court may try or convict a person for non-compliance with an order of a children's court, or for contempt of such a court, and is bound by the law as applicable to magistrates' courts when exercising criminal jurisdiction.

3.15.6 In terms of the Child Care Act of 1983, the children's court was unable to make an order of costs in a litigation suit. However, under the Children's Act this has changed. Today the court is empowered to make a costs order if the judicial officer believes that such an order is warranted. Section 48(1)(d) of the Children's Act[448] empowers the children's court to "make appropriate orders as to costs in matters before the court."

3.15.7 See also the SALRC investigation on maintenance[449] where sections 31 to 39 of the Maintenance Act[450] dealing with offences and penalties relating to maintenance orders are discussed.

c) Problems being experienced

3.15.8 Many parents who have been awarded the right to contact with their children complain that the resident parents deprive them from exercising that right. The resident parents, on the other hand, may complain of maintenance orders that are ignored. Both parties find it very difficult to enforce their right to maintenance or contact, as the case may be. The only way to enforce such rights is to bring contempt of court proceedings against the other parent. Applying to the courts, especially the High Court, is usually a

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447 Section 45(2) of the Act reads as follows:

(2) A children's court—
(a) may try or convict a person for non-compliance with an order of a children's court or contempt of such a court;
(b) may not try or convict a person in respect of a criminal charge other than in terms of paragraph (a); and
(c) is bound by the law as applicable to magistrates' courts when exercising criminal jurisdiction in terms of paragraph (a).

448 Section 48(1)(d) reads as follows:
Additional powers
48. (1) A Children's Court may, in addition to the orders it is empowered to make in terms of this Act –
(a)-(c)…..
(d) make appropriate orders as to costs in matters before the court.

449 South African Law Reform Commission ***Revision of the Maintenance Act 99 of 1998***.

450 Maintenance Act 99 of 1998.

costly and time-consuming exercise, and judges are not prone to convict a parent on a charge of contempt of court. Hence, a parent is often stuck in a vicious cycle which leaves them with unenforceable rights and at the mercy of the other parent. A complaint of contempt of court that is lodged with the police is most often not properly investigated. Furthermore, it would seem that in most instances the public prosecutor only prosecutes maintenance complaints, but not complaints regarding care and contact.

3.15.9 It should be noted that courts have little patience with parents who continually litigate as a way of solving their chronic disagreements. The courts have difficulty in establishing an objective view in determining which story to believe, and have limited resources for dealing with a chronically irresponsible parent. Although a parent who does not follow court orders is indeed in contempt of court, most judges are reluctant to use this charge against parents. Also, although it might be possible to limit the contact between an irresponsible parent and the child, most judges consider visitation to be the child's right as well as the parent's. Punishing a child for the parent's irresponsibility seems inappropriate and may damage the child.[451]

3.15.10 The possibility has been raised that parenting plans should be included in the ambit of section 35, otherwise the registration of these plans has no meaning. If there is no remedy for non-compliance with a parenting plan, it makes the plans ineffective and undermines the idea of parenting plans.

3.15.11 Section 35(1) excludes holders of parental responsibilities and rights, where there is no court order or parental responsibilities and rights agreement, such as unmarried fathers who qualify in terms of section 21 or married parents who have not yet divorced but no longer live together. Section 35(1) therefore needs to be examined to determine what exactly its ambit is or should be.

3.15.12 Section 35 should, however, provide exceptions in cases where the life of the child or care-giver is in danger, or where the child refuses to see the parent. It may be useful if the section states that section 35 should be used only as a last resort after the remedies in terms of the Act have been exhausted. In other words, the parent seeking

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451 Hodges W F ***Interventions for Children of Divorce***: C***ustody and Access and Psychotherapy*** Wiley New York 1986 at 152

relief has already attempted mediation in terms of section 33, or already has a court order.[452]

3.15.13 In an ancillary matter, the Children's Act in certain cases provides for mandatory mediation. However, the Act does not create a mechanism (certificate) for informing a court of the attitude of parties to mediation.[453] Without such a reporting mechanism, how will a court know whether the parties have given mediation a chance or not? It remains open for one (or both) of the parties to abuse the mediation provisions, by submitting to mediation simply to comply with the black-letter statutory requirement, and without entering the mediation in good faith. The court could use such information to admonish the parties by giving them a stern warning and referring the matter back to mediation, or by imposing a costs order on the offending party.[454] Note should be taken of section 64(1) of the Children's Act, which authorises the children's court to adjourn proceedings for a period of 30 days. This adjournment may be used to allow parties to seek mediation or to encourage a resisting party to take part in mediation.[455]

Question:

105. How can the enforcement powers currently available be strengthened?

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452 DSD ***Recommendations in Respect of Final Draft*** 2013 at 41.

453 See the Rules Board's "mediation rules" in this regard that make provision for such a certificate during the court-annexed mediation process.

454 Paleker at 26. See discussion on costs orders above.

455 De Jong 2008 ***THRHR*** at 637.

CHAPTER 4

SPECIFIC ISSUES IDENTIFIED FOR DISCUSSION: STRUCTURE, FACILITIES AND PERSONNEL

4.1 Introduction

4.1.1 In South Africa the field of family and divorce law has developed in a notably segmented fashion as services have, over the years, been provided along lines of race, culture, and income level. Different initiatives have dealt with different components of the population.[1]

4.1.2 The different areas of service that can be identified[2] in this regard are court and other State structures; private practitioners; Non-Governmental Organisations (NGO's) in conjunction with University-based services and welfare institutions; Community Based Organisations (CBO's); and traditional authorities.

4.1.3 In this discussion the role of these areas of service will be investigated with reference to all family disputes, in so far as both private and public family law are concerned, but with an emphasis on care and contact disputes.

4.2 Courts, court officials and lawyers

a) The courts

4.2.1 In South Africa the following civil courts can be identified:[3]

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1 Van der Merwe, H A "Overview of the South African Experience@ Community Mediation Update" Newsletter ***Community Dispute Resolution Trust*** April 1995 (hereinafter referred to as "Van der Merwe"); See also Van der Merwe E & Zaal FN "A Helping Hand for Disadvantaged Divorce Litigants: An Analysis of the Implications of MG v RG" (2014) 131 ***SALJ*** 537 (hereafter "Van der Merwe & Zaal").

2 Van der Merwe at 2.

3 Section 166 of the Constitution, 1996 provides that the courts are –
a) The Constitutional Court;
b) The Supreme Court of Appeal;
c) The High Court of South Arica;
d) The Magistrates' Courts; and
e) Any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court or the Magistrates' Courts.

a) Traditional Courts presided over by senior traditional leaders in six provinces;[4]
b) Small Claims courts presided over by Commissioners appointed largely from legal practitioners;
c) District magistrates' courts presided over by Magistrates (also appointed as dedicated presiding officers in terms of the Children's Act when adjudicating disputes in terms of the Children's Act in children's courts);
d) Regional (Magistrates') Courts with civil jurisdiction since 2008; and
e) High Courts, the Supreme Court of Appeal and the Constitutional Court presided over by Judges.

4.2.2 The court system, inherited from the apartheid system of government, was designed to exclude Africans from the mainstream of civil adjudication. The district courts which had civil jurisdiction were largely located in the former white areas and suburbs. The branch courts and periodical courts, which largely serviced the black areas, did not provide civil and family law services (Soweto, being the biggest township, did not, for example, have a civil court). The congestion and the clogged court system at the main centres in the cities and towns were the manifestation of the flawed system of courts based on the policy of segregation. A programme that looked at the realignment of the old magisterial demarcations has sought to assist in remedying this.[5]

4.2.3 Although South Africa has a no-fault divorce law,[6] divorce proceedings still occur within the Courts and in accordance with mostly adversarial court procedures.[7] As a result, whilst divorce itself is no longer the battle of an innocent party and a guilty one, the legal process of divorce is still regarded as a mechanism which provides for the most effective re-adjustment of obligations once a family unit has broken down. Thus society has left to the courts the task of creating rules for, and the social structure of, post-divorce relationships. Whether the courts are the most appropriate body to

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4 See discussion on traditional courts below.

5 Department of Justice and Constitutional Development ***Brief Overview of the Extension of Civil Jurisdiction to the Regional Courts Bill*** Briefing to the Justice Portfolio Committee 6 February 2008 at 4.

6 The principle of fault is still considered a factor when the court adjudicates on maintenance for a spouse and the division of the matrimonial property when forfeiture of benefits is in issue. It is in these cases that the care of or contact with children is often used to gain leverage or some strategic advantage during the course of the litigation. Often a strategy of litigating a party into submission by dragging out the court case is employed.

7 See discussion on the adversarial nature of the courts in Chapter 3 above.

provide rules for the re-organisation of parent-child relationships upon divorce is a difficult question, as is the question whether it is fair or right for society to expect the courts to make such decisions.[8]

4.2.4 The jurisdiction of the various courts in South Africa has been a highly contested feature throughout the developments regarding family law over the past three decades.

4.2.5 The current position in this regard is as follows:

a) The High Court has inherent jurisdiction as upper guardian of all children. The inherent jurisdiction of the High Court is a doctrine of the common law which provides that a superior court has the jurisdiction to hear any matter that comes before it, unless a statute or rule limits that authority or grants exclusive jurisdiction to some other court. It refers to the court's inherent jurisdiction as a general power to control its own procedure so as not to prevent it being used to achieve justice.[9]

b) The Regional (Magistrates') Court derives its civil jurisdiction from the Jurisdiction of Regional Courts Amendment Act (JRCAA).[10] In terms of section 29(1B)[11] the court has jurisdiction to hear and determine suits

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8 Mowatt 1987 ***De Rebus*** 198.

9 See the English case of ***Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd*** [1981] AC 909.

10 Jurisdiction of Regional Courts Amendment Act 31 of 2008.

11 Amending section 29 of the Magistrates' Court Act, 1944. Section 29(1B) of the JRCAA reads as follows:

Jurisdiction in respect of causes of action
29. (1)-1(A)……

(1B) *(a)* A court for a regional division, in respect of causes of action, shall, subject to section 28(1A), have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998).
(b) A court for a regional division hearing a matter referred to in paragraph *(a)* shall have the same jurisdiction as any High Court in relation to such a matter.
(c) The presiding officer of a court for a regional division hearing a matter referred to in paragraph *(a)* may, in his or her discretion, summon to his or her assistance two persons to sit and act as assessors in an advisory capacity on questions of fact.
(d) Any person who has been appointed as a Family Advocate or Family Counsellor under the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), shall be deemed to have also been appointed in respect of any court for a regional division having jurisdiction in the area for which he or she has been so appointed.

relating to the nullity of marriages and civil unions, divorce between persons and decisions on any questions arising there-from. It also includes any order possible under the Recognition of Customary Marriages Act.[12] It is the intention of this Act to ensure that the adjudication of all aspects of divorce and its consequences is now possible on a lower level in the court structure, thereby creating a parallel jurisdictional competence which would extend to all facets of the potential relief sought. Since the court is a court of first instance in family law matters only when any aspect of parental responsibilities and rights is coupled to a "divorce action", it would seem as though international relocation disputes may fall outside the jurisdiction of the Regional Court and that jurisdiction in respect of Hague abduction matters would be difficult to found.[13]

c) The children's court derives its jurisdiction from section 45 of the Children's Act (matters the children's court may adjudicate). Section 45(1)[14] of the Children's Act provides that, subject to certain restrictions, a children's court may adjudicate any matter involving the protection and

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(1C) Jurisdiction conferred on a court for a regional division in terms of this section shall be subject to a notice having been issued under section *2(1)(iA)* in respect of the place for the holding, and the extent of the civil adjudication, of such court.

(2) In subsection (1) 'action' includes a claim in reconvention.".

12 Recognition of Customary Marriages Act 120 of 1998.

13 Sloth-Nielsen J "The Jurisdiction of the Regional Courts Amendment Act, 2008: Some Implications for Child Law and Divorce Jurisdiction" 2011 36 ***Journal for Judicial Science*** (hereafter "Sloth-Nielsen") 14.

14 Section 45 (1) of the Children's Act reads as follows:

Matters children's court may adjudicate
45. (1) Subject to section 1(4), a children's court may adjudicate any matter, involving-
(a) the protection and well-being of a child;
(b) the care of, or contact with, a child;
(c) paternity of a child;
(d) support of a child;
(e) the provision of-
(i) early childhood development services; or
(ii) prevention or early intervention services;
(f) maltreatment, abuse, neglect, degradation or exploitation of a child, except criminal prosecutions in this regard;
(g) the temporary safe care of a child;
(h) alternative care of a child;
(i) a child and youth care centre, a partial care facility or a shelter or drop-in centre, or any other facility purporting to be a care facility for children; or
(j) the adoption of a child, including an inter-country adoption;
(k) any other matter relating to the care, protection or well-being of a child provided for in this Act.

well-being of a child including the care of, or contact with, a child. The jurisdiction of the children's court is restricted in the following ways:

(i) Section 1(4) of the Children's Act[15] excludes the jurisdiction of the children's court from any proceedings relating to children arising out of the application of the Administration Amendment Act, the Divorce Act, the Maintenance Act, the Domestic Violence Act and the Recognition of Customary Marriages Act;[16]

(ii) In terms of section 45(3) of the Children's Act[17] the High Court and Divorce Court[18] has exclusive jurisdiction over eight listed legal issues, including guardianship, pending the establishment of family courts;

(iii) In terms of section 45(4) of the Children's Act[19] the inherent jurisdiction of the High Court as upper guardian of all children is protected.

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15 Section 1(4) of the Children's Act 38 of 2005 reads as follows:

Interpretation
1. (1)-(3)…

(4) Any proceedings arising out of the application of the Administration Amendment Act, 1929 (Act 9 of 1929), the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act 116 of 1998), and the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998), in so far as these Acts relate to children, may not be dealt with in a children's court.

16 Administration Amendment Act 9 of 1929, the Divorce Act 70 of 1979, the Maintenance Act 99 of 1998, the Domestic Violence Act 116 of 1998 and the Recognition of Customary Marriages Act 120 of 1998.

17 Section 45(3) of the Children's Act 38 of 2005 reads as follows:

Matters children's court may adjudicate
45. (1) - (2)…

(3) Pending the establishment of family courts by an Act of Parliament, the High Courts and Divorce Courts have exclusive jurisdiction over the following matters contemplated in this Act:
(a) The guardianship of a child;
(b) the assignment, exercise, extension, restriction, suspension or termination of guardianship in respect of a child;
(c) artificial fertilisation;
(d) the departure, removal or abduction of a child from the Republic;
(e) applications requiring the return of a child to the Republic from abroad;
(f) the age of majority or the contractual or legal capacity of a child;
(g) the safeguarding of a child's interest in property; and
(h) surrogate motherhood.

(4)….

18 Divorce courts do not exist anymore. See discussion in Chapter 2.

19 Section 45 (4) of the Children's Act 2005 states that "(4) Nothing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children."

4.2.6 The effect of the JRCAA is that almost all family law matters can now also be dealt with at regional and district court level, which is more affordable and geographically more accessible than the High Court. This fact renders justice more accessible where children are concerned.[20]

4.2.7 However, the relationship between the different courts concerning family disputes are concerned, is murky at best. The developments have resulted in a dual and fragmented court system.[21]

4.2.8 A schizophrenic position emerges, as most matters affecting parental responsibilities and rights are, in contradictory fashion, accorded to children's courts while, at the same time, some are reserved exclusively for other courts.[22]

4.2.9 The fact that there is also no articulation between the district children's court and the Regional Court, as was originally envisaged by the SALRC[23] for instances in which a more complicated issue emerges, or where an appeal is noted, has the effect that one is confronted with two compartmentalized court structures, namely children's courts and Regional Courts that seem to be jurisdictionally competent in overlapping ways.[24]

4.2.10 It was not envisaged, at the time of drafting the Children's Act, that courts of regional stature would be involved in divorce litigation as courts of first instance. Therefore the new provisions enhancing the allocation and exercise of parental responsibilities and rights were not made applicable to Regional Courts.[25]

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20 Sloth-Nielsen at 15.

21 See full discussion in par 4.9 below.

22 Sloth-Nielsen at 7.

23 This may be because, for a large part during the process of developing the Children's Act, the children's courts were envisaged to be "child and family courts" situated on two tiers at District and Regional Court level with jurisdiction in respect of all matters relating to the protection and well-being of children (child, family and domestic cases) as a court of first instance. The two-tier court structure, which in effect sought to create a 'regional level' jurisdiction in child law matters, was dropped. In its stead, a single tier system for all matters related to the *Act*, irrespective of complexity or nature, was promoted, and this would comprise, as in the past, the children's court situated at magistrates' court level. As mentioned, the extended role, functions and, above all, powers of the children's court remained more or less intact, however.

24 Sloth-Nielsen at 15.

25 Sloth-Nielsen at 13.

4.2.11 The *JRCAA* further makes no mention of the Children's Act or the consequences of divorce relating to children, such as assignment of parental responsibilities and rights, nor the issue of guardianship.[26] The failure to consider the interface with the Children's Act and the fact that the Act is premised solely on the aftermath of divorce, shows a narrow understanding of family law. It also negates the steps that have been taken in developing a more realistic understanding of 'family' which includes unmarried partners and other stakeholders in parental responsibilities and rights pertaining to children.

4.2.12 It would seem that the relationship between the High Court and the children's court was also not clarified when the Children's Act was drafted, as is evident from the fact that section 45(3) refers to the pending establishment of family courts.

4.2.13 The same is true of the relationship between the Regional Court and the High Court. The effect which conferring formerly High Court jurisdiction on a lower court has upon the established hierarchy is unclear. The High Court is, according to case law,[27] a court of review of the former, as well as a court of appeal and, in some instances, a court of concurrent jurisdiction. It is a distinct possibility that forum shopping may occur.[28]

4.2.14 Various problems are being encountered in so far as the jurisdiction of the courts is applied to family law disputes. Possible issues for discussion are as follows:

(i) Extension of children's court jurisdiction in respect of the amendment of divorce orders

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[26] Possibly, we are supposed to infer that responsibility for children and their maintenance, care and contact are 'questions arising' from divorce.

[27] See Sloth-Nielsen at 12 for a discussion of ***Ntuli v Zulu*** 2005 (1) SA 45 (N) where the court found that the black divorce courts which operated under the Administration Act had the status of inferior courts and, as such, proceedings held in these courts were subject to review by the High Court. Although the civil Regional Court, as referred to in the *JRCAA*, is not a direct successor to the black divorce courts, it may be so that decisions on guardianship, care or contact of the courts now imbued with jurisdiction by the *JRCAA* can nevertheless be reviewed by a High Court, as well as (in addition to) being brought before High Courts on appeal.

[28] Sloth-Nielsen at 16.

4.2.15 A divorce order is issued in the High Court in terms of the Divorce Act.[29] Section 8(2) of the Divorce Act 70 of 1979 states that a court other than the court which made an order in regard to custody and guardianship or access to a child may rescind, vary or suspend such order if the parties are domiciled in the area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court. Court is defined as a High Court or Regional Court with divorce jurisdiction.[30]

4.2.16 The effect of section 1(4) of the Children's Act and section 8(2) of the Divorce Act are that children's courts are able to address care and contact issues in terms of the Children's Act, but may not amend the divorce order.

4.2.17 However, in terms of the Maintenance Act the Maintenance Court may amend the maintenance arrangements between parties even though the original order was made by the High Court. A specific provision has been made in a statute. See ***Swarts v Swarts ea***[31] where the court was of the opinion that there could not, in principle, be any legal reason why the children's court could not change the provisions of a Rule 43 order.[32]

4.2.18 In practice, parties who agree on amendments to be made to the divorce order have been known to enter into a parenting plan reflecting these changes, which would then be registered with the Family Advocate or confirmed by the children's court as such. The argument in this regard is that, should one of the parties disagree, the matter will have to be determined in the High Court, but this expensive option can be sidestepped whilst there is agreement between the parties. Technically this process is unlawful.[33]

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29 Divorce Act 70 of 1979.

30 The children's court cannot make an order competing with, and amounting to a variation of the High Court order,. a prior order of the High Court dealing with care and contact of a child. ***Bergh v Coetzer and the Minister of Social Welfare*** 1963 (4) SA 990 (C). See also ***Raath v Carikas*** 1966 (1) SA 756 (W).

31 ***Swarts v Swarts*** 2002 (3) SA 451 (T).

32 Judge Bertelsman stated as follows at 462 C:

> Staan dit een maal vas dat die onderhoudshof, wat n gespesialiseerde hof van die landdroshof is, die bevoegdheid het om die bepalings van n Reel 43 bevel ten aansien van onderhoud te wysig of op te hef, kan daar in beginsel geen regsgeldige argument bestaan waarom die kinderhof, wat ook n gespesialiseerde landdroshof is, nie die bepalings ten aansien van die beheer en toesig van n Reel 43 bevel onder gepastse omstandighede kan wysig of ophef nie.

33 DSD ***Recommendations in Respect of Final Draft 2***013.

4.2.19 It has been proposed[34] that section 45 of the Children's Act should be amended[35] to provide the children's court with the power to amend divorce orders of the High Court or the old Divorce Courts in relation to aspects of care of and contact with a child. Section 8 of the Divorce Act could be amended accordingly.

4.2.20 The intention of such an amendment would be to facilitate access to justice in cases where there has been a real change in circumstances since the divorce order.

4.2.21 In order to provide safeguards against abuse, however, the section would have to include a condition such as, for example, "on good cause shown". There has to be a safeguard against forum shopping.

Question:

1. Should the jurisdiction of the children's court be extended to include the power to amend divorce orders?

(ii) Granting the children's court jurisdiction to hear guardianship applications

4.2.22 Section 45 (3)[36] of the Children's Act provides, inter alia, for the exclusive jurisdiction of the High Court in respect of the guardianship of a child.

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34 DSD ***Recommendations in Respect of Final Draft*** 2013 at 49.

35 With consequential amendments to section 1(4) and 46 of the Children's Act.

36 Section 45(3) and (4) of the Children's Act 38 of 2005 reads as follows:

Matters children's court may adjudicate
45.(1)-(2)..

(3) Pending the establishment of family courts by an Act of Parliament, the High Courts and Divorce Courts have exclusive jurisdiction over the following matters contemplated in this Act:
(a) the guardianship of a child;
(b) the assignment, exercise, extension, restriction, suspension or termination of guardianship in respect of a child;
(c) artificial fertilisation;
(d) the departure, removal or abduction of a child from the Republic;
(e) applications requiring the return of a child to the Republic from abroad;
(f) the age of majority or the contractual or legal capacity of a child;
(g) the safeguarding of a child's interest in property; and
(h) surrogate motherhood.
(4)..

4.2.23 Section 24 of the Children's Act,[37] also provides for the exclusive jurisdiction of the High Court in respect of the consideration of the application for guardianship.

4.2.24 It has been proposed that section 24(1) should allow persons applying for guardianship to approach the children's court and the High Court.[38]

4.2.25 The process of approaching the High Court for an application for guardianship is expensive and is therefore inaccessible to the majority of people who need a guardianship order. There are large numbers of orphans or abandoned children living with relatives, especially grandparents, who are not in a position to approach the High Court. An application for guardianship of an HIV/Aids orphan, which is unlinked to divorce, must remain a High Court matter – i.e. the most expensive and least geographically accessible option. This is paradoxical to say the least.[39] Guardianship orders are also routinely required by schools and medical aid schemes before the child can access services.

4.2.26 It is already possible for unmarried fathers who want to have their automatic acquisition of rights recognised in terms of section 21 to approach the children's court. The children's court also routinely presides over adoption proceedings that have far-reaching and permanent consequences in respect of parental responsibilities and rights, including guardianship.

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37 Section 24 of the Children's Act 38 of 2005 reads as follows:

> **Assignment of guardianship by order of court**
> **24.**(1) Any person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant.
>
> (2) When considering an application contemplated in subsection (1), the court must take into account—
> (a) the best interests of the child;
> (b) the relationship between the applicant and the child, and any other relevant person and the child; and
> (c) any other fact that should, in the opinion of the court, be taken into account.
>
> (3) In the event of a person applying for guardianship of a child that already has a guardian, the applicant must submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child.

38 DSD ***Recommendations in Respect of Final Draft*** 2013 at 30. The DSD argues that if this proposal is accepted, section 22(7) should be deleted since section 22(4)(b) already allows access to the High Court. Sections 23 and 24 may also be collapsed into one. Section 45(3)(a) and (b) must be deleted and an additional subsection should be included in section 45(1) that provide that "guardianship" is a matter that may be adjudicated by the children's court. A further subsection must be included in section 46(1) that the children's court may make an order in respect of guardianship.

39 Sloth–Nielsen at 12.

4.2.27 Granting jurisdiction to hear guardianship applications to the children's court could promote access to justice for children and caregivers who are vulnerable because their legal relationship is uncertain. The children's courts are easier and less expensive to access. [40]

Question:

2. Should children's courts have jurisdiction in respect of guardianship applications?

(iii) Dual and fragmented court system

4.2.28 As stated above, South Africa has had a long history of racially differentiated court services for divorce litigants. This position has been partly addressed by the Divorce Courts Amendment Act in 1997, when the Black Divorce Courts were opened to all races.

4.2.29 Regardless of the existence of these courts, divorces could also be more expensively obtained from the (then) Supreme Court. [41]

4.2.30 The High Court has since replaced the Supreme Court as an upper-tier forum mainly for wealthier divorce litigants. The government has also subsequently transferred inferior court divorce jurisdiction to regional magistrates' courts in terms of section 9 of the Regional Courts Amendment Act 31 of 2008,[42] while retaining concurrent High Court jurisdiction.

4.2.31 The continuation of a dual-court system, now involving Regional Courts and the High Court, is of concern. Those who are poor (and predominantly black) will continue

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40 Section 24 (3) provides that in the event of a person applying for guardianship of a child that already has a guardian, the applicant must submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child. There are, however, numerous cases of grandparents or an unmarried father applying for and holding guardianship together with the existing guardian or biological mother. Section 24 (3) should be restricted to make provision only for instances where "sole guardianship" is sought. Sections 24(1) and (2) would deal with co-guardianship.

41 Van der Merwe & Zaal at 538.

42 Van der Merwe & Zaal at 538.

to receive less adequate divorce adjudication and related services than litigants who can afford to approach the High Court.[43] See discussion in par 4.9 below.

4.2.32 A related matter of concern is the current fragmentation of the courts. Moving family matters between different courts is to the disadvantage of children, and it has been described as the secondary systematic abuse of children. In addition, this system is also a waste of costs (to have different courts dealing with different pieces of legislation).[44]

4.2.33 It is uncertain why family law courts cannot be 'clustered' in an attempt to provide a more coherent family law service. Examples include maintenance courts and courts dealing with domestic violence. The question of why a children's court should be barred from dealing with domestic violence and maintenance, which are crucial issues in the sphere of child care and protection, has also been posed.[45]

Question:

3. How can South Africa's fragmented and dual family court system be improved?

b) Presiding officers

4.2.34 Since South Africa does not have a dedicated family court,[46] it has been argued that there are a limited number of judges who are experts in family law matters. The majority of judges have limited experience in family law. It must be borne in mind that South African High Court judges do not, in general, specialise in family law as do specialist family judges in other jurisdictions.[47]

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43 Van der Merwe & Zaal at 539.

44 Prof Zaal presentation to Welfare (Social Development) Portfolio Committee, Minutes of meeting 12 April 2000.

45 Sloth-Nielsen at 7.

46 See discussion below.

47 Van Zyl DH "21 Years of Dealing with Family Law Matters on the Bench" Paper presented at Miller du Toit Family Law Conference Cape Town 2007.

4.2.35 Currently in South Africa, in most instances, judges tend to rely on the advice of the Office of the Family Advocate and other welfare officials. Despite initial resistance from the judiciary, the decisive role played by Family Advocates over the years cannot be overstated. Very few judges have not, at some time or another, been dependent on Family Advocate reports in dealing with issues relating to children.[48]

4.2.36 Section 42(3) of the Children's Act[49] provides the Minister for Justice and Constitutional Development with the discretion to appoint magistrates and additional magistrates as dedicated presiding officers in the children's courts.

4.2.37 The lack of experience of the rotating magistrates results in procedural difficulty and irregularity in the application of the Act and causes undue delays. In courts where the children's court presiding officers are frequently rotated, social workers, the child and the parties face presiding officers with very little knowledge of the practical application of the Act and Regulations. Section 42(3) should include a requirement that the designated magistrate must receive specialised training in the Children's Act.[50]

4.2.38 It has been proposed that section 42(3) should be amended to –

a) state that the Minister for Justice and Constitutional Development and the head of the administrative region "must" appoint a dedicated presiding officer, instead of "may" appoint a dedicated officer;

b) include the phrase "who meets the prescribed requirements" after "magistrate or additional magistrate" to ensure the presiding officer has the requisite training.

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48 Ibid.

49 Section 42(3) of the Children's Act 38 of 2005 reads as follows:

Children's courts and presiding officers
42. (1)-(2)..

(3) For the purposes of this Act, the Minister for Justice and Constitutional Development may, after consultation with the head of an administrative region defined in section 1 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), appoint a magistrate or an additional magistrate as a dedicated presiding officer of the children's court, within existing resources.

(4)-(10)..

50 Some care and contact matters are heard in the children's court, for example, orders relating to unmarried fathers, grandparents and other interested parties and parental responsibilities and rights agreements.

Practical considerations may prohibit the implementation of these proposals.[51]

4.2.39 It has been argued that the dedicated magistrate who acts as presiding officer should –

a) be a specialist in family law and the Children's Act;
b) receive specialist training on the Children's Act, the Bill of Rights and international instruments that deal with children;
c) hold the position on a permanent basis;
d) not be rotated.

4.2.40 In 2008 the Portfolio Committee on Justice and Constitutional Development cautioned that, whilst the provisions relating to training in civil adjudication are sound in principle, training in itself does not necessarily constitute an adequate mechanism to equip judicial officers to deal with family and other civil matters. Sound jurisprudential qualities are made up from a combination of legal education, training, experience and individual aptitude. Care should therefore be taken to ensure that only those judges and magistrates who are fit and proper persons, in that broader sense, are appointed and are designated to exercise civil jurisdiction in the High Courts and Regional Courts, respectively.[52]

c) Lawyers

4.2.41 Mental health professionals and employees of the Office of the Family Advocate have mentioned that some lawyers are instrumental in delaying custody and contact proceedings.[53] More worrisome, however, is the allegation that there are lawyers who make a practice of increasing the acrimony between divorcing or separating parents. False allegations also continue to enter divorce proceedings by way of lawyers who place allegations of criminal behaviour in affidavit material without substantiation from child welfare or police authorities, and without consequence to the accusing parent.[54]

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51 See discussion of these proposals in DSD ***Recommendations in Respect of Final Draft*** 2013 at 46.

52 Justice and Constitutional Development Portfolio Committee ***Report on the Jurisdiction of Regional Courts Amendment Bill [B 48-2007]*** 19 March 2008 at par 5.

53 Focus Group Forum discussion.

54 See, in this regard, the comments in ***Van Vuuren v Van Vuuren*** 1993(1) SA 163 (T) at 167C-D.

4.2.42 Many lawyers do not put the interests of their client first or consider the damage the protracted conflictive court battle has on the children. Rather, their primary concern is that the matter appears before a court and that the pleadings process is prolonged so that their fee can escalate. Further, some unethical lawyers are encouraging their clients to apply for protection orders in terms of the Domestic Violence Act 116 of 1998 in order to frustrate the attempts by the non-custodial parent to see his or her children.[55]

Questions:

4. Should the courts be regarded as the most appropriate body to provide rules for the re-organisation of parent-child relationships upon divorce?
5. Should one main court handle all child, family and domestic cases as a court of first instance?
6. What are the key problems with enforcing care and contact arrangements through the courts?
7. Should judges be able to specialise in family court matters?
8. Should magistrates and judges be rotated?
9. In your experience, do lawyers consider the impact of protracted proceedings on children?

4.2.43 See also the discussion in par 4.4 and 4.5 on traditional courts and community dispute resolution, respectively.

4.3 Office of the Family Advocate

a) Applicable legislation

(i) Mediation in Certain Divorce Matters Act 24 of 1987

4.3.1 This Act establishes the Office of the Family Advocate. It was passed at a time when divorce rates were increasing in South Africa, and there was an urgent need to protect the interests of children. This Act also amended the Divorce Act of 1979 in order to provide for the consideration by a court of the report and recommendations of

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55 See Bonthuys E "Spoiling the Child: Domestic Violence and the Interests of Children" 1999 15 ***SAJHR*** 308. See also the discussion in this regard in Chapter 2.

a Family Advocate before granting a decree of divorce or other relief.[56] The Office of the Family Advocate is celebrating its 25th anniversary this year.[57]

4.3.2 Section 2 of this Act furnishes the Minister of Justice with authority to appoint one or more officers referred to as a 'Family Advocate' to each division of the High Court. A person is appointed as a Family Advocate if s/he has been admitted as an Advocate in terms of Act 74 of 1964 and has experience in the adjudication and settlement of family matters. Further, in terms of section 3 of the Act, the Minister may appoint a Family Counsellor to assist the Family Advocate with his/her functions. Together they work as an interdisciplinary team to promote the welfare of children. The exact role aside from 'assisting' the Family Advocate is not clearly specified in the Act or regulations to the Act.

4.3.3 The statute does not specify the qualifications of a Family Counsellor. In practice, only professionals with special expertise and experience in child and family matters are considered eligible. Social workers, retired teachers and ministers of religion often act as Family Counsellors.[58]

4.3.4 The powers and duties of the Family Advocate in terms of this Act are outlined in section 4 of the Act.[59] The function of a Family Advocate is to institute an enquiry to

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56 In providing for an enquiry to be conducted by the Office of the Family Advocate, this Act amended Sections 6, 8 and 12(1) and (2) of the Divorce Act 70 of 1979.

57 The first office was opened in October 1990. Mosima Mashao quoting the Chief Family Advocate Adv Petunia Seabi-Mathope in "Family Advocates's Office; Reflects the Journey Travelled" ***Justice Voice Online*** Issue 19 23 October 2015 at 4: To date, the Office provides services in 25 offices countrywide, and are available in high courts, magistrates' courts, children and regional courts. Through the assistance of non-governmental, faith based and civil organisations, family counselors are now able to travel even to the most rural and remote areas in discharging their duties.

58 Paleker at 22.

59 Section 4 of the Mediation in Certain Divorce Matters Act 24 0f 1987 reads as follows:

Powers and duties of Family Advocates
4. (1) The Family Advocate shall-
(a) after the institution of a divorce action; or
(b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act 70 of 1979),
if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him by the court.

(2) A Family Advocate may-
(a) after the institution of a divorce action; or

enable him or her to furnish the court with a report and recommendations on any matter concerning the welfare of each minor child or dependent child of the marriage, or regarding such matter as is referred to him or her by the court.

4.3.5 Such enquiry can only be conducted in terms of this Act after a divorce action or application for variation, rescission or suspension of an order in terms of the Divorce Act has been instituted, and either of the parties or the court may request the enquiry. The Family Advocate may also, in terms of section 4(2), of his/her own initiative request the court to grant an order to conduct such an enquiry, after the institution of a divorce action.

4.3.6 In ***Van Vuuren v Van Vuuren***[60] the court stated that where it is clear from the facts that there are serious problems in connection with access to the children, the Family Advocate should act in terms of section 4(2). It further set out other instances, for the guidance of the Family Advocate, under which such an investigation should be initiated:

a) Where it appears that there is an intention not to place young children under the custody and control of the mother;
b) Where there is an intention to separate children from each other by awarding custody and control of, say, one child to one parent and the other child to the other parent;
c) Where there is an intention to award the custody and control of a child to a person other than the child's parents;
d) Where there is an intention to make an arrangement in respect of custody and control which is prima facie not in the interests of the child.

The Court further stated that, naturally, the Court should in every case which comes before it still consider whether an investigation should be authorised.

(b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979,

if he deems it in the interest of any minor or dependent child of a marriage concerned, apply to the court concerned for an order authorizing him to institute an enquiry contemplated in subsection (1).

(3) Any Family Advocate may, if he deems it in the interest of any minor or dependent child of a marriage concerned, and shall, if so requested by a court, appear at the trial of any divorce action or the hearing of any application referred to in subsections (1) *(b)* and (2) *(b)* and may adduce any available evidence relevant to the action or application and cross-examine witnesses giving evidence thereat.

60 ***Van Vuuren v Van Vuuren*** 1993 (1) SA 163 (T) at 166.

4.3.7 The report and recommendations of the Family Advocate are to be furnished to the court at the time of the divorce action and the Family Advocate may cross-examine witnesses or adduce evidence at the time of the hearing or trial of the divorce action.

4.3.8 Sections 6, 7 and 8 of this Act provide that a divorce decree may not be granted until the requested or ordered report and recommendations of the Family Advocate has been considered by the court.[61] Further, in granting an order of divorce in such circumstances the court must be satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be affected in the circumstances.

4.3.9 The memorandum to the original Bill states that the work of the Family Advocate, assisted by the Family Counsellor, will enable the parties to a divorce action to reflect on the provision to be made for the minor or dependent children in a non-accusatorial atmosphere, with the professional assistance of a neutral third party. The Act is not clear as to how this is to be achieved or what process is to be used.[62]

4.3.10 The Family Advocate and the Family Counsellor are empowered by Regulations,[63] promulgated in terms of the Mediation in Certain Divorce Matters Act, to appoint person(s) to assist them in their duties.[64] Mental health professionals such as psychiatrists and psychologists may be appointed to assist.[65]

4.3.11 The Judicial Matters Second Amendment Act[66] has made provision for the amendment of the Mediation in Certain Divorce Matters Act in order to make provision for additional regulations.[67]

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61 Although the Mediation in Certain Divorce Matters Act did amend the Divorce Act, all it provided for was an enquiry or an investigation in certain matters, but not for mediation. See discussion below.

62 See discussion below.

63 Government Notice Regulation No 2513 *GG* 14263 of 3 October 1990.

64 Regulation 6.

65 Paleker at 22.

66 Judicial Matters Second Amendment Act 55 of 2003.

67 Section 5(1)(dA) of the Mediation in Certain Divorce Matters Act 24 of 1987 reads as follows:

Regulations
5. (1) The Minister may make regulations as to-
(a)-(d)….

4.3.12 The JRCAA further inserted a definition of "court" in section 1 of the Mediation in Certain Divorce Matters Act.[68] The definition ensures that the Family Advocate may also conduct enquiries where divorces are granted in the Regional Court.

(ii) Children's Act 38 of 2005

4.3.13 The functions of the Office of the Family Advocate have been considerably broadened by the full implementation of the Children's Act 38 of 2005.[69]

4.3.14 The Act's objective appears to be to ensure better provision for the children in circumstances not provided for in the Mediation in Certain Divorce Matters Act, by the intervention of the Family Advocate. The Act, for example, also makes provision for certain public family law functions, especially in so far as alternative dispute resolution is concerned.

(iii) Recognition of Customary Marriages Act 120 of 1998

4.3.15 The Recognition of Customary Marriages Act makes provision for the application of the Mediation in Certain Divorce Matters Act to the dissolution of customary marriages.[70]

(dA) the circumstances in which a court may cause an investigation to be carried out by a Family Advocate as contemplated in section 10 (1A) of the Maintenance Act, 1998 (Act 99 of 1998), and section 5 (1A) of the Domestic Violence Act, 1998 (Act 116 of 1998); (e)-(f)…

68 Section 1 of the Mediation in Certain Divorce Matters Act 24 of 1987 reads as follows:

Definitions
'court' means the court having jurisdiction in any action or proceedings referred to in section 4.

69 See sections 1 (definitions), 21 (biological fathers), 22 (parental responsibilities and rights agreements, 23 (interested parties), 29(5) (court proceedings), 33 (parenting plans), 49 (lay-forums hearings), 62 (professional reports), 63 (evidence), and 276 (child abductions).

70 Section 8 of the Recognition of Customary Marriages Act 120 of 1998 provides as follows:

Dissolution of customary marriages
8. (1) –(2)…

(3) The Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987) and section 6 of the Divorce Act, 1979 (Act 70 of 1979), apply to the dissolution of a customary marriage.

(4)-(5)…

(iv) Civil Union Act 17 of 2006

4.3.16 The Civil Union Act makes provision for the application of the Mediation in Certain Divorce Matters Act to children born from civil unions.[71]

(v) Domestic Violence Act 116 of 1998 and Maintenance Act 99 of 1998 (as amended by the Judicial Matters Second Amendment Act 55 of 2003)

4.3.17 The Judicial Matters Second Amendment Act amends the Domestic Violence Act[72] and the Maintenance Act[73] in order to set out the circumstances in which the Family Advocate may intervene in domestic violence and maintenance proceedings.

b) Problems identified for discussion[74]

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71 Section 13 of the Civil Union Act 17 of 2006 provides as follows:

Legal consequences of civil union
13. (1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.

(2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to-
(a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
(b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.

72 Section 5 of the Domestic Violence Act 116 of 1998 reads as follows:

Consideration of application and issuing of interim protection order
5. (1) …

(1A) Where circumstances permit and where a Family Advocate is available, a court may, in the circumstances as may be prescribed in the Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987), when considering an application contemplated in subsection (1), cause an investigation to be carried out by a Family Advocate, contemplated in the Mediation in Certain Divorce Matters Act, 1987, in whose area of jurisdiction that court is, with regard to the welfare of any minor or dependent child affected by the proceedings in question, whereupon the provisions of that Act apply with the changes required by the context.

73 Section 10(1A) of the Maintenance Act 99 of 1998 reads as follows:

Enquiry by maintenance court
10.(1) ….

(1A) Where circumstances permit and where a Family Advocate is available, a maintenance court may, in the circumstances as may be prescribed in the Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987), at any time during the enquiry, cause an investigation to be carried out by a Family Advocate, contemplated in the Mediation in Certain Divorce Matters Act, 1987, in whose area of jurisdiction that maintenance court is, with regard to the welfare of any minor or dependent child affected by such enquiry, whereupon the provisions of that Act apply with the changes required by the context.

74 The problems identified for discussion in this section are, except where otherwise indicated, firstly, based on the responses received to a set of questionnaires, dealing with the Office of the

(i) Harmonisation of legislation

4.3.18 It may be advisable that the Mediation in Certain Divorce Matters Act be fully revised to take account of the increased functions of the Family Advocate as set out in various pieces of legislation. The Act does provide for functions to be added by way of regulation, but it is submitted that certain additional key functions are performed by the Family Advocates and that the empowering supporting legislation may have to be reviewed in order to ensure that it provides a sufficiently comprehensive basis for the additional duties that have to be performed. A comprehensive new Act may be necessary.[75]

4.3.19 A new Act will also address current problems regarding the articulation between the Mediation in Certain Divorce Matters Act and the other legislation that provide for the duties of the Family Advocate. For example section 5(1)(dA) of the Act empowers the Minister of Justice and Constitutional Development to make regulations relating to the "circumstances in which a court may cause an investigation to be carried out by a Family Advocate" as contemplated in the Maintenance Act 99 of 1998 and the Domestic Violence Act 116 of 1998. However, no mention is made of the Children's Act - and yet the Family Advocate has many specified responsibilities arising from that Act, some of which are already in operation since 1 July 2007. The Children's Act does not expressly amend the Mediation in Certain Divorce Matters Act. It is, therefore, proposed that section 5(1)(dA) of this Act be amended to include a reference to section 29(5) of the Children's Act.

4.3.20 The Children's Act should also be amended to make provision for section 5(1)(dA) of the Mediation in Certain Divorce Matters Act.

(ii) Mediation conducted by Office of Family Advocate

Family Advocate, which were distributed via email and faxes, and published on the SALRC's website (http://www.doj.gov.za/salrc/qnr.htm). These questionnaires targeted family advocates, social workers, legal practitioners and psychologists. Secondly, further input was received from the Office of the Family Advocate during Focus Group Forums with officials of nine provinces of the Office of the Family Advocate and at a national Focus Group Forum with the senior and principal Family Advocates that was held on the 21 February 2008.

75 See in this regard the Hoexter Commission's proposals for the replacement of the Mediation in Certain Divorce Matters Act with a proposed Family Advocate and Family Counselling Service Act. See also the further discussion below on the need for a comprehensive family law system for South Africa.

4.3.21 The term "mediation" has in the past been arbitrarily used in some instances to refer to any process containing non-adversarial elements, since there is no specific family mediation legislation in place in South Africa. This position is, however, about to change with the envisaged development of an Alternative Dispute Resolution Act.[76] It may, therefore, also be necessary to clarify the position regarding the alternative dispute resolution processes used by the Family Advocate.

4.3.22 Both the Short Title and the Long Title of the Mediation in Certain Divorce Matters Act[77] indicate that the process intended by the Act to determine what custody and access arrangements are in the child's best interests is mediation.[78]

4.3.23 However, "mediation" as such is not defined in the Act, nor is it referred to in the text. The processes described in the Act, furthermore, do not accord with the usual (if somewhat muddled) understanding of what mediation entails. It has, therefore, been argued that Family Advocates and Family Counsellors are not authorised to conduct mediations per se in terms of the Act, but rather to conduct enquiries or investigations.

4.3.24 The concept of mediation has also been developed and given content administratively by the Family Advocates themselves and has been implemented as part of a wider procedure when an enquiry is conducted by the Family Advocate.[79]

4.3.25 The differences between "mediation" by the Family Advocate and mediation as it is commonly viewed and described in the literature[80] are the following:

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76 See discussion in Chapter 1 and further. See also the section on court-annexed mediation rules.

77 The long title of the Act defines the purpose of the Act as follows:

'To provide mediation in certain divorce proceedings, and in certain applications arising from such proceedings, in which minor children or dependent children of the marriage are involved.

78 The legislators have not included the word mediation in the substance of the Act. Consequently it appears that the objective or purpose of the Act is something other than mediation.

79 Van Zyl GJ "The Family Advocate: 10 Years Later" 2000 21 ***Obiter*** 372 (hereafter "Van Zyl") at 377.

80 Paleker at 22 and further. See however, De Jong M "Chapter 13: Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce" in Heaton J (ed) 2014 at 583 where she states that the requirement that mediation should be voluntary can no longer be regarded as an absolute as participation in the process is increasingly being forced on parties. The parties are, however, not compelled to reach a decision and any agreements they do reach are voluntary.

a) Mediation by the Family Advocate, at least to some extent, is not submitted to completely voluntarily by both parties;[81]

b) The Family Advocate and the experts assisting him or her actively participate in the decision-making process.[82] His or her functions and powers cut right across the basic premises of mediation, namely, that it is a mutual voluntary effort in which the parties are guided by a neutral third party to reach settlement for which they are responsible.[83]

c) Mediation by necessary implication also involves an evaluation of the parenting abilities of the parties since the Family Advocate is duty-bound to assure the court that, whatever the agreement between the parties, what is agreed upon will be in the best interests of the children. The Family Counsellor is a key figure in the evaluation process.[84] Even where the Family Advocate tries to create an atmosphere that is less acrimonious than a court, it becomes clear, once parties are unable to reach an agreement within the first few minutes of a session, that an adversarial approach is being implemented. The same Family Advocate and Family Counsellor who began mediating switch to assessing the parents, which does not augur well for parties. Clearly, objectivity is compromised under these types of conditions.

d) The reference to enquiry, it is submitted, creates the reasonable impression that the Family Advocate may embark on fact-finding with a view to informed decision-making. Fact-finding is not in itself inimical to mediation as long as the mediator remains neutral. However, neutrality is difficult to guarantee under the Act. This is the case because when the Family Advocate is unable to resolve a dispute between the parties through an enquiry and the matter goes to court, the Family Advocate may appear to cross-examine witnesses and adduce evidence.[85] The

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81 Van Zyl at 378.

82 Van Zyl at 378.

83 Paleker at 23.

84 Van Zyl at 378.

85 Section 4(3).

Family Advocate may even draft a report for consideration by the court.[86] The report is normally exhaustive and invariably contains facts revealed by the parties during the enquiry process. Confidentiality is thus compromised.[87]

e) Offices that are under-resourced or overburdened with work require a quick turnover of cases to cope. They do not have the luxury of time when conducting an enquiry. Of course, such constraints are inimical to mediation. Because mediation is less inquisitorially driven, the process usually takes longer. When time is of the essence, mediation under these circumstances cannot realise the same fruits as when the mediator and the parties are operating in a relaxed and non-time driven environment. Mediation is predicated on consensual decision-making where parties voluntarily and without external pressure meet middle ground. In a time-driven, stressful environment there is always the risk that recommendations as to what is in the best interests of a child, may later be seen to have been foisted upon parties in a bid to resolve the matter as quickly as possible.[88]

4.3.26 It has been argued that, instead of being a mediator, the Family Advocate must rather be appreciated and validated for offering state-sponsored, court-connected, and court-accountable social welfare intervention. Even though the Office of the Family Advocate may, holistically speaking, as indicated by the DOJCD, have a mediatory function, the Family Advocate's Office is currently viewed as a decision-making body[89] rather than an Office that can help families mediate their disputes prior to litigation. [90]

4.3.27 Studies also reveal that the Office of the Family Advocate is perhaps too legalistic and that it maintains strong links with the adversarial litigation process.

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86 Section 6(1).

87 Paleker at 23.

88 Paleker at 22.

89 The Family Advocate has no decision making powers but only the competence to make recommendations to the court as to what is in the best interest of a child. However, in order to make these recommendations the Family Advocate has to decide which party to support. In this sense the parties lose the initiative to reach an agreement.

90 Paleker at 23.

Consequently, it is sometimes difficult to tell where the so-called mediation function of the Family Advocate ends and where the formal litigation process begins.[91]

4.3.28 The functions of mediation and evaluation should ideally be separated so that the focus can be correctly placed. To expect parties to participate in a mediation attempt, knowing full well that the facts and information provided will later be used as part of the evaluation process, should the mediation attempt fail, militates against the idea of mediation. [92]

4.3.29 Aside from conducting enquiries and assessments, the Family Advocate's Office is now also required to conduct mediations in terms of the Children's Act, affirming the need to separate the functions of mediation and evaluation.[93]

4.3.30 After deliberations,[94] representatives of the Office of the Family Advocate suggested that since this Office has limited capacity, and mediation in all disputes requires increased human resources, skill and time, that the best arrangement could be for the Office to have two distinct streams which work in conjunction but independently of each other. One stream could focus solely on mediation, and the other could focus on assessment and litigation. This would allow Family Advocates and Family Counsellors to focus on a particular function and to dedicate the amount of time required to obtain the best results.

4.3.31 To ensure objectivity and affectivity, in the event of mediation failing, parties will be referred from the mediation stream to the assessment stream where a new team of Family Advocate and Family Counsellor will then engage in the assessment and evaluation of what would be in the best interests of the child. If the mediation is successful, then the parenting plan will be signed by both parties and endorsed by the assessment stream of the Family Advocate's Office. If the assessment stream is satisfied with the arrangements on the face of the agreement, they will endorse the agreement, and the parties can obtain their order from court. If, however, the

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91 Paleker at 22

92 Van Zyl at 388.

93 Sections 21 and 33 of the Children's Act are two of the many sections in the Act which require the Office of the Family Advocate to engage in the added responsibility of assisting with mediations.

94 Focus Group Forum.

assessment stream is not satisfied with the mediated agreement, they will still have the capacity to conduct an enquiry.

(iii) Early intervention needed

4.3.32 It has been argued[95] that an early intervention to divorce proceedings is necessary. However, it is disappointing to note that the Mediation in Certain Divorce Matters Act envisages such assistance being offered in the adversarial environment of the court process. Such intervention would be more appropriate at an earlier stage before the attitudes of the parties hardens in the acrimonious atmosphere of the hearing of a divorce action.

4.3.33 As such, the Act is rather narrow and unimaginative and fails to meet the objective of its short title, which is deceiving.[96]

4.3.34 The Family Advocate's functions have recently been broadened to include a variety of matters, not originally included in the Act, in terms of other legislation. A measure of early intervention is therefore now possible,[97] and may be used as a basis to extend the powers and duties of the Family Advocate even further, especially in so far as ADR is concerned.

(iv) Scope of the Family Advocate's investigation

4.3.35 No room is provided in the Act for the assistance of children born of religious marriages or domestic partnerships.[98]

4.3.36 Section 21 of the Children's Act, 2005 does, however, ensure that there is a procedure in law for unmarried fathers to request the assistance of the Office of the Family Advocate to establish care, contact and guardianship rights.

4.3.37 Finally, the Act makes reference to "marriage" and uses the adjectives "minor"

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95 Mowatt 1987 ***De Rebus***.

96 Section 4(3) The Mediation in Certain Divorce Matters Act 24 of 1987.

97 See the Family Advocate's involvement in parenting plans, lay-forum hearings, etc.

98 See the Recognition of Customary Marriages Act 120 of 1998 and the Civil Union Act, 17 of 2006 that makes provision for the application of the Mediation in Certain Divorce Matters Act to the dissolution of customary marriages and civil unions respectively.

and “dependent” child.[99] The question arises whether these provisions should not be aligned to apply to domestic partnerships and religious marriages and by removing the adjectives “minor” and “dependent” when referring to a child.

4.3.38 It should be noted that, in practice courts do refer relevant matters to the Office of the Family Advocate even where there is no authorisation in legislation to do so.[100]

4.3.39 Even though the functions of the Family Advocate have been expanded, no investigation is possible in so far as matrimonial property matters are concerned. This could be problematic since care and contact disputes are often inextricably bound to matrimonial disputes.[101]

4.3.40 The Office of the Family Advocate should perhaps be allowed to conduct enquiries in matters involving all children under any circumstances after breakdown of a relationship.[102]

4.3.41 Professional mediators, as part of their continuous accreditation requirements, should also be asked to do a few hours a year pro bono work to help with staff shortages.

4.3.42 Trained mediators need to be appointed to conduct mediations. They should employ intake officers who have the expertise to conduct screening of matters as regards their suitability for assessment or mediation.

4.3.43 The Office must be given the discretion and increased resources to outsource mediations to private mediators when their resources and expertise are unable to handle a particular matter or the work load.

(v) No assistance to parties after court order has been granted

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99 In section 4 of this Act.

100 De Jong M ***Egskeidingsbemlddeling In Suid-Afrika: 'n Vergelykende Studie*** LLD thesis University of South Africa November 2002 (hereafter “De Jong thesis”) at 74 with reference to Van Zyl CLE Conference Journal “Child in Divorce Practice” at 1; Van Zyl at 374.

101 Clark B “No Holy Cow - Some Caveats on Family Mediation”1993 56 ***THRHR*** 454 at 460; De Jong thesis at 73.

102 Van Zyl at 388.

4.3.44 The Office of the Family Advocate has no capacity (powers) to assist parties after a court order has been granted. Hence, where parties have problems with enforcing access orders after the hearing or the trial, the Office of the Family Advocate cannot assist them. Once again they are forced to go to court for assistance which is yet another lengthy, bitter and costly affair.

4.3.45 The Office of the Family Advocate has no power to enforce care and contact orders.

4.3.46 The question is posed whether the role of the Family Advocate should cease once a report has been finalised, or whether it should be extended to continue even after a court order has been made.

(vi) Inadequate resources and time

4.3.47 The Family Advocate's Office does not have adequate resources or time to investigate each and every settlement agreement that reaches them.[103] The capacity of the office is limited. The volume is overwhelming and the complexity of cases requires special skills. Staff burnout is a real issue. More training and logistical support for the offices are necessary.[104] Although the Office was established to help protect the best interests of children involved in contact and care disputes, they are only able to conduct investigations when the matter is before the courts. They have to scrutinise each and every summons for divorce involving minor and dependent children and may apply to the judge in chambers to conduct an inquiry in any divorce matter involving children.

4.3.48 The role, functions, powers, duties, structure and character of the Office of the Family Advocate should be reviewed and expanded. Issues tom be considered are the following: the amount of office space allocated to the various centres; the number of offices in the outlying areas; and the number of staff at the various centres.

4.3.49 Various matters have been brought to the DOJCD's attention regarding the processes utilised when determining care and contact disputes::

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103 Van Zyl at 382.

104 Van Zyl at 388.

a) It sometimes takes an extraordinarily long time to conduct an enquiry and come up with a report.[105] Some cases take several years to conclude during which time the needs of children change considerably. There are many cases where the child was only a few months old when the process began and a few years old when it is concluded. During all this time the child is exposed to uncertainty and the ongoing conflict between the parents.[106]

b) The recommendations of a report are generally based on a one to two hour interview, with all the parties concerned.[107]

c) The workload of the Family Advocates and Family Counsellors – what one person can cope with – should be assessed and, when required, more people should be appointed. If the way the Office works and their approach adjusted to what the norm is in overseas countries, where a lot of research has been done to streamline the process, the workload can be decreased.[108]

4.3.50 During the 2013/14 financial year, 7 new Family Advocate offices have been established in Welkom, Palm Springs, Sibasa, Vossman, Upington, Rustenburg and Mitchells Plain. The establishment of these offices, with between 3 and 4 Family Advocates per office, will go a long way in assisting provinces such as Limpopo where previously there was only one office to serve a whole province.

4.3.51 Establishment of these offices was necessitated, firstly, by the increase in workload as a result of the Act that designated Regional Magistrates' Courts to deal with divorce matters. Secondly, mediation services for families are now mainly handled by the Chief Family Advocate and to a lesser extent in the Department of Social Development.

4.3.52 It is therefore not clear whether these improvements have succeed in ameliorating the current situation.

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105 Heath S "Concerns Regarding the Functioning of the Office of the Family Advocate in South Africa" Letter written to the DG, DOJCD on 25 June 2009 (hereafter "Heath") at par 2.

106 Heath at par 10.

107 Heath at par 21.

108 Heath at par 22.

(vii) Permanent appointments versus contract appointments

4.3.53 The Act allows for Family Advocates to be permanently appointed, but section 3(2) provides that Family Counsellors may only be appointed on three year contracts. This provision providing for permanent appointment for one group of employees, the Family Advocates, compared to the fixed-term employment for the counsellors, seems to constitute unjustifiable differentiation and is possibly out of line with practice. The question arises whether Family Counsellors are in fact still appointed on three-year contracts by the Department of Justice and Constitutional Development. It may be that in practice Family Counsellors are employed on a permanent basis and therefore this provision is outdated.

(viii) Reports of the Family Advocate

4.3.54 The Family Advocate, with the assistance of the Family Counsellor, evaluates the comparative capacities of the parents involved as well as the specific needs of the child and make objective recommendations to the court. In this sense, s/he works essentially as an advocate for the child. His or her contribution may prove to be invaluable for the judge, who may have a need for greater clarification of the emotional factors, perhaps more so in this type of case than in others.

4.3.55 One issue that is raised[109] is whether the report should be made available to the parties or remain confidential in the hands of the court. It is argued that the document may contain sensitive information about the parents which may be used later by a vengeful disappointed partner to hurt the child. Similarly, the contents of the document, if known to both sides, may destroy the remnants of the relationship between parents which is essential for the continued psychological welfare of the child. Further, the knowledge that the parents will see the document may discourage school teachers or family doctors or family friends interviewed by the Family Counsellor from being entirely open about the parties.[110]

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109 Mowatt 1988 ***TSAR*** 1.

110 Ibid.

4.3.56 It would, however, seem as though the arguments set out above will not be strong enough[111] to justify keeping these matters a secret from the parents.[112] In custody disputes divorcing parents may be required to undergo a humbling process of investigation and accept that as part of the judicial process.[113]

(ix) Technical issues[114]

4.3.57 The Mediation and Certain Divorce Matters Act still refers to the Supreme Court. Section 2(1) empowers the Minister of Justice and Constitutional Development to appoint a Family Advocate at each division of the Supreme Court. Section 3(1) authorizes the Minister of Justice to appoint at each division of the Supreme Court a Family Counsellor to assist the Family Advocate with inquiries in terms of any applicable law. The references to the Supreme Court in these sections have become obsolete. The Constitution makes it clear that the courts in the Republic are the Constitutional Court, the Supreme Court of Appeal, the High Courts and the Magistrates' Courts. As stated above, although the legislature has, in the proposed Superior Courts Bill, retained the word division, it has abandoned the adjectives '*provincial*' or 'local'.[115] Furthermore, as stated above, the Jurisdiction of the Regional

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111 De Jong thesis.

112 See section 32(1) of the Bill of Rights contained in Chapter 2 of the Constitution that provides that everyone has the right to access to any information held by the state and any information that is held by another person that is required for the exercise or protection of any rights. See also the Promotion of Access to Information Act 2 of 2000 in this regard.

113 Mowatt 1987 ***De Rebus*** 198.

114 SALRC Consultation Paper Project 25. Section 1 of this Act defines, among others, 'Minister' as the Minister of Justice. It is recommended that 'Minister of Justice and Constitutional Development' be substituted for 'Minister of Justice' in section 1; Furthermore, a number of provisions of this Act refer to 'he', 'him', and 'his'. The SALRC recommends that the expression 'he or she' be substituted for the word 'he', wherever it occurs in sections 2(2); 4(2) and (3) and 5(1)(f). It is also recommended that the expression 'him or her' be substituted for word 'him' wherever it occurs in sections 2(1); 4(1) and 4(2). It is also recommended that the expression 'his or her' be substituted for the word 'his' in sections 2(2); 3(2); and 3(4).

115 Clause 6 of the proposed Superior Courts Bill 7 of 2011 provides that:

Constitution of High Court of South Africa
6.(1) The High Court of South Africa consists of the following Divisions:
(a) Eastern Cape Division, with its main seat in Grahamstown.
(b) Free State Division, with its main seat in Bloemfontein.
(c) Gauteng Division, with its main seat in Pretoria.
(d) KwaZulu-Natal Division, with its main seat in Pietermaritzburg.
(e) Limpopo Division, with its main seat in Polokwane.
(f) Mpumalanga Division, with its main seat in Nelspruit.
(g) Northern Cape Division, with its main seat in Kimberley.
(h) North West Division, with its main seat in Mafikeng.
(i) Western Cape Division, with its main seat in Cape Town.

Courts Amendment Act has amended the Magistrates' Courts Act of 1944 by conferring on regional courts the jurisdiction to entertain civil disputes including matters that were regulated by section 10 of the Administration Amendment Act of 1929. Prior to its repeal, the Administration Amendment Act of 1929 provided that "Any person who has been appointed as a Family Advocate or Family Counsellor under the Mediation in Certain Divorce Matters Act, 1987 (this Act) shall be deemed to have also been appointed in respect of any Divorce Court having jurisdiction in the area for which he or she had been so appointed." Section 29(1B)(d) of the Magistrates' Court Act provides as follows: "Any person who has been appointed as Family Advocate or Family Counsellor under the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) shall be deemed to have also been appointed in respect of any court for a regional division having jurisdiction in the area for which he or she has been so appointed." However, no consequential amendments were made to this Act pursuant to the enactment of Act 31 of 2008.

4.3.58 In light of the constitutional provisions alluded to above, the changes brought about by the Jurisdiction of Regional Courts Amendment Act of 2008[116] and the changes likely to be enacted into law when the Superior Courts Bill comes into force, it is recommended that the power of the Minister of Justice and Constitutional Development be extended to include the appointment of Family Advocates and Family Counsellors for courts of regional divisions as well.

Questions:

10. Is there a need for the character and structure of the Office of the Family Advocate to change to enable effective and "proper" mediation to occur?
11. Are Family Advocates and Family Counsellors currently able to conduct "proper" mediation sessions with parties?
12. What are the limitations of the Office of the Family Advocate in its current form?
13. Should there be two streams, a mediation stream and a litigation/assessment stream in the Office of the Family Advocate to enable mediators and evaluators to be unbiased and objective in carrying out their respective functions? Alternatively, should a separate Family Justice Centre be established with the Family Advocate's Office as an important role player within such a Centre?[117]

[116] The Minister of Justice and Constitutional Development, Honourable Minister Jeff Radebe, published Government Notice GN 670 in GG 33418 on 29 July 2010 which established the 62 seats of the regional court within a regional division in each province. Each designated place of sitting has its particular areas of jurisdiction and this enables litigants to institute action or application in the locality or nearest seat.

[117] See also the discussion on the People's Family Law Centre (PFLC) in par 4.9.47 below.

4.4 Traditional courts[118]

a) Administration of justice in rural South Africa

4.4.1 Section 211 of the Constitution[119] provides recognition of the institution of traditional leadership in accordance with customary law and subject to the Constitution.[120] Customary law is not, however, defined in the Constitution.

4.4.2 Section 39(2) and (3) of the Constitution[121] binds the courts in their development of customary law to promote the spirit, purport and objects of the Bill of Rights.

4.4.3 The recognition of the institution of traditional leadership is also subject to the Constitution as a whole, and thus the following sections of the Constitution are also implied:[122]

a) Section 8(1), which makes the Bill of Rights applicable to all law, including customary law, and which binds all organs of State, including traditional authorities; and

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118 See also the discussion on African dispute resolution in Chapter 3 above.

119 Section 211 of the Constitution provides as follows:

Recognition
211. (1) The institution, status and role of traditional leadership, according to customary law, is recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

120 See Chapter 3 for a discussion on customary law and children.

121 Section 39(2) and (3) of the Constitution provides as follows:

Interpretation of Bill of Rights
39. (1) …

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

122 Rautenbach C, Bekker JC & Goolam NMI ***Introduction to Legal Pluralism in South Africa*** 3ed Lexis Nexis 2010 (hereafter "Rautenbach et al") 179.

b) Section 9, which forbids unfair discrimination by the State and private persons on various grounds, including race, gender, disability, culture and birth.

4.4.4 The administration of justice in traditional communities in rural South Africa is predominantly carried out by chiefs' courts.[123]

4.4.5 A community may be recognised[124] as a traditional community if it -

(a) is subject to a system of traditional leadership in terms of that community's customs; and
(b) observes a system of customary law.[125]

4.4.6 The Traditional Leadership and Governance Framework Act of 2003[126] and the National House of Traditional Leaders Act of 2009[127] provide a framework and norms and standards on traditional leadership and governance.[128] Both Acts will, however, be repealed if, and when, the newly developed Traditional Affairs Bill [129] is enacted.

4.4.7 The operation of the traditional courts within the traditional communities is governed by a number of statutes[130] from the pre-Constitutional era[131] and there is general agreement that the provisions of these statutes have to be consolidated and

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123 South African Law Reform Commission ***Traditional Courts and the Judicial Function of Traditional Leaders*** Report Project 90 2003 (hereafter "SALRC Project 90 Report") at 1.

124 The recognition is to be done by the premier of a province in accordance with provincial legislation and after consultation with the provincial house of traditional leaders, the community concerned and the king or queen, if any, under whose authority that community would fall.

125 Section 2 of the Traditional Leadership and Governance Framework Act 41 of 2003.

126 Traditional Leadership and Governance Framework Act 41 of 2003.

127 National House of Traditional Leaders Act 22 of 2009.

128 The objectives of the Act, as stated in the Preamble to the Act, are -

(a) to set out a national framework and norms and standards that will define the place and role of traditional leadership within the new system of democratic governance;
(b) to transform the institution in line with constitutional imperatives;[128] and
(c) to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices.

The transformation and adaptation should be effected by preventing unfair discrimination, promoting equality and seeking to advance gender representation in traditional leadership positions.

129 Traditional Affairs Bill 2013.

130 Black Administration Act 38 of 1927; Bophuthatswana Traditional Courts Act 29 of 1979, KwaNdbele Traditional Authorities Act 8 of 1984, the Chiefs Courts Act 6 of 1993 (Transkei) and the KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990.

131 The continued operation of homeland statutes is sanctioned by item 2 of Schedule 6 of the 1996 interim Constitution.

modernised in accordance with Constitutional principles.[132] The development of a Traditional Courts Bill is therefore receiving attention.[133]

4.4.8 Presently, the law to be applied in civil cases is customary law. Those customary or traditional courts currently operating under the Black Administration Act[134] are obliged to decide civil cases in accordance with customary law in terms of section 12.[135]

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132 See discussion below on developments in respect of the proposed legislation in this regard.

133 See discussion in par (b) below.

134 Many of the sections of the Black Administration Act have been repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005. However, the repeal is not yet in effect.

135 Section 12 of the Black Administration Act 38 of 1927 reads as follows:

Settlement of civil disputes by Black chiefs, headmen and chiefs' deputies
12. (1) The Minister may-

(a) authorize any Black chief or headman recognized or appointed under subsection (7) or (8) of section *two* to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within his area of jurisdiction;

(b) at the request of any chief upon whom jurisdiction has been conferred in terms of paragraph *(a)*, authorize a deputy of such chief to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within such chief's area of jurisdiction:

Provided that a Black chief, headman or chief's deputy shall not under this section or any other law have power to determine any question of nullity, divorce or separation arising out of a marriage.

(2) The Minister may at any time revoke the authority granted to a chief, headman or chief's deputy under subsection (1).

(3) A judgment given by such chief, headman or chief's deputy shall be executed in accordance with the procedure prescribed by regulation under subsection (6).

(4) Any party to a suit in which a Black chief, headman or chief's deputy has given judgment may appeal therefrom to any magistrates' court which would have had jurisdiction had the proceedings in the first instance been instituted in a magistrates' court, and if the appellant has noted his appeal in the manner and within the period prescribed by regulation under subsection (6), the execution of the judgment shall be suspended until the appeal has been decided (if it was prosecuted at the time and in the manner so prescribed) or until the expiration of the last-mentioned period if the appeal was not prosecuted within that period, or until the appeal has been withdrawn or has lapsed: Provided that no such appeal shall lie in any case where the claim or the value of the matter in dispute is less than R10, unless the court to which the appellant proposes to appeal, has certified after summary enquiry that the issue involves an important principle of law.

(5) .....

(6) The Minister may make the regulations mentioned in subsections (3) and (4), and generally regulations prescribing the procedure which shall be followed in any action taken under this section.

[Sec12 of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005, with effect from such date as national legislation to further regulate the matters dealt with in sub-s. (1) is implemented.**]**

4.4.9 This section empowers the Minister to authorise any black chief or headman recognised or appointed under section 2[136] "to hear and determine civil claims arising out of Black Law and Custom brought before him by blacks against blacks resident within such chiefs' area of jurisdiction.

4.4.10 The primary aim of the court procedure is to effect reconciliation between the parties, hence the use of arbitration.[137] The "trial" takes place in an open court and is informal. This means there is less emphasis on the mechanical rules of exclusion. Both parties must be present. Proceedings are conducted orally in the language most widely spoken in the area of the court's jurisdiction.[138]

4.4.11 The current application of customary law operates as a decentralised system, at several levels, and the tribal court often acts as a kind of appeals court. This system has various checks and balances, including the cultural norms informing restorative principles, the broad presentation of views, good understanding of the context and meaning of behaviour, a fully consultative process and the possibility of appeal to a Magistrate. The presence at the tribal courts of ndunas and councillors, who are charged with assisting the court, mediates and constrains the powers and decisions of the presiding officer.[139]

4.4.12 The plaintiff, accompanied by his or her group, proceeds to the homestead of the wrongdoer to report the matter and open negotiations, as soon as a civil wrong has been committed. If the negotiations do not produce an acceptable outcome, the plaintiff proceeds at once to institute his or her claim in the ward court, and from there, the court of the headman or that of the senior traditional leader.

4.4.13 Legal representation is prohibited. A litigant may, however, be assisted by relatives. Any person who is a party to a matter before a traditional court may be

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136 Section 2 has been repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005 and the appointment of traditional leaders is now dealt with in terms of the Traditional Leadership and Governance Framework Act 41 of 2003.

137 In terms of section 7 of the Traditional Courts Bill, 2008, traditional courts are distinct from courts referred to in section 166 of the Constitution and operate in accordance with a system of customary law and custom that seeks to prevent conflict, maintain harmony and resolve disputes where they have occurred, in a manner that promotes restorative justice and reconciliation and in accordance with the norms and standards reflected in the Constitution.

138 Rautenbach C et al at 179.

139 Professor Ben Cousins, University of Western Cape (UWC) Submission to the Justice Portfolio Committee during the Public Hearings on the Traditional Courts Bill {B15-2008] on 14 May 2008.

represented by any other person in accordance with customary law. Full participation of all interested parties without discrimination on grounds of race, sex or gender is promoted.

4.4.14 Children have the right to testify in tribal courts, the only exception being an infant. Children are competent witnesses if they are old enough to give an account of facts and account being taken of their mental development. The court has a special duty to protect a child from undue harsh and confusing cross-examination.[140]

4.4.15 The Traditional leaders receive a monthly salary from the State.

4.4.16 Generally speaking the traditional system is admirably suited to the needs of African disputes, particularly family disputes. There is no time limit; therefore, the cases are thoroughly discussed. The procedure is simple and singularly free from those technicalities of ordinary courts.

4.4.17 The substance of the case rather than the form in which it is presented is important, whereas the litigant in the common law system may lose a case by adopting the wrong procedure. The fact that verdicts are usually unanimous and conciliatory is gratifying to the community.[141] See, however, the criticism regarding the new draft Bill below.

4.4.18 In its White Paper on Families, 2013[142] the Department of Social Development states that traditional leaders have an important role to play in the implementation of their White Paper as traditional leaders not only remain the custodians of the traditional value system, but also preside over land, marriages and the family in rural areas.

b) Proposed legislation to deal with traditional courts

4.4.19 The right to access to justice of millions of South Africans who live in rural areas subject to traditional leadership, is currently the subject of proposed legislation.

4.4.20 The South African Law Reform Commission proposed a Traditional Courts Bill in 2003 to recognise traditional courts. The purpose of the Bill was to repeal the Black

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140 Van Niekerk "Principles of the Indigenous Law of Procedure and Evidence as Exhibited in Tswana Law" in Sanders ***Southern Africa in Need of Law Reform*** 1981 137 as referred to in De Bruin thesis.

141 Rautenbach et al at 180.

142 Department of Social Development***, White Paper on Families*** 2013 at 54.

Administration Act of 1927 and to develop the role and scope of traditional courts by regulating dispute resolution in line with "customary law" and the Constitution. The draft recognised the traditionally decentralised system of dispute resolution and kept the principle that people should be able to opt in or out of the jurisdiction of traditional courts.

4.4.21 The Traditional Courts Bill[143] that was tabled in Parliament for the first time in 2008, however, excluded the opt-in opt-out system proposed. It also made provision for more extensive powers of traditional leaders, geographically bound jurisdiction and made no provision for the Constitutional right to equality of women.[144]

4.4.22 The Bill was met with fierce opposition. It was argued that there had been inadequate consultation on this version of the Bill since the rural citizens had not been consulted. The Bill also mirrored apartheid-era legislation and might be unconstitutional.[145]

4.4.23 The provinces mandated their delegates to the National Council of Provinces (NCOP) to request revisions to the draft submitted. The 2008 draft of the Bill was withdrawn from Parliament at the end of 2008.

4.4.24 The Traditional Courts Bill[146] was reintroduced, for the second time, in 2012, directly into the National Council of Provinces. Questions that were posed during the consultation process included the following:

a) If the courts were in line with customary law why did the Bill only apply in former Bantustans? The jurisdiction is based on the apartheid boundaries perpetuated by the Traditional Leadership and Governance Framework Act of 2004.
b) Why were people not given the option to opt-out of the system, where they would prefer to use the magistrates' courts under the civil law in line with the fluidity of the living customary systems and the Constitution?

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143 Traditional Courts Bill B15-2008.

144 The Bill made provision for the continuation of the requirement that women be represented by men in traditional courts.

145 Gasa N "State Repeats Mistakes in Third Attempt at Courts Bill" ***Daily Despatch*** 23 June 2015.

146 Traditional Courts Bill B1-2012.

c) Why were executive, legislative and judicial decision-making power centralised in senior traditional leaders. This was inconsistent with the more democratic functioning of existing traditional courts under customary law;

d) How would the court address multiple identities and customs?

e) The fact that there is no general right to legal representation would also affect the constitutional right of children to legal representation.[147]

4.4.25 In 2013 the Minister of Justice, Minister Jeff Radebe, indicated that the Bill had been withdrawn because the wrong version of the Bill had been introduced.

4.4.26 Government has indicated its intention[148] to reintroduce the Traditional Court Bill for the third time in 2016 in a revised form after consultations with stakeholders.

4.4.27 It would seem that people have not opposed the Bill because they reject the institution of traditional leadership. It has been reported[149] that traditional courts are now being described as a means of alternative dispute resolution. In terms of this argument the courts should not be regarded in the same sense as civil courts, but rather as mediation and arbitration forums, dependent for their effectiveness on participation by the communities that use them.[150]

c) Is the traditional court a court or is it some other institution?

4.4.28 Section 166 of the Constitution makes provision for the courts that make up the judicial system in South Africa. Section 166 does not refer directly to traditional courts. Section 166(e), however, refers to "any other court established or recognised in terms of an Act of Parliament".[151]

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147 See discussion in Chapter 2.

148 Minister of Justice and Correctional Services, The Honorable Minister Michel Masutha, in a written reply to a question in Parliament in March 2015.

149 Mnisi S "Traditional Courts a Ticking Time Bomb" ***Sunday World*** 22 June 2015 at 13.

150 See discussion below.

151 Section 166(e) of the Constitution 1996 reads as follows:

> **Judicial system**
> **166.** The courts are –
> (a)-(d)…
> (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.

4.4.29 If traditional courts fall within the scope of section 166(e) then it cannot be misconstrued that these courts ought to be compliant with constitutional values and principles. If the courts do not fall within the section then it indicates these forums do not have to comply with the principles applicable to courts.

4.4.30 In the First Certification judgment,[152] the Constitutional Court held that section 166(e) of the Constitution, which refers to "any other court established or recognised by an Act of Parliament" includes the approximately 1500 traditional courts recognised in terms of the Black Administration Act 38 of 1927. It should, however, be noted that the Black Administration Act does not create such courts, but rather makes provision for conferring jurisdiction on a traditional leader.

4.4.31 In the SALRC report on customary law[153] the view was accepted that traditional courts should be courts of law.

4.4.32 This view has the effect that the independence and impartiality of these courts must be assessed in terms of section 165(2).

4.4.33 In ***Bangindawo v Head of the Nyanda Regional Authority***[154] Madlanga J held that the conception of judicial independence and impartiality in respect of traditional courts is not the same as in the Western law setting. There was no separation of powers between judicial, executive and legislative power. In ***Mhlekwa v Head of the Western Tembuland Regional Authority***[155] it was held that traditional courts cannot be considered to be "independent and impartial" within the meaning of the words of section 165(2).

4.4.34 The view has been advanced[156] that traditional courts should be removed from section 166(e) and their position must be considered along with other tribunals and

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152 ***Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996*** 1996 (4) SA 744 (CC) at par 199.

153 SALRC Project 90 ***Report*** 2003.

154 ***Bangindawo v Head of the Nyanda Regional Authority*** 1998 (3) SA 262 (Tk).

155 ***Mhlekwa v Head of the Western Tembuland Regional Authority*** 2001(1)SA 471 (C) at par 24.

156 Currie I & De Waal J ***The Bill of Rights Handbook*** 6ed Juta 2013 (hereafter "Currie & De Waal") at 731. See also fn 131 on the same page.

forums. This would allow significant deviations from the standard of independence and impartiality imposed by section 165(2).

4.4.35 Clause 7 of the Traditional Courts Bill, 2008[157] indicates that traditional courts are distinct from the courts referred to in the Constitution. It does not, however, clarify whether these courts are courts or something different.

4.4.36 The SAHRC[158] argues that if the institution being created in the Bill is a dispute resolution mechanism, then this must be stated clearly and referred to in appropriate terms.

4.4.37 If a traditional court is regarded as a dispute resolution mechanism it would, however, imply that all parties must consent to the forum. This is not currently provided for in the Bill. See also the discussion on mandatory mediation in Chapter 3.

4.4.38 Courts are obliged to apply customary law where it is applicable in all circumstances. Therefore, a judge or a magistrate may also adjudicate on customary family law. Small claims courts will likewise be entitled to adjudicate disputes arising from customary law.

4.4.39 Section 1(1) of the Law of Evidence Amendment Act 45 of 1988 empowers any court to take judicial notice of indigenous law insofar as such law can be ascertained readily and with sufficient certainty.

4.4.40 The SAHRC[159] suggests a notion to consider whether the traditional court should function as a "family group conference" (traditional dispute resolution forum). This is a system whereby a discussion forum is instituted, taking place at a neutral

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157 Clause 7 of the Traditional Courts Bill reads as follows:

Nature of traditional courts
7. Traditional courts are distinct from courts referred to in section 166 of the Constitution, and operate in accordance with a system of customary law and custom that seeks to –
(a) prevent conflict;
(b) maintain harmony; and
(c) resolve disputes where they have occurred, in a manner that promotes restorative justice and reconciliation and in accordance with the norms and standards reflected in the Constitution.

158 SAHRC submission to the National Council of Provinces on the Traditional Courts Bill [B1-2012] 15 February 2012.

159 SAHRC submission at 37.

venue to resolve disputes. Normally such a system focusses on healing and restoring the position of all persons involved. Inasmuch as this model is used in South Africa, it is used mainly in youth justice issues.

d) Should traditional courts have jurisdiction in family matters?

4.4.41 The Constitution recognises that South Africa is not a homogenous society. The Constitution[160] guarantees persons who belong to a cultural community the right to enjoy their culture and the right to participate in the cultural life of their choice.[161]

4.4.42 However, neither of these rights may be exercised in a manner that is inconsistent with any provision of the Bill of Rights. The right to enjoy one's culture has been thrown into competition with other rights and inevitably has led to conflict. The Constitution gives no indication whether other rights supersede cultural rights; the fundamental rights are not ranked.[162]

4.4.43 The SALRC has considered the interplay between individual rights and group rights in the Constitution, particularly with regard to children, and concluded:

> There can be no doubt that the South African Constitution recognises the importance of customary law to the majority of South Africans. The Commission also accepts the importance of customary law and practices for a very large portion of our population. However, the Commission notes that customary law is recognised as a system of law provided it operates within the broad principles of the Constitution of 1996. Given the fact that the best interest of the child principle in section 28 is paramount and the individualistic nature of human rights protection, it would seem that the right of an individual child supersedes that of cultural or religious groups.[163]

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160 Section 31 of the Constitution 1996 reads as follows:

Cultural, religious and linguistic communities
31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

a) to enjoy their culture, practise their religion and use their language; and
b) to form, join and maintain a cultural, religious or linguistic association and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

161 Section 30 of the Constitution 1996 provides as follows:

Language and culture
30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

162 Bennett TW ***Human Rights and African Customary Law*** Juta Cape Town 1995 at 28.

163 SALRC Project 110 ***Report*** 2002 at 283.

4.4.44 Section 12(1) of the Children's Act[164] makes provision for the right of children not to be subjected to cultural practices that detrimentally affect their well-being. It does not create a criminal offence but is a mere prohibition; however, it could lead to delictual liability.

4.4.45 Currie and De Waal[165] argue that it will certainly be appropriate to allow traditional courts to resolve disputes about customary personal and family law.

4.4.46 In terms of section 12 of the Black Administration Act, a traditional leader will not have the power to determine any question of nullity, divorce or separation arising out of a civil marriage. "Marriage" in terms of the Act, however, seemed to have referred to civil marriage only, since it specifically stated that it did not refer to customary unions.[166] In terms of section 5(2)(c) of the Traditional Courts Bill of 2008[167], the traditional court's jurisdiction over "any matter relating to the custody and guardianship of minor children" is excluded.

4.4.47 During the Public Hearings on the Traditional Courts Bill, the following explanation was provided[168] in respect of the approach to family law matters in the traditional court. Where a woman was, for example, impregnated, compensatory damages would be payable to the family of the woman, and this would normally be dealt with by discussions between the two families. If these talks collapsed, then the matter would move through the headman, traditional leader and ultimately could reach the mainstream court. However, the claim was not for maintenance for the child. The magistrates' courts would have to deal with maintenance and support of the child born from the impregnation. In so far as domestic violence is concerned, the tribal authority would assist the abused person in referral to a police station and the remedy would lie under the Domestic Violence Act.

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164 Section 12 (1) of the Children's Act 38 of 2005 reads as follows:

Social, cultural and religious practices
12. (1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her wellbeing.

165 Currie & De Waal at 731. See also fn 131 on the same page where the argues that the jurisdiction of traditional courts should be limited to areas of personal or family law.

166 It is uncertain what the Customary Marriage Act's determination that all references in legislation to "marriage" should include a "customary marriage" would be.

167 Traditional Courts Bill [B15-2008].

168 Adv Jacob Skosana, Chief Director Policy, DOJCD, Justice Portfolio on 14 May 2008.

4.4.48 Customary marriages must now be dissolved by a competent court in terms of section 8(1) of the Recognition of Customary Marriages Act. The reference to competent court does not include a traditional leader's court.[169] In terms of section 8(5) of the Act a traditional leader may mediate in any dispute or matter arising prior to the dissolution of a customary marriage by a court. The question is whether this is the position regarding traditional leaders only when they are not officiating in the traditional court?

4.4.49 The SALRC states[170] that, although mediation is an innovation for common law, it has always been part of the customary divorce process since people traditionally prefer to settle their domestic disputes within the family and where possible achieve reconciliation.

4.4.50 In so far as the training for presiding officers is concerned, an interesting example can be found in Australia where experienced mediators can be appointed. See discussion above in the section on African Dispute Resolution.

4.4.51 Chiefs' courts enjoy jurisdiction in these matters except issues relating to civil marriages. It could therefore be perceived as a diminution of the powers and functions of traditional leaders and their courts to deny them jurisdiction on these matters. Traditional leaders are not happy with these exclusions. Some respondents[171]

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169 Section 8 of the Recognition of Customary Marriages Act 120 of 1998 reads as follows:

Dissolution of customary marriages
8. (1) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.

(2) ….

(3) The Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987) and section 6 of the Divorce Act, 1979 (Act 70 of 1979), apply to the dissolution of a customary marriage.

(4) A court granting a decree for the dissolution of a customary marriage-
(a)-(c)……
(d) may make an order with regard to the custody or guardianship of any minor child of the marriage; and
(e)…

(5)… Nothing in this section may be construed as limiting the role, recognised in customary law, of any person, including any traditional leader, in the mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution of a customary marriage by a court.

170 South African Law Reform Commission ***Customary Law: Succession*** Discussion Paper Project 90 2000 at 132.

171 Public Hearings on the Traditional Courts Bill.

particularly opposed the exclusion of custody and guardianship of children from the jurisdiction of customary courts. They argued that these were areas which have traditionally been handled by traditional courts.

4.4.52 The joint submission from CALS, CGE and NLC argues that, besides their patriarchal character, customary courts lack the capacity to deal with maintenance and that in practice many women are already taking their cases to magistrates' courts instead of the chiefs' courts. It was observed in the interviews that women prefer to go to magistrates' courts rather than chief's courts because the former have clear legal processes to deal with defaulters while the latter have none and do not have the capacity to enforce payments.

4.4.53 Professor Mqeke is one of the few people who addressed these issues in his submissions. He submits that issues of custody and guardianship of children should continue to be handled by customary courts. He also suggests that these courts should be allowed to determine matters relating to customary marriages.[172]

Questions:

14. Is the traditional court a court or is it some other institution?
15. Should traditional courts have family law jurisdiction?
16. How should training of presiding officers be dealt with?

4.5 Community dispute resolution forums (community courts)

4.5.1 Effective government is largely dependent on a respected legal system. The challenge facing the democratic state is to ensure that the justice system is acceptable and accessible to the larger community.

4.5.2 Community involvement in the administration of justice as a whole, and the judicial process specifically, has not received due attention among lawyers.[173]

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172 Prof Mqeke submits that these issues are "deeply emotional and culturally involved" and therefore should remain within the jurisdiction of customary courts.

173 Mokgoro Y "The Roles and Place of Lay Participation, Customary and Community Courts in a Restructured Future Judiciary" Unpublished presentation made at University of Western Cape Conference (hereafter Mokgoro") at 1.

4.5.3 Traditional forms of dispute resolution which, for present purposes, may be termed ADR processes, have long existed in rural South Africa. Unofficial dispute resolution has, furthermore, been the norm in metropolitan areas for as long as these areas have existed. The earliest unofficial “people’s courts” were the civic associations with dispute-settlement functions which were found in 1901 in the township of Uitvlugt in the Cape Town area.[174]

4.5.4 In the latter part of the 1970's the people’s courts were generally known as makgotla and should be distinguished from the politicised people’s courts that could be found in the mid-1980's. In 1989 newly structured people’s courts emerged.[175]

4.5.5 Since the legal problems as well as problems of social adjustment encountered by urban blacks were not being solved, it is not strange that people resorted to self-help in the form of unofficial or folk institutions. In urban areas different forms of community forums were instituted.

4.5.6 These forums had their philosophical background in the customary law that was being practised by traditional leaders in traditional courts in the rural areas. It could however also be seen as a particular application of the consensual principles of ADR and its non-authoritarian consensus-producing processes within the structure of a specific community and according to the culture of its prevailing moral norms and social standards.[176] This form of justice has always been part of African and Asian traditions where conciliatory solutions were seen to be to the advantage of all and often as a sine qua non for survival.

4.5.7 Mncadi and Citabatwa[177] refer to these justice systems as being informed by African traditional law, urban popular justice practices and religious law.

4.5.8 The judicial process, approach and reasoning used are all elements which echo indigenous South African procedures. It echoes the practice of makgotla, linkundla, ibunga and imbizo where members of the community directly participate in questions

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174 Van Niekerk 22.

175 Op cit.

176 Faris, J “AADR, Community Dispute Resolution and the Court System@ Community Mediation Update” 1996 10 ***CDRT Newsletter*** 7.

177 Mncadi M & Citabatwa S “Exploring CommunityJustice” **I*mbizo*** Community Peace Foundation Issue 1 1996.

and decisions. These popular justice systems have evolved to adapt their practices to urbanised circumstances.

4.5.9 In most stable, organised communities there are at present street committees and civic structures that are functional. They are an integral part of the communalist world-view which inclines residents to compensate for the inadequacy and inappropriateness of State structures. This world-view is based on the principle of reciprocity. People obey because they know that they are going to need their peers at some future date. Family, tribe or village solidarity is often a sine qua non for survival. They are surrogate welfare, child care and support systems, burial societies and savings clubs, to name but a few functions. They thus form an integral part of organic township life throughout the country, be it Cape Town, Port Elizabeth, Soweto, Alexandra and in Kwa-Zulu Natal.

4.5.10 Community forums are a fact of life. A fundamental issue to be answered is whether, and if so, to what extent, the State should administer and regulate the forums, or lend its State support to private initiatives in the field. Hierarchies via a multi-tiered civic structure with a definite political alignment spell problems if participants do not share the same political allegiance. A solution may be for the State to create an avenue for the administration of justice within communities which will present the community with opportunities, thereby empowering it to participate in the shaping of its justice system.[178]

4.5.11 Different institutions, governmental and non-governmental, have over the years tried to address the question of integrating, controlling, acknowledging or formalising these institutions. The State's efforts to control these alternative institutions through the establishment of advisory boards, urban and community councils and town councils proved unsuccessful. Attempts have also been made by a number of NGO's to introduce more appropriate forms of dispute resolution to communities.

4.5.12 Proposals for formal recognition of community structures have always been based on the condition that the structure of these forums should be given specific form and content:[179]

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178 De Jong 2005 ***TSAR*** 33 at 41-43 argues that these community forums need to be formally incorporated or integrated into the formal justice system.

179 Mokgoro at 18 with reference to SANCO-EC, July 1993, Port Elizabeth.

a) the composition and organisation of the structure should reflect the demographic profile of the communities within that jurisdiction;
b) functions of the structure should revolve around dispute resolution, crime prevention and community education;
c) appropriate training should be provided, for example, paralegal training around their functions;
d) a referral system should be created to, for example, the magistrates' court;
e) a code of conduct should be developed and adopted to ensure accountability; this is important if the abuses of such courts in the past are to be avoided.

4.5.13 The advantages of a community forum system seems to be that it depends on voluntary participation, it is cheap and accessible, language is used which is understood within the community, there is an absence of legalese; it is based on restorative justice with its holistic approach to problem-solving; it is sensitive to local community values and background conditions; there are fewer delays, therefore swift and less formal justice which helps in the knitting of the social fabric.

4.5.14 The disadvantages on the other hand seems to be that the forums are vulnerable to political pressure, the jurisdiction factor could be a problem, there is a lack of investigative capacity and representation: youth and gender inclusivity could be an issue particularly in a rural setting, it currently has parallel status with the formal system, it is not necessarily applicable in all communities in South Africa, and there is an inability to involve people if there is no voluntary participation.

4.5.15 A matter of major concern is that the community forums should not be regarded as poor people's justice for black people. In this regard it will be of paramount importance to ensure that minimum standards and guarantees should be maintained even in these alternative organs and procedures. The risk, of course, is that the alternative will indeed provide a second class justice. The forums should aim to uphold those safeguards of independence and training that are present in respect of ordinary judges and those formal guarantees of procedural fairness which are typical of ordinary litigation. It is however true that the present justice system cannot provide for issues of affordability, swiftness, repairing the damages caused by the offence and ensuring harmonious relations in communities (issues that are central to a restorative approach

to justice) unless fundamental changes take place in the justice system. Far from being a cosmetic change, conciliatory justice may be able to produce these changes.

4.5.16 Community–based dispute resolution structures serve a useful purpose in meeting the needs of the majority of the South African population for accessible justice. The possible recognition and support of these structures should therefore be considered. In evaluating this possibility the following matters should be considered:[180] These forums should not be considered to be courts, but rather to be community forums. Attendance at a forum should be voluntary and decisions of the forum should be binding only if the parties have agreed thereto beforehand. The role of the law should be to ensure that such agreements are respected. Training in various aspects of leadership, mediation and the ideas of restorative justice should be provided to individuals who operate these forums.

Questions:

17. Is there a place for community dispute resolution forums in South Africa?
18. If so, how should these community structures be recognised?

4.6 Private mediators

4.6.1 Private mediation is practised by a large number of individuals who have been trained in mediation techniques. The mediation movement has developed to a very sophisticated level in most city areas, for example the Gauteng region, Durban, Port Elizabeth, George and Cape Town.

4.6.2 It is however felt that private mediation services have largely been available only to those who can afford the fees of professional mediators, while the majority of black communities have had to rely on dispute resolution services of advice centres, community-based structures and traditional leaders only.

4.6.3 Private mediation is completely unregulated by the State. See, however, the private endeavors by organisations such as NABFAM.[181]

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180 South African Law Reform Commission ***Community Dispute Resolution Structures*** Project 94 Discussion Paper 87 1999 at (iv).

181 See discussion in Chapter 3.

Question:

19. How should private mediation be regulated?

4.7 Non-governmental Organisations (NGOs), Community Based Organisations (CBOs) and University based services

4.7.1 The Non-Governmental Organisations (NGOs), which are not directly government controlled, but have links with educational structures, provide highly skilled services either free of charge or at minimal cost to communities that otherwise have very limited access to the law or dispute resolution procedures.

4.7.2 Community-based organisations also operate in close cooperation with their communities. They are seen as accessible and responsive to community concerns.

4.7.3 Advice centres and community-based paralegals are often the only resource in the community for residents who need information about maintenance, care and contact and divorce. They assist parties to resolve disputes without going to court. They also play an important role in educating communities about the law, their rights and mobilising communities to lobby for change. These organisations have also settled many disputes about care, contact and maintenance.

4.7.4 By reason of the various legal systems prevalent in South Africa and the controversy that exists in the implementation of these legal systems, the community centres have delivered an important service in matters which could not be dealt with by a specific court system.

4.7.5 Both CBO's and NGO's are at present severely constrained by a lack of resources. With the change in government in 1994 international funders withdrew much of their support and the government has been slow to fill the gap.

Question:

20. How should CBOs and NGOs be accommodated in the larger family law system?

4.8 Legal Aid South Africa

4.8.1 Legal Aid South Africa was established by section 2 of the Legal Aid South Africa Act.[182] The objectives of the Board are to provide or to make legal aid available to indigent persons.[183]

4.8.2 In order to attain these objectives the Board, apart from other powers vested in it in terms of the said Act, is empowered to obtain the services of legal practitioners and to set conditions on which legal aid is granted.

4.8.3 Legal Aid SA has 64 Justice Centres and 64 Satellite Offices spread throughout the Republic of South Africa. The Centres are headed by the Justice Centre Executive (JCE) and are responsible for the delivery of legal aid services.

4.8.4 Legal Aid SA has civil law capacity at all the Justice Centres. However, Civil Units have been established at certain Centres to provide more specialist civil law advice and legal representation.[184]

4.8.5 Non-litigious assistance through Justice Centres, including arbitration and mediation, may only be given if the main service provider is:

a) a salaried legal practitioner employed by a Justice Centre or Co-operation Partner;
b) a person working under the control and supervision of a salaried legal practitioner employed by a Justice Centre or Co-operation Partner; or.
c) an accredited Judicare practitioner who is instructed to provide mediation services on behalf of Legal Aid SA clients.

However, in appropriate circumstances, the JCE can get advice or an opinion from a specialist or expert if necessary to properly advise a client.

4.8.6 Legal aid may only be granted to vary or enforce a divorce order when:[185]

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182 Legal Aid South Africa Act 39 of 2014.

183 Section 3 of the Legal Aid South Africa Act reads as follows:

> **Objects of Legal Aid South Africa**
> **3.** The objects of Legal Aid South Africa are to –
> (a) render or make available legal aid and legal advice;
> (b) provide legal representation to persons at state expense; and
> (c) provide education and information concerning legal rights and obligations.

184 Legal Aid South Africa ***Legal Aid Guide*** 13ed 2014 (hereafter "***Legal Aid Guide***") at par 3.2.

a) The issue in dispute deals with the care of children or contact with children, and

b) The application is supported by a report of a social worker or Family Advocate.

The Family Advocate is not required to prepare a report unless proceedings have been instituted. Proceedings may be started to acquire the Family Advocate's report but should be held over while waiting for the report and while the JCE decides on the merit of the case.

4.8.7 Indications are that contributions to the legal aid systems from governments are decreasing worldwide. In the UK private family law was removed from the scope of legal aid while legal aid for mediation was continued. The thinking was that couples should be encouraged to resolve disagreements as early as possible without recourse to court proceedings and unnecessary legal expense. Removing family law from the scope of legal aid would lead to additional mediation.[186]

4.8.8 However, there was a sharp fall in mediations. Among the reasons provided were the following:[187]

a) end of compulsory mediation assessment during trials;

b) removal of solicitors from the process;

c) inadequate provision of clear, reliable and easy to access advice on mediation and the continuing availability of legal aid in this regard.

4.8.9 The criticism has turned around the "unfortunate lack of 'joined up' thinking" in the preparation of the new legal regime.[188]

Question:

21. What should the role of Legal Aid South Africa be in the resolution of family disputes?

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185 ***Legal Aid Guide*** at 4.11.

186 House of Commons ***Justice- Eighth Report Impact of Changes to Civil Legal Aid Under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*** 4 March 2015 (hereafter ""***Eighth Report***") at par 139.

187 ***Eighth Report*** at par 149.

188 ***Eighth Report*** at par 150.

4.9 Possible unification of the South African family justice system

a) Introduction

4.9.1 In order to understand the nature of the problems that have been identified in the current investigation, it is important to get a bird's eye view of developments that have shaped family law in the past fifty years, in so far as the development of a coherent family law system is concerned. Much time, energy and money have been spent, with little to show for the effort. South Africa currently has a dual, fragmented court system and little specific provision has, furthermore, been made to cater for alternative dispute resolution processes. Perhaps it may be possible to learn from the experiences described below and retain some of the ideas for future use.[189]

b) Pre-Hoexter Commission era

4.9.2 During this decade three State-appointed bodies considered family law issues and one Act was passed:

(i) Thompson Report of 1974

4.9.3 The Thompson Report recommended in 1974 that the present system of children's court, juvenile court and maintenance/non-support court should be maintained since the family law problems being experienced stemmed from the inadequacy of the social services being provided rather than from the structure of the court.[190]

(ii) South African Law Commission Report of 1978

4.9.4 In 1977 the SA Law Commission published its report on the law of divorce and matters incidental thereto[191] in which it indicated that public opinion as reflected in representations made to the Commission was strongly in favour of family courts being instituted.

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189 See also the discussion on jurisdictional issues in par 3.4 above.

190 ***First Hoexter Report***.

191 South African Law Reform Commission ***Review of the Law of Divorce and Matters Incidental Thereto*** Report Project 12 1978 (RP 57/1978) (hereafter " SALRC 1978 ***Report***").

4.9.5 The idea was, however, not supported since the Commission stated that a court of law could not be expected to apply therapy, but that it is the function of the court to hand down a decision according to the applicable legal rules.

4.9.6 The Commission's opposition to a family court[192] amounted to a rejection of the conciliation or therapeutic functions of such a court. It was also premised on the belief that the existing structures dealing with family matters were adequate.[193]

4.9.7 It should, however, be noted that the Commission, in a subsequent unpublished report[194] submitted to the Minister of Justice in July 1983, indicated, with reference to the 1977 report, that it should not be inferred from the recommendations that the Commission is opposed to the establishment of family courts. The intention was merely to show that on the information available at the time, the Commission was not convinced that the establishment of such courts was necessary for the adjudication of divorce proceedings.[195]

(iii) Divorce Act 70 of 1979

4.9.8 The Divorce Act 70 of 1979 introduced the no-fault divorce. This development brought South Africa's substantive divorce law in line with modern realities.[196] The South Africa Law Commission (as it then was), on whose report this Act was based, argued that if irretrievable marriage breakdown was to be accepted as a ground of divorce and if the accent was no longer placed on the guilt of the spouse, this would mitigate the conflict and emotion with which divorce proceedings are fraught.[197]

4.9.9 However, after the introduction of the 1979 Act, the divorce rate rose dramatically and, while fault as a ground for divorce had been removed, it remained a

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192 Schafer at 23.

193 Goldblatt B "A Feminist Perspective on the Law Reform Process: An Evaluation of Attempts to Establish a Family Court in South Africa" 1997 13 ***SAJHR*** 373 (hereafter "Goldblatt") at 380.

194 South African Law Reform Commission ***Evaluation of the Effect of the Divorce Act*** Report Project 40 1979 at par 5.5.

195 ***First Hoexter Report***.

196 SALRC 1978 ***Report.***

197 Op cit at par 8.3.

fact in ancillary issues and continued to cause "bitterness, distress and humiliation' in divorce.[198]

(iv) Galgut Report (of the Commission of Enquiry into Civil Proceedings in the Supreme Court of South Africa) of 1979.

4.9.10 The Galgut report came to the conclusion that there was no need for the establishment of a Family Division of the Supreme Court or a special court in the magistrates' office. The report was not published**.**

c) Hoexter Commission Reports and implementation

(i) Hoexter Commission Report (Commission of Inquiry into the Structure and Functioning of the Courts), 1983 ("First Hoexter Commission")

4.9.11 In 1979 the State President appointed a Commission of Inquiry, again under the Chairpersonship of The Honourable Mr Justice GG Hoexter ("First Hoexter Commission"), into the structure and functioning of the courts, including the desirability of establishing a family court.[199]

4.9.12 In 1983 the Commission published its report ("***First Hoexter Report"***).

4.9.13 One of the main findings of the Commission was that there was general dissatisfaction with the manner in which divorce actions are dispatched in the Supreme

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198 Goldblatt at 381. Hetherington EM & Kelly J ***For Better or for Worse: Divorce Reconsidered*** WW Norton & Company 2002 as quoted by Bruch CS in Freeman 2013 ***IFL*** 41 at 42 stated that: "The only childhood stress greater than having two married parents who fight all the time is having two divorced parents who fight all the time."

199 Its terms of reference were as follows:

To inquire into the structure and functioning of the courts of law in the Republic of South Africa and to report and make recommendations on the efficacy of that structure and functioning and on the desirability of changes which may lead to the more efficient and expeditious administration of justice and a reduction in the cost of litigation and in the course of such inquiry and in such recommendations to give attention in particular, but not exclusively, to the desirability of –

(a)…
(b) establishing a family court as a branch of the court contemplated in paragraph (a) or otherwise;
(c)-(e)
(f) providing special machinery for the settlement of minor civil disputes in an informal manner;
(g)….

Court, and particularly with the fact that the circumstances and true interests of the minor children involved are not properly investigated.[200]

4.9.14 The Commission's main recommendations were, inter alia, as follows:

a) The establishment of a single family court for all inhabitants of the Republic, irrespective of race, having comprehensive jurisdiction in regard to family matters. The new court should be part of the lower courts functioning at the level of the Regional Court, and should be known as "the family court".[201]

b) The children's court, the juvenile court and the maintenance court be unified under one roof as a family court which would have jurisdiction concurrent with the Supreme Court to hear divorce actions and applications ancillary thereto.[202]

c) The structure of the proposed family court should have the following twin components:[203]

   (i) a social component known as the Family Court Counselling Service (FCCS); and

   (ii) a court component being a court of law and a court of record in which a legally qualified officer would preside and in which the rules of procedure and evidence would apply.

d) The FCCS would fulfil the following three functions;[204]

   (i) the *reception process* at the family court's reception centre, where family problems will be sifted and classified, where both legal advice and social counseling will be available and where the spouses in marriages that can still be saved will be referred to marriage counsellors with a view to reconciliation;

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200 ***First Hoexter Report***, Part A, Volume 1, Part I, para 3.5.3 at 31; Goldblatt at 381 refers to Schafer "Family Courts – Reconsideration Invited" 1983 ***Acta Juridica*** 191 and S Burman and M "Church versus State? Divorce Legislation and Divided South Africa" 1985 12 (1) ***Journal of Southern African Studies*** at 116 who suggest that the impact of the 1979 Divorce Act forced the issue of a family court back onto the law reform agenda despite the earlier, unanimous rejection of such a court. After the introduction of the 1979 Act, the divorce rate rose dramatically and, while fault as a ground for divorce had been removed, it remained a fact or prevalent in ancillary issues and continued to cause 'bitterness, distress and humiliation' in divorce.

201 ***First Hoexter Report*** Part A, Volume 1, para 4.7.1at 49.

202 Op cit at para 4.7.3 at 50.

203 Op cit at Para 9.4.

204 Op cit at para 9.4.2.

(ii) the *conciliation process*, which, in the case of an irreparable rift in the marriage, is aimed at helping estranged spouses to communicate directly and to good purpose with each other to make their parting less traumatic for them as well as for their minor children'; and to resolve by agreement disputed points (such as custody of and access to minor children and the division of matrimonial assets);

(iii) The *supporting service* to the court where the counselling service will see to it that, where the court has to adjudicate upon a family matter, any further social welfare investigation or action that may be required by the court will be undertaken either by the counselling services staff or by the staff of some approved social agency.

e) Simultaneously with the establishment of the family court there should be created the office of the Children's Friend who will protect the interests of minor and dependent children. The Children's Friend will have the power to arrange for legal representation of the child at public expense.[205]

f) In regard to physical lay-out and interior, the family court should be housed separately from other courts and special attention should be given to ensure child-friendly environment.[206]

g) A further shift in emphasis towards a more inquisitorial procedure as regards family matters would benefit the administration of justice since the adversarial system often resulted in the court having to consider the problems based on one-sided testimony only.[207]

h) The family court should serve the rural areas of the Republic by means of a circuit system. [208]

(ii) Limited Implementation of the 1983 Hoexter Commission Report

4.9.15 The 1983 Hoexter Commission report was not fully implemented. However, it remains a highly significant report in terms of its comprehensive and far-reaching proposals.[209]

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205 Op cit at para 9.8.2.

206 Page (iv) of Annexure (i).

207 Op cit para 8.9.5.

208 Page (v) of Annexure "I".

209 Goldblatt at 382.

4.9.16 The following two Bills were drafted to make provision for the implementation of the recommendations of the 1983 Hoexter Commission, but neither was ever enacted:

- The Family Court Bill 62 of 1985 made provision for both the institution of the court component and the social component. It was, however, rejected by a Parliamentary subcommittee.[210]
- The Divorce Amendment Bill of 1985, inter alia, made provision for the fact that, in considering the arrangements as proposed for the minor children of the marriage, due regard should be had to the evidence of both parties and a report by a welfare agency. The recommendation was not endorsed by Cabinet – due to its implication on the court structure and costs, among others.[211]

4.9.17 The Report did, however, give effect to the following developments, but with limited success:

- Mediation in Certain Divorce Matters Act, 1987
- Divorce Courts Amendment Bill, 1992
- Magistrates Court Amendment Bill, 1993

(iii) Mediation in Certain Divorce Matters Act 1987

4.9.18 Even though the 1983 Hoexter Report was not fully implemented, it did, however, lead to the Mediation in Certain Divorce Matters Act,1987[212] that made provision for the appointment of Family Advocates and Family Counsellors to assist the Family Advocates. See discussion of the Act in par 3 above.

(iv) Divorce Courts Amendment Bill 1992

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210 Para 3.1 at 41of 2nd HCR.

211 Department of Justice and Constitutional Development ***Brief Overview of the Extension of Civil Jurisdiction to the Regional Courts Bill*** Briefing to the Justice Portfolio Committee 6 February 2008.

212 Act 24 of 1987.

4.9.19 A Black Divorce Court was established in terms of section 10 of the Black Administration Act of 1929 to serve the African community.

4.9.20 The 1983 Hoexter Commission Report resulted in the abolition of separate maintenance courts for Africans,[213] but left the Black Divorce Courts intact.

4.9.21 During 1991 the draft Divorce Amendment Bill[214] of 1992 was published for comment. It made provision for the establishment of specialist divorce courts, hearing only divorce actions and functioning within the existing structure of the Supreme Court. It would be accessible to persons of all race groups, but would incorporate the sort of features which enhance the accessibility of the Black Divorce Courts such as elementary and inexpensive procedures, speedy adjudication and the appearance of attorneys in courts. The Bill was, however, abandoned.

(v) Magistrates' Court Amendment Act, 1993

4.9.22 In 1993 the Magistrates' Court Amendment Act[215] was enacted and assented to, but never implemented. It has not been repealed yet. It emanated from the comments received regarding the Divorce Amendment Bill of 1992.

4.9.23 The Act provided, inter alia, for the establishment of family courts for the adjudication of divorce actions and the appointment of family magistrates for the said courts. It established a forum for the hearing of divorce actions within the structures of the magistrates' court.[216]

4.9.24 It did not, however, give effect to all the Hoexter Commission recommendations. It did not, for instance, make provision for a dual function for the family court by incorporating a social and a court component and omitted to envisage the existence of private family mediation services associated with the conciliation function that was to form part of the social component of the court.

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213 Special Courts for Blacks Abolition Act 34 of 1986.

214 GN 513 of 1991.

215 Act 120 of 1993.

216 ***Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court Third and Final Report*** RP 200/1997 9 December 1997 (hereafter the "***Second Hoexter Report***").

4.9.25 The following criticism was raised in respect of this Act:[217]

a) By allowing people to choose between the Supreme Court and the family court there is the possibility of creating a hierarchy of justice (the family courts would effectively serve blacks whereas most whites would use the Supreme Court).
b) The jurisdiction of the courts was much more limited than envisaged in the Hoexter Report. The multiplicity of fora for family matters would remain and this would mean a duplication of resources.
c) The absence of the Family Advocate and the lack of mediation machinery for family disputes.
d) Quality of justice would be lower than that provided in the Supreme Court (or courts at Regional Court level).
e) Much criticised procedure for unopposed divorces would remain (action rather than by way of application).

4.9.26 The Director-General noted in a letter written in 1996 that the Act has not been put into operation because of "practical implications as well as the transition to a new constitutional dispensation". During a Legal Forum in November 1995, role players agreed that the Act should be held in abeyance "pending further deliberation on appropriate mechanisms for the adjudication of divorce matters".[218]

(vi) Hoexter Commission Report (Report of the Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court), 1997

4.9.27 On 31 March 1995 the President appointed Mr Justice GG Hoexter to head a Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court (hereafter the "***Second Hoexter Report***").

4.9.28 In its report, the Hoexter Commission recommends the establishment in South Africa of a specialist family court of comprehensive jurisdiction having the status of a High Court. This family court would have concurrent jurisdiction with the High Court.

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217 Goldblatt at 383.

218 Goldblatt at 384 referring to a letter received by the researcher from the DG dated 7 June 1996 following a written request to clarify the Family Court process.

4.9.29 The Commission recommended that the family court should -[219]

a) hear those matters which are at present heard in the divorce court of the High Court and which, in addition to divorce itself, will include all matters ancillary to divorce such as the division of matrimonial assets, maintenance for a spouse and minor children, custody of and access to minor children, guardianship of minor children, applications *pendente lite* for a contribution towards the costs of a divorce action, for interim maintenance and for interim custody of and access to children, applications for maintenance as between parent and child and grandparent and grandchild, and applications for interdicts in matrimonial matters;

b) hear the matters at present heard by the High Court under the Age of Majority Act, 1972 (now Children's Act);

c) grant consent to the marriage of a minor if such minor's parent or guardian refuses such consent, which power is at present exercised by a judge of the High Court under section 25(4) of the Marriage Act, 1961; and

d) hear cases in which paternity is sought to be determined and which affect the status of a woman or child.

4.9.30 A further recommendation was that the family court should have jurisdiction to hear matters involving disputes between a man and a woman arising from an existing or previous spousal union between them, where this union is recognised by their own customs or religious beliefs but not by the civil marriage laws.

4.9.31 The Hoexter Commission also recommended that the family court should have concurrent jurisdiction with the Magistrates' Court to hear the matters at that time heard by the Commissioner of Child Welfare under the Child Care Act, 1983; to hear the matters at present heard in the Maintenance Court under the Maintenance Act, 1963; to carry out the duties and exercise the powers assigned to magistrates in terms of Chapter 3 of the Mental Health Act, 1973; to investigate the accommodation or care of

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219 Sloth-Nielsen J & Van Heerden B "Putting Humpty Dumpty Back Together Again: Towards Restructuring Families and Children's Lives in South Africa" 1998 114 ***SALJ*** 156 at 169.

aged or debilitated persons under section 6 of the Aged Persons Act, 1967 and to carry out the duties under sections 5(3) and 5(4) of this Act; to hold enquiries under the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, 1971, and to commit persons to rehabilitation centres. The Hoexter Commission Report did not assign any criminal jurisdiction to the family court.

4.9.32 The Report proposed the repeal of the Mediation in Certain Divorce Matters Act, 1987, and its replacement by a new statute to be called the 'Family Advocate and Family Counselling Service Act', to grant the Office of the Family Advocate greater powers in all divorce matters, and to give it the power to inquire into and to report to the family court in connection with any child. It also proposed the establishment, as part of the Family Advocate's Office, of a Family Counselling Service to provide experienced social welfare workers to the Family Advocate's Office on a regular and reliable basis.

4.9.33 The Hoexter Commission further recommended housing the family court separately from other courts, and where this is not possible, that the family court should at least have its own separate entrance. The lay-out and appointments of the family court should be such as to create a relaxed and informal atmosphere with cheerful waiting rooms equipped with playthings for children, comfortable offices, and adequate child care facilities for infants.

4.9.34 Recommendations regarding a family court and family counselling services were once again not implemented. However, in 1998 an interim system of family courts (initially in six pilot project areas) saw the Justice system building on the Office of the Family Advocate in order to provide some social work services in regard to children whose parents are divorcing.

4.9.35 The Minister of Justice[220] indicated in 1997 that rationalisation of the courts had been delayed because the report of the Commission of Inquiry into rationalisation of court structures headed by Mr Justice GG Hoexter was awaited. Disappointingly the Report contained no unanimous recommendations with regard to any of the major issues. He intended giving role players a further opportunity to respond to the

[220] Mr Omar's budget speech 20 May 1997.

Commission's report and thereafter consult with the Parliamentary Standing Committees.[221]

(vii) De-racialising Black Divorce Courts

4.9.36 The Black Divorce Court was established in terms of the Black Administration Act of 1929 to serve the African community. In 1997 the Divorce Courts Amendment Act 1997 removed the racial exclusivity of the Black Divorce Courts by de-racialising them. The presiding officers, appointed by the Minister of Justice and Constitutional Development, were deemed to be magistrates of a regional division as contemplated in Act 32 of 1944.

4.9.37 The areas of jurisdiction were, however, not "de-racialised" but remained structured around the areas which were the seats of the Commissioners' Appeal Courts, namely – Ferreirasdorp (Johannesburg), King Williamstown and Durban.[222] The Divorce Courts were structured around these three centres and the entire Republic demarcated on the 3 areas – which did not follow the constitutional re-arrangement.[223]

4.9.38 In the Black Divorce Courts mediation was a limited, irregular and informal component of the settlement process. The Divorce Courts provided an alternative to the High Court, which traditionally had the only authority to grant divorces. The Divorce Courts were designed to deal with less complicated divorces quickly and inexpensively.[224]

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221 Department of Justice and Constitutional Development ***Brief Overview of the Extension of Civil Jurisdiction to the Regional Courts Bill*** Briefing to the Justice Portfolio Committee 6 February 2008.

222 There were 3 presiding officers for every division. This means for example 3 presiding officers attached to the Port Elizabeth division rotated around 19 areas spread across three provinces of Eastern Cape, Free State and Western Cape. The 3 presiding officers in Johannesburg served 8 areas across Gauteng and North West; while the Durban division served 10 areas across KZN, Mpumalanga, Limpopo and Pretoria in Gauteng.

223 When a litigant consults a legal practitioner outside his/her magisterial district his/her legal practitioner needs to brief a correspondent in the area of jurisdiction of the court – paying two attorneys for the same service.

224 DOJCD briefing at 23: In the Central Divorce Court an average of 1122 cases per month were registered:

- 715 were finalised through settlement outside court;
- only 200 are finalised through trial;
- one presiding officer sat in 8 circuits per month;
- the Southern Divorce Court sat an average of 2 days per month in areas across the Western Cape, Eastern Cape and Free State.

d) Post Hoexter Commission developments

(i) DOJCD family courts pilot project

4.9.39 In October 1998 the Department of Justice appointed a task team[225] comprising officials of the Department of Justice, the Acting Chief Family Advocate and the Chairman of the Family Courts Committee of the Rules Board, to take responsibility for the implementation of a pilot project in regard to the family courts mentioned in section 2 of Act 120 of 1993.[226]

4.9.40 As part of the pilot project five family courts were established in Cape Town (the first Family Court Centre on 27 January 1999), Johannesburg, Port Elizabeth, Durban and Lebowakgomo. The restructured Divorce Court was incorporated into the Family Court Centre.

4.9.41 The aim of the pilot courts was to test the integration of the four areas of divorce, maintenance, domestic violence and children's courts (child welfare) as they were then, for nation-wide implementation. The five pilot sites were established, funded and monitored by the DOJCD.[227]

4.9.42 In 2002 the Task Team embarked on a rigorous policy development process in order to strengthen the five pilot family courts and make them viable. The process resulted in the adoption of an interim policy for family courts in South Africa.[228] To deliver an integrated and co-ordinated service six steps were identified.[229]

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225 Department of Justice and Constitutional Development ***Pilot Project for "Family Court"*** 23 January 1997.

226 As an interim provision a Bill was considered and adopted by Cabinet to make provision for access of people of all races to the Black Divorce Courts. See discussion above. This was regarded as a temporary provision until the task group completes its work.

227 DOJCD Business Unit Court Services Courts Operations Centre Family Court Information for January to December 2002.

228 The key principles underlying the policy are that the pilot courts should -

a) deal exclusively with comprehensive service delivery in the areas of maintenance, domestic violence, children's courts and divorce;
b) provide services in an integrated manner;
c) provide users with relevant substantive rights education services;
d) provide users with substantive legal advice and assisted form completion;
e) embrace the use of alternative dispute resolution and build this service directly into workflows; staffed and supported by appropriately skilled people, who will receive specifically developed training in order to enable them to perform their functions;
f) operate in terms of their own specifically designated budget and will move towards performance-based budgeting;
g) operate with clear management and reporting lines;

4.9.43 The role of the PFLC (see below) in assisting this strengthening exercise was recognized by the Department.[230] The policy principles adopted by the DOJCD drew heavily from the PFLC experience.[231]

4.9.44 The family court pilot sites were established at Regional Court level. The lack of a legislative framework and governance has since been identified as some of the obstacles that resulted in the objectives and benefits of the pilots not being realised.

4.9.45 In 2008 the family courts and divorce courts were incorporated into the newly established civil regional courts.

4.9.46 During their briefing to Parliament on the extension of civil jurisdiction to Regional Courts in 2008 (see discussion below), the DOJCD indicated that the extension of civil jurisdiction to Regional Courts may help to remove some of the obstacles experienced with the pilot project.[232]

(ii) People's Family Law Centre (PFLC)[233]

4.9.47 The PFLC was created as a section 21 company in terms of a non-funding public-private partnership with the DOJCD.[234] It opened its doors in Cape Town in March 2002 and in Johannesburg in April 2003.

4.9.48 It considered issues such as illiteracy, innumeracy, cultural diversity, the quality of service provision, the sustainability of the institution and the need for a holistic solution that incorporated all the diverse aspects of South Africa family law. It

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h) be subject to on-going monitoring and evaluation that is uniform in nature.

229 Step One: Reception, assessment and referral; Step Two: Mediation, Counselling and Conciliation; Step Three: Role of the Clerk of the Court (admin); Step Four: Role of Judicial Officers; Step Five: Role of Family Advocates; Step Six: Role of the Family Court Centre Social Services.

230 Gillwald C MP Deputy Minister for Justice and Constitutional Development Address at the Opening of the People's Family Centre in Johannesburg 24 April 2003.

231 See discussion below.

232 DOJCD Briefing to Justice Portfolio Committee "Brief Overview of the Extension of Civil Jurisdiction to the Regional Courts Bill" 6 February 2008.

233 People's Family Law Centre ***Information Document*** October 2003.

234 Nedcor Foundation and the Peoples Bank contributed financially to the setting up of the Centres.

acknowledged the fact that full representation of citizens would place an impossible financial burden on the State, rendering the model unsustainable. The approach was that formal legal representation would not be necessary in all matters.

4.9.49 The PFLC identified the need for structured training, accreditation procedures and greater specialisation amongst paralegal service providers. It was envisaged that appropriately qualified paralegals would be formally recognised and play an important role in the work of the PFLC, specialising in family law. The PFLC joined hands with the National Paralegal Institute of South Africa (the umbrella organisation) and POSLEC (the education and training authority).

4.9.50 To recover costs of services a nominal fee would be charged for citizens who pass the indigence test.

4.9.51 The Centre's model of service provision is premised on the belief that self-representation, preceded by a system of user education combined with the provision of start-up documentation, is a viable alternative in family law matters. Instead of managing client's cases, the aim is towards user empowerment. The client is enabled to take control of his or her problem and see the matter through to completion him- or herself. Should the matter become defended and require proper legal representation, the Centre has a panel of attorneys to whom they can refer their clients.[235]

4.9.52 The generic flow of service provision was as follows:

a) Screening or problem identification;
b) video adult education;
c) reinforcement of adult education and route selection via traditional legal route or alternative dispute resolution;
d) information extraction and document generation;
e) formalisation, filing and take-home information booklet;
f) telephonic support.

4.9.53 The service delivery model was designed to bridge the gap between the "top-end" – but unaffordable – services provided by the formal legal profession on the one

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[235] Burman S & Glasser N "Giving Effect to the Constitution: Helping Families to Help Themselves" 2003 19 ***SAJHR*** 486 at 487.

hand and, on the other, the services provided for free but less effectively by under-resourced advice offices and the State.

4.9.54 The PFLC provided substantive legal services to citizens. The question was posed whether the DOJCD only had the obligation to provide administrative support (rights education and facilitating the direction of citizens to the formal legal system). The PFLC argued that high levels of innumeracy, illiteracy and poverty meant that providing administrative services only would fail to assist the majority of the citizens to actualise their "paper rights".

4.9.55 The strategic direction of the PFLC was to assist its own mainstreaming into the DOJCD programme of strengthening the pilot family courts.[236]

(iii) SALRC Report on the Review of the Child Care Act, 2002

4.9.56 The SALRC was requested to investigate and review the Child Care Act, 1983 and to make recommendations to the Minister of Social Development for the reform of this particular branch of the law in 1997. It published its report, including proposed draft legislation, in 2002.[237]

4.9.57 The Children's Act, 2005 emanated from this SALRC report. See the discussion on the applicable sections in the Act below. It is, however, interesting to note those SALRC recommendations that were not, at the time, for various reasons, included in the final Act, but may be of interest to the current discussion.

4.9.58 The SALRC recommended that the children's courts at that time operating at district magistrates' court level be renamed as child and family courts. As a second phase a smaller network of Child and Family Regional courts should be set up, that would deal with more complex matters.

4.9.59 A child and family court registrar would assist the court with matters that do not necessarily require a court hearing.[238] Part 4 of Chapter 6 of the proposed Bill deals

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236 Gillwald C Opening Address at opening of the PFLC in Johannesburg on 24 April 2003. See par 4.9.43 and fnts 228 and 229 above.

237 SALRC Children's Bill 2002.

238 The appointment of registrar must be in accordance with legislation governing the public service in terms of clause 92 of the SALRC Children's Bill 2002.

with the powers and functions of the child and family court registrar. Matters such as the reception and screening of matters,[239] pre-hearing conferences,[240] family group

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239 Clause 94 of the SALRC Children's Bill 2002 reads as follows:

Screening of matters
94.(1) A child and family court registrar must –
(a) receive all matters brought to or referred to a child and family court;
(b) determine in respect of each matter whether it –
(i) may be brought before a child and family court;
(ii) requires a pre-hearing conference or further investigation before it is brought before a child and family court;
(iii) should not first be referred to a lay forum for an attempt to settle the matter out of court, which may include –
(aa) mediation by a Family Advocate, a social worker or other professionally qualified person;
(bb) a family group conference as provided for in section 97; or
(cc) mediation by a tribal authority; or
(iv) should not first be referred to a child and family court magistrate in chambers.

(2) If the registrar determines that a matter requires further investigation before it is brought before a child and family court, the registrar must –
(a) designate a person to carry out the investigation; and
(b) determine the issue to be investigated.

(3) Before determining that a matter should be referred to a lay forum, the registrar must take into account all relevant factors, including –
(a) the vulnerability of the child;
(b) the ability of the child to participate in the lay forum proceedings;
(c) the power relationships within the family; and
(d) the nature of any allegations made by parties in the matter.

(4) The court hearing the matter may –
(a) adjourn the matter for a period not exceeding 14 days at a time; and
(b) order that the child, pending decision of the matter, must –
(i) remain in temporary safe care at the place where the child is kept;
(ii) be transferred to another place in temporary safe care;
(iii) remain with the person under whose control the child is;
(iv) be put under the control of a family member or other relative of the child; or
(v) be placed in temporary safe care.

(5) If the court finds that the child is in need of care and protection, the court may make an appropriate order in terms of section 175, taking into account section 164.

(6) If the court finds that the child is not in need of care and protection, the court must –
(a) make an order that the child, if the child is in temporary safe care, be returned to the person in whose control the child was before the child was put in temporary safe care; or
(b) decline to make an order, if the child is not in temporary safe care.

(7) When deciding the question of whether a child is a child in need of care and protection in terms of subsection (1), the court must have regard to a report of a social worker which report must be in the prescribed format.

240 Clause 96 of the SALRC Bill 2002 reads as follows:

Pre-hearing conferences
96. (1) If a matter brought to or referred to a child and family court is contested, the child and family court registrar may hold a pre-hearing conference 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.

conferences,[241] other lay-forums,[242] which all include mediation as an option, as well as giving advice and assisting children and parents to prepare for court were included in the ambit of the registrar's powers and duties.

4.9.60 It was proposed that where a matter is settled out of court the registrar could submit the settlement to court for confirmation or rejection.[243]

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(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 must attend and may participate in the conference unless the registrar decides otherwise.

(4) The registrar –

(a) presides at the conference;
(b) must ensure that 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) must give a report on the conference to the court when the matter is heard.

241 Clause 97 of the SALRC Children's Bill 2002 states as follows:

Family group conferences
97. (1) The child and family court registrar may cause a family group conference to be set up with the parties involved in a matter brought to or referred to a child and family court, including any other family members of the child, in order to find solutions for any problem involving the child.

(2) The registrar must –

(a) appoint a suitably qualified person or organisation to facilitate at the family group conference;
(b) must ensure that 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) must give a report on the conference to the court when the matter is heard.

242 Clause 98 of the SALRC Children's Bill 2002 reads as follows:

Other lay-forums
98. (1) The child and family court registrar may refer a matter brought or referred to a child and family court to any appropriate lay forum, including a tribal authority, for an 98
attempt to settle the matter by way of mediation out of court.

(2) Other lay forums may not be held in the event of a matter involving the alleged abuse or sexual abuse of a child.

(3) The registrar must –

(a) ensure that 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
(b) give a report on the proceedings before the lay forum to the court when the matter is heard.

243 Clause 100 of the SALRC Children's Bill 2002 reads as follows:

Settling matters out of court
100. (1) If a matter is settled out of court and the settlement is accepted by all parties involved in the matter, the child and family court registrar may submit the settlement, or must submit the settlement if a social worker in the service of a provincial department of social welfare so requests, to the child and family court for confirmation or rejection.

(2) The court must consider the settlement and, if it is in the best interest of the child, may –

4.9.61 Section 77(2) (a) of the Bill empowered Family Advocates to work in these child and family courts. The role of the Family Advocate would be to act as the legal representative for a party in a matter before the child and family court.

4.9.62 Other functions of the family court registrar included the obligation to attend every child and family court hearing; present evidence and information, including professional reports, to the court, cross-examine witnesses or parties before the court and when necessary arrange legal representation for a child before the court.[244]

4.9.63 No provision has been made for a family and child court registrar in the Children's Act, 2005. Some of the proposed powers and duties of the registrar set out in the Bill are being performed by a clerk of the court in terms of the Act.[245] However, the two positions cannot be compared.[246] The reason why the recommendations of the SALRC might not have been accepted may be because the idea of alternative dispute resolution as currently envisaged was not yet foreseen. See also the discussion regarding the expanded role of the Family Advocate Office as discussed above.

(iv) Children's Act 38 of 2005

4.9.64 The Children's Act[247] was enacted in 2005. It sets out principles relating to the care, contact and protection of children, defines parental responsibilities and rights and

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(a) confirm the settlement and make it an order of court;
(b) before deciding the matter, refer the settlement back to the parties for reconsideration of any specific issues; or 99
(c) reject the settlement.

244 Clause 101 of the SALRC Bill reads as follows:

Other functions
101. The child and family court registrar –
(a) must attend every child and family court hearing;
(b) may present evidence and information, including professional reports, to the court;
(c) with the permission of the court, may question or cross-examine a witness or party before the court; and
(d) must, when necessary, arrange legal representation for a child before the court.

245 The functions of the clerk of the children's court in terms of the Children's Act that are relevant to this discussion are as follows:
a) enquiries in terms of sections 53(1) and 65(4); and
b) children's court inquiries in terms of sections 56)c), 57, 59(1), 68, 73 and 170(7).

246 The clerk must, in terms of the Act, comply with the appointment requirements for a post as administrative clerk (DOJCD Regulation 2) whereas the registrar must , in terms of the Bill, have the qualifications as prescribed, sufficient understanding of the needs and stages of development of children and mediation skills (clause 93).

247 Children's Act 38 of 2005, containing sufficient knowledge of legal measures, processes and resources available for the protection of children.

makes provision for matters such as children's courts, parenting plans, adoption, child abduction and surrogate motherhood. The principles call for the prioritisation of the best interests of the child in all matters. The Act introduced a new discourse regarding parental responsibilities and rights and the way care and contact arrangements are constituted and determined.

4.9.65 The Act shifted focus from an adversarial inquiry or investigation to mediation and agreement between parties. Inasmuch as, traditionally, disputes concerning children were decided in a State-sanctioned adversarial legal system, the legislative encouragement of the use of mediation proceedings marks a fundamental policy shift as regards how the interests of children may best be protected.[248] This shift is in line with the recommendations of the Report of the South African Law Reform Commission in its Review of the Child Care Act, published in 2002.

4.9.66 It seems, however, that the current mediation provisions in the Children's Act are largely accredited to input made during the legislation drafting process. There is no discussion or evaluation of alternative dispute resolution mechanisms per se.[249] Mediation as a concept and as a method of dispute resolution is mentioned in the Children's Act but no detail is provided. In the way the mediation provisions have to be implemented, most notably through the Office of the Family Advocate, certain core values of mediation have been disregarded.[250]

4.9.67 The Children's Act makes provision for the establishment of children's courts. In terms of section 43 a children's court is a court of record and has a similar status to that of a magistrates' court at district level. Section 45 of the Children's Act sets out the matters that a children's court may adjudicate.

4.9.68 The Children's Act does not specifically make provision for the establishment of a family court. However, in section 45 it states that "pending the establishment of family courts by an Act of Parliament" the High Courts and Divorce Courts have

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248 Paleker at 2. The House of Commons Justice Committee ***Operation of the Family Courts*** Sixth Report of session 2010-12 14 July 2011 at 3 refers to evidence from Australia, to the effect that the idea of shared parenting did not only confuse parties about how the "best interest of the child" test should operate, but may also encourage a more litigious approach by parents in private law cases.

249 Paleker at 4.

250 Paleker at 28.

exclusive jurisdiction over the a number of issues that are enumerated. This reference may refer to the 1993 Act that makes provision for family courts at magistrates' court level.

4.9.69 It is interesting to note the contents of the minutes of the Welfare Portfolio Committee during the Parliamentary process of developing the Children's Act. Compared to the dates of the family court pilot projects and PFLCs, it is clear that the DOJCD was fully involved with and committed to the family court pilot projects when the decision was taken to support the status quo and make provision only for the existing children's courts in the Children's Act.[251]

(v) Jurisdiction of Regional Court Amendment Act 2008

4.9.70 In 2008 the Jurisdiction of Regional Courts Amendment Act[252] was enacted. This Act amended the Magistrate's Court Act[253] to establish civil jurisdiction on the Regional Courts, including jurisdiction to deal with matters being dealt with by the Divorce Courts. The Divorce Courts merged with the Regional Courts.

4.9.71 The purpose of this exercise was to enhance accessibility of the lower courts, to provide magistrates with additional knowledge, specifically in civil matters and family related law, generally to improve the efficiency and effectiveness of the lower courts and to address the discrepancies in the Divorce Courts that had, as their origin, the apartheid legislation.

4.9.72 Extended civil jurisdiction resulted in the integration of the divorce and family courts pilot sites into the regional division, and increased the capacity of the courts in areas of need.[254]

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251 Minutes Social Development Portfolio Committee 14 November 2003. Ms C Kok, DOJCD in a briefing of the Committee, stated that Chapter 5 of the Bill had been amended because of restructuring in the Department. She indicated that the family court would be dealing with children's court matters, domestic violence, child maintenance and sexual offences against minors. It was noted that the committee would need briefing on the new areas of competence of the family court. During the Social Development Portfolio Committee meeting of 28 May 2003 members of the Portfolio Committee indicated that it might be necessary to have a separate discussion paper on the issues of family court jurisdiction extension. The Committee indicated that a separate debate with the Departments of Social Development and Justice was needed.

252 Jurisdiction of Regional Courts Amendment Act 31 of 2008.

253 Magistrates' Court Act 32 of 1944.

254 A budget of R37 mil was allocated additional to the baseline budget of 2007/8 to provide for additional magistrates' posts in the first year.

4.9.73 The idea was that Regional Courts sit in proclaimed district courts, hence all current courts would be able to provide additional services, with minor structural increase to the court infrastructure. However, this programme has not yet (in 2015) been extended to all the Regional Courts.

4.9.74 The Committee effected an amendment to the Bill in order to ensure, firstly, that rules of court are made in order to enable the Regional Courts to exercise their new extended civil jurisdiction effectively and efficiently and, secondly, that those rules retain and build on the characteristics of the current Divorce Court rules, in so far as those Courts are user-friendly, inexpensive and accessible. The new rules had to be made within six months of the commencement of the Act and had to be submitted to Parliament. The Committee stressed that those rules should, as far as possible, result from a consensus-seeking approach by all role players.[255]

(vi) Rules Board court-annexed mediation 2014

4.9.75 The Rules Board for the Courts of Law has published Rules[256] that provide the procedure for the voluntary submission of civil disputes to mediation in selected magistrates' courts. The rules apply to the voluntary submission by parties to mediation of disputes prior to commencement of litigation and disputes in litigation which has already commenced and contemplated in Rules 78 and 79.

4.9.76 Court-annexed mediation in terms of the Rules became available as part of a pilot project at specified sites on 1 December 2014. These interim arrangements have not been specifically tailored for family dispute resolution.[257]

e) Conclusion

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255 Portfolio Committee on Justice and Constitutional Development ***Jurisdiction of Regional Courts Amendment Bill [B 48-2007]*** Report 19 March 2008 at par 6.

256 Government Gazette 37448 on 18 March 2014.

257 See discussion in Chapter 3.

4.9.77 It is clear from the exposition above that South Africa has not succeeded in establishing a comprehensive family law system. Ad hoc initiatives have been less than successful since it lacked an overarching plan.

4.9.78 The current challenges can be summarized as follows;

a) An unfortunate hierarchy of justice exists;
b) There is a multiplicity of fora with the concomitant duplication of resources and costs;
c) Lack of an adequate mediation machinery for family disputes;
d) Procedure for unopposed divorces is action rather than application based.

4.9.79 Reading through this section, it is evident that excellent suggestions have been made on various occasions to address these issues. The challenge seems to be to pull together the most worthy initiatives to ensure a judicial system that is both more efficient and more likely to serve therapeutic justice. The challenge for the future is not a choice between mediation and litigation, but a plan to integrate the two.[258] The therapeutic justice process should empower families through skills development, assist them to resolve their own disputes, provide access to appropriate services, and offer a variety of dispute resolution forums within one unified system where the family can resolve problems without additional emotional trauma.[259]

4.9.80 Roscoe Pound, the great scholar and former dean of Harvard Law School, was the guiding spirit behind both the movement for trial court unification and a unified family court in the USA. Pound stated a "multiplicity of courts is characteristic of archaic law." According to Pound, the aim of a unified system is:

> to put an end to the waste of time, energy, money, and the interests of the litigants in a system, or rather lack of system, in which as many as eight separate and unrelated proceedings may be trying unsystematically and frequently at cross-purposes to adjust the relations and order the conduct of a family which has ceased to function.

Questions:

22. Is South Africa in need of an integrated family justice system or should the various ad hoc initiatives be supported and further developed?
23. Should child, family and domestic issues be handled within one main court?
24. Are existing court structures making proper use of mediation procedures? If not, should this situation be rectified? If so, how?

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258 Schepard A & Bozzomo JW “Efficiency, Therapeutic Justice, Mediation and Evaluation: Reflections on a Survey of Unified Family Courts” (2003) 37 ***Family Law Quarterly*** 333 at 336.

259 Florida Supreme Court's Family Court Steering Committee in June 2000.

25. Is there a place for a form of compulsory family mediation as part of an integrated dispute resolution system or should mediation always be voluntary?
26. Should mediation and conciliation functions be incorporated in a social component of the envisaged family system? If so, how should this be done?
27. Should a community mediation service be developed that will be specifically linked to any of the present court structures? If so, how?
28. Should community based mediation be developed within the structures of the community courts discussed above? If so, how?

CHAPTER 5

THE WAY FORWARD AND QUESTIONNAIRE

5.1 As stated in Chapter 1, the object of this investigation[1] is to develop an integrated approach to the implementation of family law in South Africa by, amongst others, developing alternative dispute resolution proposals for the resolution of family disputes. Specific reference has been made to disputes relating to care of and contact with minor children that may develop before, during and after divorce or separation. The interests of all children, including children from customary marriages and children living in rural areas are being considered.

5.2 The DOJCD provides family law services to the public in four main legal areas, namely divorce, maintenance, domestic violence and child care matters.

5.3 Significant progress has been made over the past three decades in bringing about an improved system in respect of the area of family law.[2] Family law has also benefitted from legislative reform and increased political attention, advocacy and research. However, for the most part, despite these policy considerations, most South African citizens often have little more than "paper rights" in the area of family law. Services in the area of family law remain fragmented and inconsistent within the justice system. It is extremely difficult for citizens to exercise these rights through the country's generally overwhelmed and under-resourced courts. This is a major stumbling block to service provision.[3]

5.4 The judicial system, furthermore, does not reflect or relate to the cultural diversity of South Africa's population. People who grew up in an Afro-centric cultural environment form the majority of the South African population. The legitimacy of a

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1 SALRC ***Care of and Contact with Children*** Project 100 as extended by the inclusion of the Project 94 subproject on family dispute resolution. See par 1.1.1 -1.1.2 above.

2 Examples are the institution of the Office of the Family Advocate, extension of civil jurisdiction to the Regional Courts and the extended jurisdiction of the Children's Courts.

3 People's Family Law Centre ***Information Document*** October 2003 at 1.

family law system which is unacceptable, inapplicable and inaccessible to the majority of the population must be seriously questioned.[4]

5.5 A variety of alternative dispute resolution methods have been developed to deal with the numerous problems encountered during divorce,[5] separation and other family disputes.

5.6 Although mediation is being offered by some private mediators in South Africa and by various community-based organisations and institutions, it appears that these mediation services are either under-utilised or seriously hampered by a lack of funds and human resources. It also seems that mediation services in the private sector and at community level are still mostly unregulated and presently not incorporated into the South African family law system.[6] It should be noted that, in jurisdictions where mediation services are available to the public on a voluntary basis, it appears that these services are under-utilised. Where mediation is made compulsory through legislation, these States accept the responsibility to ensure country-wide, high-quality mediation services to all its citizens.

5.7 The Justice Ministry has already started transforming the justice system at various levels in line with democratic values.[7] It may be that the introduction of ADR-techniques supplementing formal justice systems at different levels, especially in so far as family law is concerned, may help to provide South Africans with an opportunity to establish an acceptable justice system that will be swift and effective.

5.8 An important goal of late modern justice is the empowerment of individuals to choose their own solutions; a matter of privatised justice.[8] Ultimately, however, how far a democratic state is willing to allow the law which is delivered through its justice system to be determined outside State institutions, is a matter of political judgment.[9]

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4 De Jong 2005 ***TSAR*** 33 at 35.

5 De Jong at 35.

6 De Jong at 34.

7 Of specific importance in this investigation are the developments regarding the court-annexed mediation initiative discussed in Chapter 3.

8 Eekelaar J and Maclean at 201.

9 Ibid at 205.

5.9 The Office of the Family Advocate is currently the main source of assistance to parties after divorce. However, it has several limitations in effecting adequate service delivery. This is due to limited capacity, competencies, office space, expertise, powers, duties and time. These problems need to be addressed.

5.10 As the investigation deals primarily with revising the legal procedures applicable to determining contact and care arrangements, the discussions will focus on the manner in which these procedures should be conducted. Substantive changes that is needed to accommodate the best interests of children in all matters will, however, also be considered.

5.11 All aspects of alternative dispute resolution of family disputes will be raised.

5.12 It is suggested that the issues and options outlined in the Chapters above ought to be debated thoroughly before any particular course is embarked upon. Based on the outcome of such discussions legislation in respect of a new family law system may be proposed.

5.13 The comments of all parties who feel that they have an interest in this topic, or who may be affected by the kind of measures discussed in this paper are therefore of vital importance to the Commission.

5.14 All respondents are invited to indicate their preferences in respect of the questions posed and to indicate whether there are other issues or options that must be explored.

5.15 All the relevant role players and institutions that are likely to be affected by the proposed measures should therefore participate in this debate.

5.16 It will assist the Commission considerably if it could have a clear idea of what would be realistic to achieve as regards reform of the law in the area under investigation. There could be problems which the law will not be able to solve. Law reform is inevitably influenced by broad social policy issues, professional practice, ethics and the availability of resources.

5.17 In this context the approach to reform could be one of ad hoc amendments or additions to provide for the most pressing needs. This would probably bring speedy

relief but will not address the apparent underlying dissatisfaction with the procedural family law system. On the other hand a review of the family law system could be necessary or desirable which may, as in certain comparable legal systems, result in recommendations for comprehensive law reform.

5.18 In 2011 the independent Family Justice Review in the United Kingdom, chaired by David Norgrove, when it wanted to investigate the family justice system, found the family justice system was "no system at all". The question may be posed whether this is also true of South Africa. The United Kingdom Family Justice Minister Simon Hughes *said*:[10]

> For too long children have suffered from excessive delays and confrontational court battles. Our reforms will keep families away from negative effects or battles or delays in court and make sure that when cases do go to court they happen in the least damaging way."

5.19 To facilitate a focused debate, respondents are requested to formulate crisp submissions to the list of questions set out in the text of the paper and repeated in ***Annexure A.***

5.20 The SALRC, DOJCD and DSD regard this matter as being of great importance to ensure access to justice for the most vulnerable people in our community: our children.

5.21 Interested parties are requested to consider this paper and to respond before 30 June 2016.

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[10] Ministry of Justice "Family Justice Reforms Benefit Children" Press release 22 April 2014 accessed at https://www.gov.uk/government/policies/family-justice-system on 19/6/2015.

ANNEXURE A

QUESTIONS

CHAPTER 1: INTRODUCTION

No questions

CHAPTER 2: SPECIFIC ISSUES IDENTIFIED FOR DISCUSSION: POLICY

Terminology (Para 2.1, page 22)

1. Comment is invited on the following points:
   a) Inclusion of the definitions of "mediation" and "alternative dispute resolution" in the Children's Act;
   b) Replacement of the words "custody" with "care" and "access" with "contact", in all legislation;
   c) Deletion of the word "divorce court";
   d) Clarification regarding the words "child" and "suitably qualified person" in the Children's Act; and
   e) Whether the issue of "primary or principal residence" should be addressed in legislation, and if so, how?

Hearing the child's voice (Para 2.2, page 32)

2. Should a parent also be allowed to inform the child about actions and decisions taken and the contents of a parenting plan?
3. Who or what institution should be approached for assistance in order to enforce children's rights under section 31?
4. Who is responsible to ensure that consideration should be given to the child's views? Is there a duty on the mediator to include the child in the mediation?
5. Do the child's views have to be actively canvassed in terms of Regulation 8 even if there is no dispute where the child has not expressed a view?
6. Will children become a party to the mediation? May only children from a certain age participate in mediation?
7. Are Regulations 7 and 8 ultra vires. If so, how should this problem be addressed?
8. Should the Children's Act and the Mediation in Certain Divorce Matters Act be amended to clarify the position of the child's choice? If so, how should these amendments be made? For example, should children whose parents are unmarried and children living with a relative who is not a parent, be entitled to have their voices heard with regard to major decisions? If so, by whom?
9. Should judges be required to interview children?
10. Should children be directly involved in the mediation process? If so, how?
11. What is the correct procedure for the assignment of a legal representative?
12. Who must decide to assign a legal representative for the child? Which body should make the assignment? (For example, the State Attorney or Legal Aid Board.) How is the legal practitioner assigned?

13. Can a legal representative be assigned by the High Court?
14. What will constitute “substantial injustice” in divorce proceedings?
15. What is the position in regard to unopposed divorces? When would it be necessary to appoint a legal representative for a child in a low-conflict or unopposed divorce?
16. Who will decide if substantial justice would otherwise result?
17. According to which principles will this decision be made?
18. Under what circumstances is a child entitled to a legal representative?
19. How should the envisaged rights be implemented?
20. What are the scope and functions of the legal representative once appointed?
21. Who pays for the legal costs involved in representing the child?
22. Who is qualified to represent children? Who decides whether a curator ad litem is required or whether the child is capable of directing the litigation and should therefore have his or her own attorney?
23. It is clear that the SCA sees legal representation for children as necessary to augment their lack of capacity and as appointed by the court. Does this mean a section 28(1)(h) legal practitioner cannot assist in place of a guardian?
24. How often are the existing sections providing for the voice of the child used? Is there a budget in place to give effect to these sections?

Relocation of families (with reference to the abduction of children) (Para 2.3, page 63)

25. Should relocation be addressed in legislation?
26. What considerations should be considered in drafting legislation in this regard?

Adult dependent children (Para 2.4, page 81)

27. How should the Children’s Act deal with adult dependants?
28. Is the current position, where the duty of support has been incorporated as a subsection of parental responsibilities and rights, conceptually correct - and is it working well in practice?

Unmarried fathers (Para 2.5, page 92)

29. Should section 21 be amended to provide for the promulgation of regulations . If so, what should these regulations entail?
30. How should compliance with section 21 (1)(b) (ii) and (iii) be determined?
31. Should section 21 make provision for the issuance of a certificate indicating the status of the unmarried father?
32. Should sections 21 and 29 be amended to make provision for an application to be lodged by an unmarried father and the possibility of an enquiry by the Office of the Family Advocate?

The Impact of domestic violence or sexual abuse on the resolution of family law disputes (Para 2.6, page 97)

33. How prevalent are allegations of child abuse or domestic violence during divorce or separation cases?
34. How prevalent are unfounded allegations?
35. Who mainly makes the allegations - mothers or fathers?

36. Do the allegations cause delays? If so, how can this problem be addressed?
37. What is the effect of such allegations on the child?
38. Does section 47 provide adequate protection to children, parents and other parties?
39. Is effective or adequate screening currently available to identify domestic violence and sexual abuse?
40. Should mediation be available for parties where domestic violence or sexual abuse allegations have been made, or where protection orders are in place?

Professional reports (expert reports) (Para 2.7, page 111)

41. Should competing experts reports in custody cases be eliminated?
42. What value do expert reports add to the court process?
43. Are expert reports abused by parties?
44. Who should fund expert reports?
45. Should the UK reforms be considered for South Africa?

Child-headed households (Para 2.8, page 123)

46. Should child-headed households be regarded as a viable option to protect children in need of care?
47. How could the legal regulation of child-headed households be improved?

Children in need of care (Para 2.9, page 126)

48. How should the situation be dealt with where abandoned or orphaned children are being cared for by family members who do not bear any duty to support them?

Artificial insemination (Para 2.10, page 129)

49. What should be the test for acquiring automatic parental responsibilities and rights: biology, marital status or relationship with the child?
50. Should section 40 also apply to unmarried couples?

CHAPTER 3: SPECIFIC ISSUES IDENTIFIED FOR DISCUSSION: PROCESS

A. Introduction: Adversarial versus collaborative approach

Family disputes (Para 3.1, page 132)

No questions

Adversarial legal system? (Para 3.2, page 133)

1. How many family disputes end up in court?

2. Are the current dispute resolution processes adversarial in nature? Please provide examples.
3. Are the courts functioning well and are they best suited to decide family law questions?
4. To what extent should ADR be used to complement the court system? What role does ADR processes play in the build-up to the divorce proceedings or separation?
5. Is court-connected mediation a possible solution in family dispute resolution.

E. Appropriate court processes

Case-flow management (Para 3.3, page 140)

6. Are the current case flow management arrangements successful?
7. Is it true that there is an accepted "culture of delay" in the courts when dealing with family disputes?
8. Should a time limit be set for cases dealing with children's matters? If so, what should the time frames be?
9. Should the same Judge deal with a case throughout its entire proceedings?
10. What effect do delays in court procedures on the development of a child?
11. What effect does the proliferation of expert reports have on the speedy resolution of family law disputes?

Interim orders (Rule 43 of the Uniform Rules of Court) (Para 3.4, page 145)

12. Is Rule 43 an effective procedure to assist parties in a contested divorce?
13. Should elements of Rule 43 be regarded as unconstitutional? If so, why?
14. How should Rule 43 be amended in order to address the criticism raised?

Technology (Para 3.5, page 150)

15. How can advancements in technology improve the courts and the public access to the court services?
16. Are on-line mediation services a viable option?

C. Alternative dispute resolution (ADR)

Introduction (para 3.6, page 155)

No questions

Alternative Dispute Resolution in terms of the Children's Act (Para 3.7, page 159)

Mandatory mediation: Section 21: Parental responsibilities and rights of unmarried fathers (para 3.7, subpara (i), page 161)

17. Who should refer a matter to mediation in terms of section 21(3)(a)?
18. Should a definition of "mediation" be included in the Children's Act?

19. How should legislation provide for the procedural aspects of mediation ?
20. Should any adverse decision be made against a party who fails to attend a mediation? If so, what should this decision entail?
21. Can mediation be reviewed? If so, how?
22. What is the status of a mediation settlement?

Mandatory mediation: section 33 of the Children's Act (Para 3.7, subpara (ii), page 166)

23. What is the difference between assistance and mediation as used in sections 21 and 33 respectively?
24. Does the differentiation have a purpose?
25. How should an unsuccessful intervention be dealt with?
26. How should the dual role of the Office of the Family Advocate be dealt with?
27. Should regulations be formulated for sections 33(5)(b) and 49(1)(a)?

Discretion of court to refer matter to ADR (Para 3.7, subpara (iii), page 169)

28. Since the traditional authorities use a process akin to arbitration, how should the mediation process prescribed in sections 49 and 71 be regulated?
29. Who would be regarded as a "suitably qualified person" to facilitate the discussion?
30. What does "facilitation" entail in terms of this section?

Indirect opportunities for ADR in the Children's Act (Para 3.7, subpara (c), page 173)

31. What does section 6(4) of the Children's Act entail in practice?
32. Are the indirect opportunities for mediation as set out above currently utilised in practice?

Mediation (Para 3.8, page 176)

33. Would co-mediation increase the costs incurred by parties and/or the state? Is this cost justified?
34. If we adopt a co-mediation model, how should the team be constituted?
35. What type of mediation should be adopted?
36. Should mediation be privately or publicly managed and funded?
37. Who should be family mediators?
38. Who should be responsible to provide mediation to the public?
39. Who should qualify to be family mediators?
40. How long and what sort of training should mediators undergo?
41. Should there be a regulated fee structure for mediators?
42. What model and approach must mediators use in family matters?
43. A responsible regulatory body is needed to manage all these issues so that the public is protected and is provided with an effective service. How should this body be constituted?
44. Should mediation be compulsory? If so, in which circumstances, and when should mediation begin?
45. Should parties seeking an order of divorce who have minor children, and unmarried parties seeking an order confirming access and custody arrangements for minor children, attend mediation.

46. Should attendance at a mediation session be mandatory irrespective of whether or not parties have reached agreement on a parenting plan?
47. Should attending a mediation session be mandatory only in matters where parties have not entered into a parenting plan?
48. Should the question whether parties must attend a mediation session or not be determined at the discretion of the Office of the Family Advocate?
49. Should parties be given information on the availability of mediation as "Annexure A" which accompanies the divorce summons, instead of making mediation mandatory?
50. In what legislation should the mediation provisions be framed?
    a) Should it be included in the Divorce Act, The Mediation in Certain Divorce Matters Act, the Children's Act, or any other existing Act, as an amendment?
    b) Should it be framed in new legislation because of the diverse nature of the issues and the parties affected?
    c) Should we distinguish between family counselling and legally-oriented mediation? "Mediation" and "conciliation and negotiation" are often used interchangeably in the context of family disputes.
    d) Should in-court conciliation be seen as mediation for the purposes of this discussion?
51. Should a process similar to the CCMA process be instituted in terms of which a trial date may be granted or allocated in family law procedures only if the Registrar or Judge is in possession of a certificate which sets out that the parties have participated in mediation, but failed or which sets out the issues as determined by the mediator?
52. In answering the above question, should the fact that the context in family law is unlike that of labour law be taken into consideration?
53. How can the ADR process address the unequal bargaining positions of parties where this inequality becomes evident?
54. Should mediation be a voluntary or mandatory process?
55. Should mediation be privately or publicly managed and funded?
56. Should a facilitative or directive approach be taken when mediating in contact and care disputes?
57. Should a national regulatory body be required to manage training, accreditation, and a uniform code of ethics for mediators?
58. What model of mediation should be used by family mediators?
59. Should fees charged by mediators in the private sector be pegged (limited) in family matters?
60. What role, if any, should Family Advocates play in light of the mediation provisions of the Children's Act?
61. In cases that do not involve any minor children, would it be preferable to not require mediation?
62. What process should be used when mediation fails?
63. What should the scope of mediation be – that is, which matters should be mediated?
64. Should mediation be funded solely by the state?
65. Should mediation be funded by the parties themselves, with the state only funding mediation for parties who cannot afford it (as determined by a means test)?
66. Should mediation be funded by the state, with parties given the option of choosing to engage the services of a private mediator whom they must pay themselves?
67. Should mediation be restricted to access and custody matters only, or should it be holistic and extend to all areas of a divorce or separation case?
68. If a holistic mediation model is adopted, are there implications for the question of who should be allowed to mediate in divorce specific matters?
69. What are the advantages and disadvantages of holistic mediation?
70. Will there be problems with the practical implementation of holistic mediation, that is extending mediation to include issues of maintenance and matrimonial property?

71. Who should be allowed to attend the mediation sessions?
72. How should mediators screen for domestic violence?
73. If there is suspected domestic violence, should these cases be mediated?
74. If cases of suspected domestic violence are mediated, what measures should be implemented to ensure the safety of spouses and children?

Arbitration of family law disputes (Para 3.9, page 200)

75. Which matters should be arbitrated? The options are:
    a) blanket exclusion of any matter incidental to a matrimonial cause;
    b) clause 5 of the SALRC Domestic Arbitration Bill position;
    c) property and spousal maintenance matters; or
    d) all matters arising from divorce or family breakdown.
76. Who should act as arbitrators?
77. Should family arbitration be evaluated by contrasting it with litigation or with other forms of ADR?
78. Should family arbitration be voluntary or compulsory;
79. Should family arbitration comply only with substantive law;
80. Is family arbitration a useful adjunct to unsuccessful mediation?
81. What should the court's role in the family arbitration process be:
    a) Awards confirmed, corrected, vacated;
    b) Review by court on the merits of dispute, de novo review;
    c) Review regarding procedural and jurisdictional issues; or
    d) Review on manifest errors of law which will be contrary to public policy.
82. Should family law arbitration be regulated by the existing Arbitration Act or by a separate statute with specialised rules for family matters.

African Dispute Resolution (AfDR) (Para 3.10, page 213)

83. Should Western style family mediation be improved by incorporating African dispute resolution concepts?
84. If so, how should this be done?

Court-annexed mediation (Para 3.11, page 221)

85. Should mediation in terms of the Mediation Rules be mandatory?
86. Should the state bear some or all of the responsibility for the funding of mediation? If so, how should the funding work?
87. What should the consequences be of an unreasonable refusal to participate in ADR?
88. Should the Short Process Courts and Mediation Act be implemented or revoked?

Collaborative dispute resolution (Para 3.12, page 228)

89. Should South Africa make legislative provision for collaborative dispute resolution? If so, how?

Facilitation (Private case management) (Para 3.13, page 233)

90. Should facilitation be regulated in legislation?
91. Is facilitation an inappropriate delegation of the judicial function, a denial of due process and an impediment to court access?
92. What qualifies a person to make personal family and childrearing decisions about other people?
93. How can the success of facilitation be measured?
94. What facilitation process should be used?
95. Are there certain disputes that are more amenable to facilitation than others?
96. Should limitations be imposed on facilitators?
97. What are the advantages and disadvantages of facilitation?
98. Should a judge be able to appoint a facilitator without the parents' consent?
99. Should facilitators be appointed before or after the court has made an order (this relates to the implementation of existing court orders or parenting plans?)
100. Should provision be made for a judicial review of the process or a proper full hearing de novo appeal?

D. Information, advice and justice

Better information and education for parents (Para 3.14, page 244)

101. Should attendance of information programmes be compulsory for all parents who are confirming their custody and access arrangements, or only for those who are involved in custody and access disputes?
102. Who should manage and coordinate parent information programmes?
103. Where should parent information programmes take place?
104. How should parent information programmes be constituted?

Enforcement of rights (Para 3.15, page 246)

105. How can the enforcement powers currently available be strengthened?

CHAPTER 4: SPECIFIC ISSUES IDENTIFIED FOR DISCUSSION: STRUCTURE, FACILITIES AND PERSONNEL

Courts, court officials and lawyers (Para 4.2, page 251)

1. Should the jurisdiction of the children's court be extended to include the power to amend divorce orders?
2. Should children's courts have jurisdiction in respect of guardianship applications?
3. How can South Africa's fragmented and dual family court system be improved?
4. Should the courts be regarded as the most appropriate body to provide rules for the re-organisation of parent-child relationships upon divorce?
5. Should one main court handle all child, family and domestic cases as a court of first instance?
6. What are the key problems with enforcing care and contact arrangements through the courts?
7. Should judges be able to specialize in family court matters?
8. Should magistrates and judges be rotated?

9. In your experience, do lawyers consider the impact of protracted proceedings on children?

Office of the Family Advocate (Para 4.3, page 265)

10. Is there a need for the character and structure of the Office of the Family Advocate to change to enable effective and "proper" mediation to occur?
11. Are Family Advocates and Family Counsellors currently able to conduct "proper" mediation sessions with parties?
12. What are the limitations of the Office of the Family Advocate in its current form?
13. Should there be two streams, a mediation stream and a litigation or assessment stream in the Office of the Family Advocate to enable mediators and evaluators to be unbiased and objective in carrying out their respective functions? Alternatively, should a separate Family Justice Centre be established with the Office of the Family Advocate as an important role player within such a Centre?

Traditional courts (Para 4.4, page 283)

14. Is the Traditional court a court or is it some other institution?
15. Should Traditional courts have family law jurisdiction?
16. How should training of presiding officers be dealt with?

Community dispute resolution forums (community courts) (Para 4.5, page 295)

17. Is there a place for community dispute resolution forums in South Africa?
18. If so, how should these community structures be recognized?

Private mediators (Para 4.6, page 299)

19. How should private mediation be regulated?

Non-governmental Organisations (NGOs), Community Based Organisations (CBOs) and University based services (Para 4.7, page 300)

20. How should CBOs and NGOs be accommodated in the larger family law system?

Legal Aid South Africa (Para 4.8, page 301)

21. What should the role of Legal Aid South Africa be in the resolution of family disputes?

Possible Unification of the South African family justice system (Para 4.9, page 303)

22. Is South Africa in need of an integrated family justice system or should the various ad hoc initiatives be supported and further developed?
23. Should child, family and domestic issues be handled within one main court?

24. Are existing court structures making proper use of mediation procedures? If not, should this situation be rectified. If so, how?
25. Is there a place for a form of compulsory family mediation as part of an integrated dispute resolution system or should mediation always be voluntary?
26. Should mediation and conciliation functions be incorporated in a social component of the envisaged family justice system? If so, how should this be done?
27. Should a community mediation service be developed that will be specifically linked to any of the present court structures? If so, how?
28. Should community based mediation be developed within the structures of the community courts discussed above? If so, how?

CHAPTER 5: CONCLUSION

No questions