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MANDATORY CHILD-INCLUSIVE MEDIATION - A POSSIBILITY IN SOUTH AFRICA?

by

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MAGISTER LEGUM (LLM)

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Mandatory Child-Inclusive Mediation -
A Possibility In South Africa?

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ABSTRACT

South Africa is a signatory state to the United Nations Convention on the Rights of the Child (UNCRC) which promotes child participation as an essential right. South Africa has the advantage of the Constitution of South Africa and the Children's Act 38 of 2005 which give the child a voice but has the disadvantage of the Divorce Act 70 of 1979 which is parent-centric. This research will show that a conundrum exists between realising Article 12 of the UNCRC, Section 28(2) of the Constitution, Section 10 of the Children's Act and the Divorce Act. It will be shown that there are insufficient efforts currently practiced in dispute resolution related to parenting disputes because of the reliance placed by legal practitioners more on the Divorce Act provisions which show lack of support for child inclusion than the intent of the Children's Act to include children.

This research focuses on the process of mediation and its benefits that make it the ideal environment to include the voice of the child in separation and divorce processes. A case will be made out as to why South African legislators should consider making child inclusive mediation a mandatory process ancillary to the dissolution of the relationship between the parents. Pathways created by the Australian and Canadian jurisdictions, as signatories to the UNCRC, in realising Article 12 of the UNCRC will be looked at. Their initiatives will provide the backdrop for consideration to improving child inclusive practices in South Africa.

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ABBREVIATIONS AND ACRONYMS

ACRWC	AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD
ADR	ALTERNATIVE DISPUTE RESOLUTION
ALRC	AUSTRALIAN LAW REFORM COMMISSION
CIP	CHILD INCLUSIVE PRACTICE
FDR	FAMILY DISPUTE RESOLUTION
FRC	FAMILY RESOLUTION CENTRE
FRDP	FAMILY DISPUTE RESOLUTION PRACTITIONER
IICRD	INTERNATIONAL INSTITUTE FOR CHILD DEVELOPMENT
NADRAC	NATIONAL ALTERNATIVE DISPUTE ADVISORY COUNCIL
SALRC	SOUTH AFRICAN LAW REFORM COMMISSION
SPR	SHARED PARENTAL RESPONSIBILITY
UNCRC	UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

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Chapter 1 - Introduction

1.1 Background to the Study

When parents choose to end their relationship, regardless of the status of their relationship, such dissolution is known to create an emotional toll on each member of the family, mostly due to the adversarial processes utilised to dissolve such relationship.¹ To have an understanding as to the number of people affected by such breakdown in the family relationship, at the outset of this research, statistics collected from Statistics SA in its report: *Marriages and Divorces 2014* published in February 2016 showed that the number of people getting divorced has risen by 3.4%.² Furthermore, most of the couples divorced had only been married between 5 to 9 years with a large number of them having children under the age of 18 at the time of the dissolution of the marriage. It can only be deduced that the stability of marriage is declining, and many children³ of these divorcing or separating parents are still in their childhood at the time of the breakdown of the relationship.⁴

Since submitting the research proposal for this mini-dissertation with the above statistics, Statistics SA released the updated statistics on the dissolution of the marriage relationship in its *Marriages and Divorces Report 2017*.⁵ Since the

¹ SALRC "Family Dispute Resolution: Care and Contact with Children", Issue Paper 31, Project 100D (2015) (hereinafter referred to as SALRC Issue Paper 31) Available at http://www.justice.gov.za/salrc/ipapers/ip31_prj100d.pdf

² Statistics South Africa, *Marriages and Divorces Report 2014* Available at

http://www.statssa.gov.za/?page_id=1854&PPN=P0307&SCH=6631)

³ The word child and children, will be used interchangeably in this dissertation to mean the same, regardless of their genetic link to their parents.

⁴ Statistics South Africa, *Marriages and Divorces Report 2014* Available at http://www.statssa.gov.za/?page_id=1854&PPN=P0307&SCH=6631)

⁵ Statistics South Africa, *Marriages and Divorces Report 2017* Available at

http://www.statssa.gov.za/?page_id=1854&PPN=P0307&SCH=7650 (Statistics South Africa 2017)

2014 report, the number of divorces processed in 2017 increased by 0.3%.⁶ The longevity of the majority of the marriages prior to dissolution remained at being under a decade while 55.6% of these divorces had an impact on children under the age of 18.⁷

In light of the above statistics, many children are still being affected by the breakdown of their parent's relationship, which will have an impact on their contact and care arrangements determined by a court order. The methods of dissolution⁸ utilised within the civil justice system will be evaluated to understand if the method chosen to reach the stage of a court order being granted or an agreement finalised, adequately addresses the best interests of the child during and after such dissolution of a relationship and if the method chosen adequately considers the repercussions of such dissolution on the child when drafting the contents of the order or agreement. This dissertation will investigate whether legislation and current practices make acquisition of parental responsibilities and rights in all child-related matters inclusive of child participation.⁹

Prior to the Constitutional era, Section 6(4) of the Divorce Act¹⁰ recognised a child's right to participate in civil proceedings by being assigned a separate legal representative in the role as a *curator ad litem*.¹¹ South Africa has, since

⁶ Statistics South Africa, Marriages and Divorces Report 2017
Available at
http://www.statssa.gov.za/?page_id=1854&PPN=P0307&SCH=7650
(Statistics South Africa 2017)

⁷ *Ibid*

⁸ Dissolution will be referred to in this dissertation to mean the end of a family or partnership relationship regardless of the marital status of the parents, their genetic link to the child and the gender of the parents.

⁹ Boniface, A. (2013). Resolving Disputes with Regards to Child Participation in Divorce Mediation. *Speculum Juris* p 144

¹⁰ 70 of 1979

¹¹ Du Toit, C. (2013). Legal Representation of Children. In *Child Law in South Africa*. Juta p 93



ratifying the United Nations Convention on the Rights of the Child (UNCRC),¹² made substantial progress in recognising the right of the child to participate with the assistance of legal representation giving effect to section 28(1)(h)¹³ in the Constitution of the Republic of South Africa 1996 (hereinafter referred to as the Constitution). Subsequently judicial officers have interpreted section 28(1)(h) read with international law as a mechanism to give effect to the right of the child to participate through legal representation.¹⁴ Such legal representative is not to conduct themselves as a *curator ad litem* but to rather act upon the child's instructions and advocate on behalf of the child.¹⁵ The presence of the legal representative will be further expanded in this dissertation as a method of ensuring mandatory participation of children in all civil matters concerning them through someone who represents the child's best interests exclusively without any intervention by the parents during mediation thereby allowing the mediator to maintain neutrality throughout the proceedings.¹⁶

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Du Toit submits that the child's right to participate is a central theme in The Children's Act 38 Of 2005.¹⁷ This Act expands on the constitutional rights of children and its provisions give direction on how best to fulfil the paramount principles as contained in Section 28(2) of the Constitution. Child participation in all matters that concern children is also provided for in the Children's Act¹⁸. This further fulfills South Africa's obligations under international instruments, the United Nations Convention on the Rights of the Child¹⁹(UNCRC) and the

¹² Ratified on 16 June 1995

¹³ Section 28(1)(h) "every child has the right 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."

¹⁴ Du Toit C, (2013) p 96

¹⁵ Du Toit C, (2013) p 109

¹⁶ Du Toit C (2013) p 109; In *Soller NO v G and another* 2003 (5) SA 430 (W) para[26] Satchwell J stated in relation to a separate legal representative for the child that "neutrality is not the virtue desired but rather the ability to take the side of the child and act as his or her agent or ambassador"

¹⁷ Du Toit C, (2013) p 98

¹⁸ Section 10

¹⁹ Article 12. Ratified by South Africa on 16 June 1995

African Charter on the Rights and Welfare of the Child²⁰(ACRWC) with regard to child participation.²¹ However formal process provided for in the Children's Act²² to regulate the care of and contact with a child (matters that directly affect them) after dissolution of a relationship, do not make child participation mandatory despite the contents of such documents²³ detailing how a child's daily life will be managed by providing for how parents should exercise their parental responsibilities and rights.

It is generally accepted that the "adversarial system of litigation is not designed or developed to deal with the important, intimate, emotional, social and psychological of child centred or other family disputes".²⁴ There is a common belief that traditional court proceedings give rise to negative emotions and 'irreconcilability between disputing parties, a situation which is detrimental to any children involved'.²⁵ To address these adverse effects on children, "legal literature often refers to the fact that mediation focuses on the best interest so the child"²⁶. This will be illustrated by looking at Section 22 and Section 33 of the Children's Act²⁷ where mediation is mandated as a more appropriate method to resolve child-related disputes particularly when drafting a parenting plan²⁸ or parental responsibilities and rights agreement²⁹. It is acknowledged that the legislator intended for mediation to be seen as adjunct to civil proceedings because the High Court is the upper guardian of all minor children and that these decisions made by the parties during the mediation process and

²⁰ Article 4(2) read with Article 7. Ratified by South Africa on 7 January 2000

²¹ Skelton A. (2009). The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments. African Human Rights Law Journal. 9(2)p 482-500

²² Section 34

²³ Section 22 and 33 of the Children's Act

²⁴ De Jong M. (2013). Child-focused Mediation. In Child Law in South Africa. Juta p 112

²⁵ De Jong M, (2013) p 113

²⁶ De Jong, M (2013) p 117

²⁷ 38 of 2005

²⁸ Section 33

²⁹ Section 22



documented as per Section 22 and Section 33 of the Children's Act must be endorsed by an appropriate court.³⁰

Mediation is a series of facilitated negotiations, facilitated by a suitable mediator between the parties which leads to an agreement based on decisions the parties themselves make on the issues in dispute.³¹ To highlight the benefits of mediation, this dissertation will provide insight into the principles, styles and process of mediation as the appropriate method of dispute resolution to involve child participation.

To add to the appropriateness of mediation as the preferred forum to include child participation, submissions will be made as to the apt choice of person who should be involved as the mediator in child-related disputes. The skills and competency required for a suitably qualified mediator to be placed as the neutral and impartial facilitator in child-related disputes will be investigated. Submissions will be made to address the provisions of the Mediation in Certain Divorce Matters Act³² which delegates the Family Advocate with the function of a mediator, and present any inadequacies found with regard to the Family Advocate being suitable to fulfilling such role.

This mini-dissertation will also focus on the involvement and the participation of children in the form of child-inclusive mediation on issues related to their care of and contact with their parents during and after the separation of their parents. Through submissions, a clear distinction will be drawn between the practice of child-focused mediation and child-inclusive mediation and why the latter style of mediation is better suited to serve the interests of children. Recommendations will be made that only where exceptional circumstances exist should child-focused mediation be considered. Such exceptional

³⁰ De Jong M, (2013), p 117

³¹ De Jong M, (2013), p 121

³² 24 of 1987

circumstances will be investigated further and briefly presented in this mini-dissertation

1.2 Research Questions

This mini-dissertation will address the following questions?

- To what extent is mediation used in South Africa, and what can be done to further the development thereof formally so that it can become a mandatory process adjunct to civil proceedings to promote a more child-inclusive approach in divorce proceedings?
- What are the benefits and advantages of child-inclusive mandatory mediation that will address the shortcomings of the adversarial approach more commonly used in dissolution matters?
- Is child-inclusive mandatory mediation suitable in all circumstances surrounding a child-related dispute?
- Will the age of a child be a determining factor in allowing that child participate in a child-related dispute?
- Are exceptions available to child-inclusive mediations should it be made mandatory in civil proceedings?
- What are the criticisms and perceived challenges of child-inclusive mandatory mediation³³ and is there any recourse to addressing them?
- How will child-inclusive mandatory mediation be implemented within the South African civil justice system?

The research on this topic will further provide submissions on the following questions raised in the South African Law Reform Commission (SALRC) Issue Paper 31 Project 100D: *Family Dispute Resolution: Care of and Contact with*

³³ SALRC Issue Paper 31 p 42

*Children*³⁴ as part of its on-going investigation into the development of an integrated approach to the resolution of family law disputes³⁵;

- Child-Inclusive Mediation:
 - 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?³⁶
 - 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?³⁷

1.4 Research Methodology

A literature review will be done which will comprise of articles in journals, academic books and website publications. Primary sources such as case law, policies and legislation will be included. Various South African legislation and related authorities, which provides for mediation will also be discussed with greater emphasis in the field of family law. Reference will be made to statutes that include the Mediation in Certain Divorce Matters Act³⁸, the Children's Act³⁹, the Divorce Act⁴⁰ and the Constitution of the Republic of South Africa, 1996. Reference will also be made to the United Nations Convention on the Rights (CRC) of the Child and the African Charter on the Rights and Welfare of Children (ACRWC) to emphasise a global focus on child inclusivity in matters

³⁴ Available at http://www.justice.gov.za/salrc/ipapers/ip31_prj100d.pdf

³⁵ Executive Summary of Project 100D, p vi

³⁶ SALRC Issue Paper 31 p 44

³⁷ SALRC Issue Paper 31 p 38

³⁸ Act 24 of 1987

³⁹ Act 38 of 2005

⁴⁰ Act 70 of 1979

that involve them, specifically where there is a parenting plan or agreement necessary upon dissolution of the relationship between parents.⁴¹

The comparative legal method will also be utilised by looking at when mediation is mandatory in family matters in the various jurisdictions of the Australian states and its territories and some provinces of Canada (with the exclusion of Quebec⁴²). This is done in order to assess the practice of established mediation systems in Australia as a preferred method of dispute resolution where an adversarial system as influenced by English law already exists.

Canada is currently addressing the need for reform in its family justice system.

⁴³ This will provide an illustrated analysis of the progress and pitfalls it faces as publications emerge from Canada. Both countries have a degree of English common law in their civil justice systems and have practiced litigation as their primary method of dispute resolution. These two countries have, as in South Africa, experienced the shortcomings brought on by an adversarial approach to dispute resolution, which will be highlighted within the dissertation.⁴⁴ In view of the research questions, a comparative analysis will be made to specific Australian legislation, which provides the framework for child-inclusive mandatory mediation in family matters, as a possible suggestion on how the process could be implemented within the South African civil legal system. Along with the suggestions being made by writers from Canadian states on

⁴¹ African Charter on the Rights and Welfare of the Child was ratified in South Africa in 2000.

⁴² Quebec follows a civil law system, which is based on French law and not on English common law as the other states of Canada. Further mention of Canada in this dissertation will refer to all states excluding Quebec.

⁴³ Garton N. (2017). Family Justice Reform in British Columbia and the Northern Navigator Initiative: A Preliminary Review available at <https://www.mediate.com/articles/GartonN2.cfm>

⁴⁴ Trebilcock, M., Duggan, A., & Sossin, L. (2012). Middle Income Access to Justice. Buffalo: University of Toronto Press, Scholarly Publishing Division.; Bathurst TF. (2012). The role of the courts in the changing dispute resolution landscape. 35(3) p 870.



implementing child-inclusive mediation as part of dispute resolution within its civil justice system.⁴⁵

1.5 Significance of the Research:

According to the investigations carried out in the SALRC Issue Paper 31, divorce proceedings still occur in increasing volumes in accordance with mostly adversarial court procedures.⁴⁶ Even though the legislator and the judiciary have incorporated mediation into the procedures of the formal judiciary⁴⁷ since the implementation of the Children's Act, there has been little practical adjustment in resolving parenting disputes by incorporating the participation of children through mediation. This gives rise to more children exposed to the harmful relationship that ensues between the parents during the long court battles. It is believed that many couples, for whatever their reasons are, choose to have children out of wedlock.⁴⁸ Once this relationship ends they too engage in disputes over their parental responsibilities and rights adding to the number of disputes involving children. The SALRC Issue Paper 31 suggests that a proper evaluation of the family dispute resolution processes is needed.

With the outcome of child-related disputes having an impact on children⁴⁹, the manner in which the issues pertaining to parental responsibilities and rights are dealt with upon the dissolution of the relationship, needs to address any negative consequences it may have on the well-being of the child. In these child-related disputes a child is often treated as victim of the dispute who requires protection rather than considered as a participant of the process.⁵⁰ The decision to involve a child in a matter that concerns them is left to the discretion

⁴⁵ Bala N. (2015). Bringing Canada's Divorce Act into the New Millennium: Enacting a Child-Focused Parenting Law. *Queens Law Journal*. 40(2), p 425

⁴⁶ SALRC Issue Paper 31, Executive Summary p iv

⁴⁷ De Jong M, (2013) p 118

⁴⁸ Preller B. Available at <https://www.divorcelaws.co.za/unmarried-parents-and-the-law.html>

⁴⁹ Boniface AE, (2013) p 143

⁵⁰ Boniface AE, 2013 (1) p 131

of the parents of the child, along with their legal representatives, rather than the mandatory inclusion of children in matters that concern them as envisaged in section 31 of the Children's Act.

This mini-dissertation will address why it is imperative to implement child-inclusive mediation as a mandatory process to child-related disputes particularly around the care of and contact with the child.⁵¹

Recommendations will be made for the civil justice system to adopt a child-centric approach to child-related matters as mandatory in all child related statutes. This approach will demonstrate a transformative application of dispute resolution in child-related disputes where the focus is on creating an environment that upholds South Africa's obligations to the rights of the child.

Child-inclusive mediation, if made mandatory, could provide a highly integrated socio-legal approach to best serve the child. It will be submitted that by allowing a child to participate in the mediation process, the civil justice system will inadvertently pave the way for such child to experience a stable adjustment to life between two homes.

1.6 Chapter Outline

This mini-dissertation consists of five chapters.

⁵¹ Adams CW. (2011). Children's Interest - Lost in Translation: Making the Case for Involving Children in Mediation of Child Custody Cases. 36(3), p 355-362. This article gives a first hand account of a child's voice lost in a parenting dispute while providing reasons why it is necessary to mandate child participation.

1.6.1 Chapter 1

The background and introduction of the research with elements of the an outline of the chapters will be set out. The research question and research objectives will also be discussed.

1.6.2 Chapter 2

The mediation process and the principles of mediation will be discussed. Notably the principle of voluntariness will be expanded to address the mandatory nature of child participation within a mediation forum. The skills and competency of mediator necessary to engage with children will be addressed. While the benefits of mediation will be discussed, any shortcomings that exist in a mediated process will also be highlighted.

1.6.3 Chapter 3

This chapter will compare child-focused mediation and child-inclusive mediation. Arguments will be presented that illustrate that child-inclusive mediation promotes the right to participation as contained in the Constitution, Children's Act, ACRWC and UNCRC. This chapter will also discuss various methods of bringing child participation to the dispute while taking into account the age, maturity and stage of development of the child. One such method in discussion will be utilising a legal representative to express the views and wishes of the child thereby creating an opportunity for children to be part of the mediation proceedings. Section 28(1)(h) will be evaluated and illustrated with case law with particular reference to the interpretations provided by judicial officers with regard to the role, function and need for legal representation to children in civil proceedings, particularly where the issues are contact and care of such children. While doing so any pitfalls of child-inclusive mediation will be evaluated



1.6.4 Chapter 4

A comparative analysis of mandatory child-inclusive mediation in Australia and in Canada will be provided. The focus will be on the current reformation of the legal mechanisms in family law within these jurisdictions that bring about child inclusive practices. The challenges of adopting a blanket approach to child inclusion in parenting disputes will be identified. Submissions will be made to address whether South Africa can follow the strides made in Australia and Canada with regard to child-inclusive mediation and whether adequate procedures currently exist within South Africa to carry out mandatory child-inclusive mediation proceedings.

1.6.5 Chapter 5

Conclusions and recommendations in addressing the possibility of mandatory child-inclusive mediation in South Africa will be discussed. This chapter will also aim to favourably expand on the suggestions made throughout Issue Paper 31 with reference to child participation and the suitability of mandatory child-inclusive mediation within the South African civil justice system in child-related disputes going forward. The discussions and recommendations will draw from the overall research as presented in chapters 2, 3 and 4 to support the mandatory inclusion of child participation facilitated through the forum of mediation.



Chapter 2 Mediation

2.1 Introduction

The SALRC Issue Paper 31 calls for “the development of an integrated approach to the resolution of family disputes”.⁵² It is submitted that the process of mediation should form part of this integrated approach. It will be presented that mediation is the appropriate method of dispute resolution for family disputes particularly if the dispute involves issues of contact with and care of the children during the separation and post-divorce or post-separation phase of the children’s lives. For the purpose of addressing the research question posed, a brief outline of the definition, principles and characteristics of mediation will be discussed and the applicability of mediation being the appropriate process in which to introduce mandatory child participation in parenting disputes. The role of the mediator will be compared to the role and functions of the Office of the Family Advocate in terms of the Mediation in Certain Divorce Matters Act.⁵³ The relevant provisions of the Children’s Act related to the use of mediation will be evaluated to determine if mediation is beneficial and should be conducted adjunct to the civil proceedings in family law disputes, regardless of the marital status of the parents.

2.2 Definition

Mediation falls within the realm of ADR⁵⁴ (Alternative Dispute Resolution) and is considered one of its primary processes.⁵⁵ Mediation has been defined in various ways to identify the style they take. The two definitions which ideally

⁵² SALRC Issue Paper 31 (2016) p vi

⁵³ 24 of 1987

⁵⁴ ADR - is also considered the abbreviation for the term Adaptive Dispute Resolution or Appropriate Dispute Resolution

⁵⁵ Boniface AE. (2012). African-Style Mediation and Western-Style Divorce and Family Mediation: Reflections for the South African Context. PER/PELJ. 15(5), p 379

encapsulates both the elements of mediation and an understanding of the process itself are:

- *“Mediation is a flexible process conducted confidentially in which a neutral third person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.”*⁵⁶; and
- the Australian government’s advisory body on alternative dispute resolution, the National Alternative Dispute Advisory Council (NADRAC)⁵⁷ has adopted the definition of mediation as follows⁵⁸: *“Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (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 the 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 agreement.”*⁵⁹

Mediation has its roots in African history as a primary dispute resolution process.⁶⁰ Currently the practice of mediation in South Africa incorporates both

⁵⁶ Brand J, Steadman F & Todd C. (2016). Commercial Mediation; A user’s guide to court-referred and voluntary mediation in South Africa. Juta. p 19; Fn 11 The CEDR Mediator Handbook p 23.

⁵⁷ NADRAC was incorporated within the federal Attorney-General’s department in 2013 available at <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx> (accessed November 2018)

⁵⁸ SALRC Issue Paper 31 (2016) p 25

⁵⁹ Brand *et al* (2016) p 20; NADRAC Alternative Dispute Resolutions Definitions 1997. Available at <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF> (accessed November 2018).

⁶⁰ Boniface AE, (2012) p 378.



the western-style mediation and African-style mediation⁶¹ and has been introduced into the civil justice system, through the Court-Annexed Mediation Rules.⁶² These rules define mediation as “the process by which a mediator assist 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.”⁶³ Simply described the process of mediation is the management of other people's negotiations.⁶⁴ This management of negotiation in mediation is conducted in a manner that moves parties from adversarial positional bargaining to negotiating a realistic and mutually acceptable agreement.⁶⁵

Mediation is used in South Africa extensively to resolve labour disputes but is a lesser form of dispute resolution in “family, environmental and community disputes”.⁶⁶ In the arena of family disputes, family mediation is described as “a process in which the mediator, an impartial third party who has no decision-making powers, facilitates negotiation between disputing parties with the object of getting them back on speaking terms and helping them to reach a mutually satisfactory settlement agreement that recognises the needs and rights of all family members”.⁶⁷ This form of dispute resolution, if carried out completely and in good faith, will provide a platform for divorcing or separating parents to

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⁶¹ *Ibid*

⁶² 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.

⁶³ It is submitted that this definition is a careless definition of mediation in that, mediation is not a process of compromise but rather one of collaboration. This definition further limits the scope of the mediator's duties.

⁶⁴ O'Leary J. (2014). Mediation in Family & Divorce Disputes. Siber Ink CC, p 3.

⁶⁵ De Jong M. (2017). Child-informed Mediation and Parenting Co-ordination. In Child Law in South Africa. Juta. p 134-135.

⁶⁶ Brand *et al*, (2016) p 11.

⁶⁷ De Jong M, (2017) p 136



continue their relationship as amicable parents for the sake of the well-being of their children. Mediation by its very nature, does not support an adversarial approach but rather promotes the preservation of any ongoing relationship.

The high courts require that mediation must be considered at a pre-trial conference.⁶⁸ In the magistrate courts division there has been endorsement by the Department of Justice and Constitutional Development for mediation in the form of The Rules Regulating the Conduct of Proceedings of the Magistrates Courts of South Africa (Court-Annexed Mediation Rules)⁶⁹ to promote the use of the mediation process as a form of access to justice.⁷⁰ These court-annexed mediation rules apply to magistrates courts in certain areas as designated by the Minister by publication in the gazette as part of a pilot project.⁷¹

When the court-annexed mediation rules⁷² were introduced in 1 December 2014 at selected Magistrates' courts, it was noted that the rules were not specifically designed for family disputes.⁷³ The rules made mediation voluntary⁷⁴ which is contrary to certain provisions in the Children's Act, in terms of the creation of a parenting plan.

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⁶⁸ Rule 37(6) of the High Court Rules

⁶⁹ Available at http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf (accessed June 2016).

⁷⁰ There have been arguments that mandatory mediation restricts the constitutional right to access to courts, however it is argued by Brand J and Todd C 'Mandatory mediation in South Africa: are there constitutional implications?' *Dispute Resolution Digest* (2015) pages 47-59, that 'there is no constitutional objection to mandatory mediation' in terms of access to justice and the right to access the courts. Mediation does not always produce agreement, if it does it would in, most instances still need to be endorsed by the courts. Further if no agreement is reached in mediation, parties still have recourse to pursue resolution of their dispute in a court.

⁷¹ Information on the development of the pilot projects is available at <http://www.justice.gov.za/mediation/mediation.html> (accessed June 2016).

⁷² Available at http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf (accessed March 2018).

⁷³ SALRC Issue Paper 31 p 19.

⁷⁴ Rule 72 of Court Annexed Mediation Rules

In family and divorce disputes, mediation is a multi-disciplinary process⁷⁵ however mediation is not family therapy.⁷⁶ Within the context of family disputes related to a separation or divorce, family and divorce mediation promotes the best interests of children by reducing continued conflict between the parents.⁷⁷ Parents are regarded as the ones who best know and understand their children and should therefore be in the best position to determine an outcome most suitable for their children that does not continue further harm after the separation⁷⁸, but one that can be fulfilled amicably.

2.3 Principles of Mediation

A proper understanding of the process of mediation and its effect on dispute resolution comes from the principles of mediation that characterise this process. All mediation processes are based on the general principles of voluntariness, flexibility and informality, confidentiality, 'without prejudice, and the impartiality, neutrality and independence of the mediator.'⁷⁹ The role of the mediator is to control the process while the parties "determine the content and outcome of the dispute".⁸⁰

Mediation is usually described as a process that is entered into voluntarily.⁸¹ This is because it is believed that if parties choose the process, they are more likely to be vested in participating in the process and reaching agreement.⁸² Where parties are mandated to attend mediation, through legislation, a court order or clause in contract, their attendance may be compulsory however their

⁷⁵ De Jong M, (2017) p 137.

⁷⁶ Boniface AE. (2015). Family Mediation in South Africa: Developments and Recommendations. THRHR, p 398; O'Leary J, (2014) p 17

⁷⁷ De Jong M, (2017) p 140.

⁷⁸ De Jong M, (2017) p 140-141.

⁷⁹ Brand *et al*, (2016) p 24-26

⁸⁰ *Ibid*

⁸¹ Quek, D. (2010). Mandatory Mediation: An Oxymoron? Examining the feasibility of implementing a Court-Mandated Program. Cardozo Journal of Conflict Resolution. 11(2), p 481

⁸² Quek D, (2010) p 481

continued engagement to reach agreement remains voluntary, as Brand *et al* submit “whether or not mediation is voluntary in its initiation, it is generally voluntary in its continuation. To reiterate, despite parties being mandated to attend mediation, they cannot be forced to reach agreement, settlement is always voluntary.⁸³ Parties enter into an Agreement to Mediate⁸⁴ prior to any mediation session taking place. Contained within this agreement are the standards for rules of collaborative engagement which parties undertake to adhere to; these include treating each other and the mediator with respect and conducting themselves in good faith.⁸⁵

Mediation does not limit or deny any party access to any other dispute resolution process.⁸⁶ Mediation is conducted ‘without prejudice’ and the parties can litigate should they choose to, if no agreement is reached. Any offers or concessions made during mediation cannot be used against the other party in any process and remains in confidence.⁸⁷

“Mediation is a structured, yet flexible and informal process”.⁸⁸ Mediation can take place at any stage of the breakdown of the relationship, before proceedings have been instituted, during proceedings⁸⁹, or any time before judgement is given. Mediation may also be used by post-divorce or post-separation parents who have difficulty in fulfilling their court order. The practice and styles of mediation used by the mediator is flexible when applying the

⁸³ Brand *et al*, (2016) p 24

⁸⁴ Brand *et al*, (2016) p 120-123

⁸⁵ Mediation Training Manual as created for by the writer and trainer of mediation and negotiation skills for the Arbitration Foundation of South Africa, a mediation services provider and training institute endorsed by the University of Pretoria. Confirmation of writer as a trainer is available at <http://www.arbitration.co.za/pages/Training.aspx> (accessed January 2019)

⁸⁶ Quek D, (2010) p 482

⁸⁷ Brand *et al*, (2016) p 25

⁸⁸ *Ibid*

⁸⁹ Mediation does not disrupt prescription. It does however suspend the delivery of pleadings; see Rule 81 Court Annexed Mediation Rules. Available at http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf (accessed March 2018)

principles of mediation and as the mediator moves through the stages of the process.

Mediation is conducted confidentially and in private.⁹⁰ "Confidentiality is a hall mark of mediation."⁹¹ "The cloak of confidentiality"⁹² provides a safe environment for any party to the mediation to reveal any information relevant to the process and to bring parties closer to an agreement. Under the protection of confidentiality any party may trust that whatever is discussed will not be used against them. The parties are made aware that even note taking by the mediator remains the ownership of the mediator and may not be subpoenaed.

Confidentiality during mediation sessions is maintained on two levels.⁹³ Firstly the mediation process as a whole is held in private including the discussions by the parties. The outcome also remains in confidence, unless the parties agree to publicise it.⁹⁴ Secondly, should the parties engage in private side meetings (*caucus* sessions) with the mediator, the mediator will not divulge the discussions held in these private meeting to the other unless authorised by the party to do so.⁹⁵ This crucial second tier of confidentiality provides an opportunity for a party to provide information more freely that they may not be ready to divulge just yet to the other party in a joint mediation session and is necessary to make progress in negotiations.⁹⁶ These private sessions provide a safe environment within which a party can make full and frank disclosures to the mediator.⁹⁷ Its use is encouraged more frequently when the parties are

⁹⁰ Brand *et al*, (2016) p 21

⁹¹ Available at <https://adrresearch.net/2017/11/15/mediation-in-a-media-nation/> (accessed 10 August 2018)

⁹² Brand *et al*, (2016) p 30

⁹³ Confidentiality can be limited where "the mediator hears about past, or potential criminal conduct or where there is a threat to life, health or safety."- Brand *et al*, (2016) p 25

⁹⁴ Brand *et al*, (2016) p 25

⁹⁵ *Ibid*

⁹⁶ Brand *et al*, (2016) p 25

⁹⁷ Brand *et al* (2016) p 30



headed towards a deadlock in their negotiations. The mediator must endeavour to gather more information so as to fully understand why the momentum of the negotiations has stalled⁹⁸. During these private discussions the mediator may also explore the cause for the deadlock and introduce options and objective criteria that the party may use to move the discussion along.⁹⁹

2.4 Phases of the Mediation Process

The mediation process is conducted in phases,¹⁰⁰ with the mediator controlling when each phase will be implemented.

2.4.1 The Introduction and Opening Phase

The mediator introduces herself and explains her role, function and duties. The mediator confirms the Agreement to mediate has been read and signed by the parties. The rules of engagement are reiterated.¹⁰¹ Each party is given an opportunity to present the issues in dispute and what issues they would like to see resolved in mediation. An agenda is created and the parties are reminded that the agenda is not cast in stone and that they may make changes to it as the process unfolds. The aim of the mediator is to build a rapport with the parties.

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⁹⁸ The writer has acquired experience in the skills of a mediator as both a practitioner of and trainer in mediation and negotiation. Training manuals developed by the writer provide an in-depth understanding of the mediator's capability of facilitating negotiations within a mediation towards settlement or understanding the issues, using the concepts of a principled negotiation as discussed by Fisher, R & Ury, W in their book '*Getting to Yes: Negotiating an agreement without giving in.*' Random House Business Books, 2012

⁹⁹ Fisher *et al*, (2012) p 82

¹⁰⁰ Brand *et al*, (2016) p 34

¹⁰¹ O' Leary J, (2014) p 21 -24



2.4.2 The Exploration and Analysing Phase

The mediator and the parties develop a deeper understanding of the issues in dispute¹⁰² with the mediator posing open ended questions to delve into the interests, concerns and needs of the parties. The mediator may use *caucus* sessions at the outset, if the parties are not forthcoming with information and remain positional.¹⁰³ This phase is crucial to the process to identify the priorities of each party what value they place on each issue.¹⁰⁴

2.4.3 Options Generating (Bargaining) Phase

This phase gives parties the opportunity to directly engage in negotiating, developing and creating various options for possible consideration.¹⁰⁵ The mediator may use *caucus* sessions to engage with each party and reality test the viability of the options or the reality testing may be done in a joint session.¹⁰⁶ The mediator introduces “what-if” questions and perspective questions to bring the parties closer to possible agreement. At no point does the mediator give an opinion or suggest as to what the favourable outcome should be.¹⁰⁷ This phase embodies the bulk of the negotiation between the parties. Objective criteria is often introduced to provide clarity on the options generated.¹⁰⁸ This criteria may also be used to move the negotiation along to a more realistic outcome that benefits the circumstances of the parties.¹⁰⁹

¹⁰² Brand *et al*, (2016) p 39

¹⁰³ Brand *et al*, (2016) p 39-40

¹⁰⁴ Brand *et al*, (2016) p 40

¹⁰⁵ Brand *et al*, (2016) p 40; O’ Leary J (2014) p 23

¹⁰⁶ Brand *et al*, (2016) p 40-41, p 87 The Best Alternative to a Negotiated Agreement (BATNA) and the Worst Alternative to a Negotiated Agreement (WATNA) negotiating techniques are used during this mediation phase to reality test the viability and reasonableness of the options put forward by the parties; Fisher R *et al*, (2012) p 99-108

¹⁰⁷ O’Leary J, (2014) p 25

¹⁰⁸ Brand *et al*, (2016) p 42

¹⁰⁹ Brand *et al*, (2016) p 42



2.4.4 Reaching and Finalising Agreement

This phase brings about the confirmation of decisions reached. Parties may re-visit issues and address any outstanding decisions to be made. The parties engage in discussions on what review process they may include in their agreement should the circumstances change or if they are unable to fulfill their terms of agreement.¹¹⁰ The terms of the review clauses are discussed and clauses for a choice of dispute resolution mechanism to be used should a breach, default or misunderstanding occur from part of the review discussion.

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During these phases of the mediation process, should the mediation reach a point of deadlock, the flexibility of the process allows the mediator to “loop-back”¹¹¹ through the exploration and bargaining phases to re-address the issues that are holding the parties back from reaching agreement. To encourage the parties to continue with their discussions the mediator may change the style of mediation and introduce a different format in addressing the parties concerns.¹¹² The mediator informs the parties that the door is always open for follow up sessions when they are ready to continue with mediation.¹¹³ Parties may also use follow up sessions should they need to make changes to their current agreement or have any issues they would prefer to resolve privately.

2.5 Styles of Mediation

The mediator moves through the three common mediation styles transformative, facilitative and evaluative styles of mediation.¹¹⁴

¹¹⁰ Brand *et al*, (2016) p 43

¹¹¹ Brand *et al*, (2016) p 34-35, p 40

¹¹² Brand *et al*, (2016) p 43

¹¹³ *Ibid*

¹¹⁴ Brand *et al*, (2016) p 21.

2.5.1 Facilitative Mediation

The mediator focuses on the process that is best suited to achieve an outcome but will not give his or her¹¹⁵ opinion on the content or the merits of the issues.

¹¹⁶ The mediator rather facilitates a discussion between the parties using the communication skills to move the conversation constructively towards obtaining information about the dispute and understanding the underlying concerns and need of the parties to the dispute.

2.5.2 Evaluative Mediation

This mediation style gives the mediator a more active role in the substance of the issues. The evaluative mediator may give advice, or make recommendations to the parties on the outcome, may evaluate the strengths and weaknesses of the information shared by the parties and may attempt to persuade the parties to accept a particular outcome.¹¹⁷ Criticism of the evaluative style of mediation has been raised, in that it affects the impartiality and biasness of the mediator if the mediator were to make recommendations that favours one party over the other.¹¹⁸ As a trainer and practitioner of mediation, it is submitted that the evaluative style of mediation can be used when parties need to evaluate the options before them while the mediators uses open-ended question and reality-testing techniques to encourage parties to evaluate the best decision suitable to them.

2.5.3 Transformative Mediation

Transformative mediation focuses on the relationship between the parties to either improve or transform their relationship. The mediator encourages dialogue using a range of communication skills in a flexible process.¹¹⁹ In

¹¹⁵ Pronoun references to the mediator as female or male does not signify a gender preference.

¹¹⁶ Brand *et al*, (2016) p 22

¹¹⁷ *Ibid*.

¹¹⁸ Brand *et al*, (2016) p 22

¹¹⁹ Brand *et al*, (2016) p 21

mediation this style is used extensively where an ongoing relationship will exist between the parties and is more commonly used in mediating family disputes and workplace disputes. The transformative mediation style places focus on the future of the relationship and, through the mediator, parties transform their communication skills to improve the dialogue between them for future communication. The transformative style prepares parties on how to address any future disputes or misunderstandings they may have.¹²⁰

While the position of the mediator is one of neutrality in the facilitative and transformative styles of mediation, using the evaluative style of mediation the mediator provides an outcome favourable to one party or makes recommendations on what will be a suitable outcome for the dispute.

2.6 The Mediator

All mediation sessions are facilitated by a neutral, impartial and independent mediator¹²¹ appointed by both parties.¹²² Central to the concept of mediation is that the mediator controls the process by facilitating the negotiations and the parties control the final decision making.¹²³ The mediator does not influence the final decisions¹²⁴ nor does the mediator make any decisions for the parties.¹²⁵ It is the mediator's duty to ensure that the outcome is a well-informed one by providing information relevant to the negotiations.¹²⁶

¹²⁰ De Jong M, (2017) p 140

¹²¹ De Jong M, (2017) p 137

¹²² Brand *et al*, (2016) p 25

¹²³ Brand *et al*, (2016) p 26

¹²⁴ Boniface AE, (2015), p 398

¹²⁵ The role of the mediator is often misinterpreted as that of a judge or any presiding officer who can impose terms and conditions on parties. The mediator must at the outset of a mediation process educate the parties as to his/her role and function for parties to understand the facilitative nature of mediation; Heeden T. (2005). Coercion and self-determination in court-connected mediation: All mediations are voluntary but some are more voluntary than others. *The Justice System Journal*. 26(3)

¹²⁶ O' Leary J, (2014) p 15



The role, function and duties of the mediator uphold the principles and characteristics of the mediation process. One of the mediator's functions is to competently improve the communication skills of the parties and any other role players to the dispute to move the process constructively along,¹²⁷ while deflecting tension.¹²⁸

With the mammoth task of controlling dialogue between parties in a dispute, the mediator must be sufficiently trained and qualified to carry out his or her duties.¹²⁹ It is recognised in the SALRC Issue paper 31 that even though a legal practitioner may be knowledgeable and practice experts in the area of family law and child law, they are not necessarily trained ADR practitioners.¹³⁰ Currently the Court-Annexed Mediation Rules provide that the Minister of Justice will determine the qualifications, standards and levels of mediators who may conduct themselves as mediators.¹³¹ The minimum standard according to a directive issued by the Minister and adhered to by training institutes is that mediators must have a collective of forty (40) hours of training knowledge and practical experience in mediation to be deemed competently accredited and be affiliated to a recognised training institute.¹³²

¹²⁷ O'Leary J, (2014) p 27

¹²⁸ Smithson, J., Barlow, A., Hunter, R., & Ewing, J. (2015). The Child's Best Interests In An Argumentative Resource In Family Mediation Session. *Discourse Studies*. 17(5), p 612

¹²⁹ O'Leary J, (2014) p 15

¹³⁰ SALRC Issue Paper 31 p 20

¹³¹ Court- Annexed Mediation Rules, Rule 86(1)

¹³² Available at

<https://www.lssa.org.za/upload/Accreditation%20Standards%20for%20Mediators.pdf> (accessed June 2018)

The Children's Act refers to a mediator as someone who is a 'suitably qualified person'¹³³, however despite the past draft regulations of the Children's Act¹³⁴ defining this term at length, no definition was given as to who qualifies as a 'suitably qualified person' in the now promulgated Children's Act.¹³⁵ Even though this term is used to refer to a person who offers the mediation services, the lack of definition opens the door for any person to portray themselves as suitably qualified, following the minimum requirements as put forward by the Minister. The SALRC in its proposal to the drafting of a Mediation Act has recommended that a definition has to be drafted.¹³⁶

It is through proper training and experience, that a person may be deemed suitably qualified to conduct mediation. However the skills of a mediator are not automatically ingrained in a person, especially one who has been formally

¹³³ "The draft regulations for the Children's Act provided that:

(1) A person is suitably qualified to mediate disputes concerning fulfilment of conditions for the acquisition of parental responsibilities (and) rights and to provide assistance in the development of parenting plans if he or she -

- a. has at least five years expertise in mediation, arbitration, restorative justice or other forms of alternative dispute resolution after attainment of his or her professional qualification;*
- b. belongs to a recognised body aimed at the education and professional development of mediators;*
- c. possesses a recognised qualification in child development, child psychology, early childhood development, social work or any social service profession and has at least five years experience after attainment of such qualification;*
- d. is an admitted attorney or advocate of the high Court with at least five years experience in child and family law; or*
- e. possess any other similar qualification which renders him or her suitably qualified to mediate disputes or provide assistance in the development of parenting plans, or who, due to practical experience, can be regarded as suitably qualified."*; O'Leary (2014) p 53

¹³⁴ O' Leary J, (2014) p 52

¹³⁵ SALRC Issue Paper 31 p 27

¹³⁶ SALRC Issue Paper 31 p 27

trained in adversarial style dispute resolution process.¹³⁷ Brand *et al* submit that the mediator may possess expertise or experience in a particular area of the dispute but may not impart advice rather, use this expertise to explore options available to reach an agreement or narrow the issues in dispute.¹³⁸ Imparting legal information¹³⁹ to the parties with regard to the issues in dispute, must not be mistaken for giving advice. A mediator must not give advice to any party as it will affect his or her impartiality as such behaviour will be deemed as favouring the one party over the other. Instead the mediator must “refer the parties for independent legal advice” should they require it.¹⁴⁰

The skills of the mediator during mediation must include:

- An “array of”¹⁴¹ communication skills specifically used in mediation.
- The mediator must use their toolkit of questioning and listening techniques to motivate constructive dialogue.¹⁴² A mediator is trained to understand that the key to unlocking a way forward is to pay attention to what is not being said than what is being postured during the mediation. When offers are being made, the mediator uses clarifying questioning skills to test with the parents what outcome would work best in reality, in practice it is called the “what-if” format of questioning.¹⁴³

¹³⁷ Trainees in mediation have expressed difficulty in taking a neutral, impartial and unbiased approach to facilitating discussions between parties during role-play assessments. It is through practice hours spent being assessed and corrected in mediation training do trainees understand the shift in mindset when conducting a mediation and behave appropriately; O’Leary (2014) p 18

¹³⁸ Brand *et al*, (2016) p 26

¹³⁹ De Jong M, (2017) p 140

¹⁴⁰ De Jong M, “*Giving Children a Voice in Family Separation Issues: A Case for Mediation*”, TSAR (4) (2008) p 788

¹⁴¹ O’Leary J, (2014) p 27

¹⁴² O’Leary J, (2014) p 24 - 35

¹⁴³ Available at <https://www.susan-ingram.com/2015/09/divorcing-couples-and-the-parenting-plan-balancing-act/> (accessed June 2016)

- The mediator engages in discussions that extracts more information from the parties to understand the reasoning behind their competitive negotiation stance to bring out their needs, concerns and fears. Mediators are trained to do this by using the technique of going beneath the “ice berg”¹⁴⁴ to address why parties seek the outcome they find appropriate for their circumstances.

2.7 Mediation Principles in Practice

Mediation techniques, used by a specifically trained mediator, can be the “best process to navigate the challenge of integrating a child’s voice”¹⁴⁵ During the mediated discussions, the mediator tests the options put forward by the parties and discusses a realistic outlook on the way forward that maintains a co-parenting relationship post-divorce or post separation that is beneficial to the child and not detrimental.¹⁴⁶

The process is facilitative in nature and the result of such facilitation transforms the parental relations post-divorce or post-separation into a collaborative one because the parties are lead through the blue print of their parenting plan in a controlled manner.¹⁴⁷ Taking into account the finite details required within the parenting plan, the mediator can at any stage of the mediation proceedings, when it is conducive to do so, introduce the participation of the child as legally required .¹⁴⁸ The parties and the child are constantly reminded of the

¹⁴⁴ The ‘Ice Berg’ analogy used to demonstrate the method of obtaining answers from parties which moves them away from positional bargaining is commonly used in mediation training programmes. It is a compilation of questions and mannerism that a mediator has in their skill set that opens the discussion for parties to reality test their decisions. Various online articles provide insight on the methodology of the analogy. Available at <https://www.mediate.com/articles/noblecb120180614.cfm> (accessed February 2019)

¹⁴⁵ Adams CW, (2011) p 353-362

¹⁴⁶ O’Leary J, (2014) p 54

¹⁴⁷ O’ Leary J, (2014) p 4

¹⁴⁸ O’Leary J, (2014) p 46



confidential nature of the proceedings allowing them to reveal any information that will move the mediation towards agreement.

2.8 Family and Divorce Mediation in South Africa

The Office of the Family Advocate was created by the Mediation in Certain Divorce Matters Act 24 of 1987 ("Act"). The family advocate's role and function is derived from section 4 of this Act¹⁴⁹ and empowers the family advocate to make recommendations to the court after engaging with the family using the process of mediation on the contents of the parting plan or agreement. The role played by the family advocate does not fall within the ambit of the section 28(1)(h) of the Constitution right to have a legal practitioner appointed to a child, nor is the family advocate appointed as a *curator ad litem* for the child.¹⁵⁰ Despite being a legal practitioner, the family advocate also does not represent any party and is meant to maintain neutrality in order to carry out investigations of the dispute, write a report and make the recommendations to the court on what will outcome is preferable in the best interests of the child.¹⁵¹ The family advocate may engage with the children and obtain their views on what they envisage their life will be after divorce. These recommendations made however, may in some instance be in conflict with the views of the child.¹⁵²

De Jong criticises the functions of the family advocate as being not in line with the function of the traditional mediator.¹⁵³ De Jong submits that in the process of the family advocate developing a report based on facts and information

¹⁴⁹ Section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987. Available at http://www.justice.gov.za/legislation/regulations/1990_1987-024-certain-divorce-matters-reg.pdf; *Soller NO v G* 2003 (5) SA (W)

¹⁵⁰ Du Toit C, (2017) p 130

¹⁵¹ Section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987. Available at http://www.justice.gov.za/legislation/regulations/1990_1987-024-certain-divorce-matters-reg.pdf; *Soller NO v G* 2003 (5) SA (W)

¹⁵² Du Toit C, (2017) p 130

¹⁵³ De Jong M, (2017) p 143; The traditional mediator being one who uses the facilitative and transformative style of mediation and not one who makes recommendations in favour of a party.

gathered when carrying out the investigation¹⁵⁴, parties to the proceedings may not be too open to revealing much information for fear that it will be recorded in the report and may be used against them by the court.¹⁵⁵ De Jong submits that family advocates should not be referred to as mediators “but rather as advocates for the children”.¹⁵⁶ De Jong’s reasoning for such criticism is that the family advocate in executing his or her function conducts himself or herself as an evaluator by compiling information given during mediation to present to the court, thus breaching the confidentiality principle of mediation.¹⁵⁷ De Jong submits further that the role of the family advocate should rather be extended to “ensuring that proper, comprehensive community and private mediation services are available to everyone nationwide” and to standardise the practice of family and divorce mediation practices.¹⁵⁸

The current approach of practising divorce and family mediations in South Africa is “based mainly on the British and American models”.¹⁵⁹ These are the methods that mediators are trained to practice when conducting family and divorce mediations. However the Children’s Act recognises the African style of mediation by empowering the Children’s Court to refer family disputes to traditional authorities¹⁶⁰ who “administer the affairs of any group of indigenous people resident within the area, under the control of a traditional leader”, to conduct lay-forums using the process of mediation “in order to protect children

¹⁵⁴ This practice can be considered a breach of the confidentiality element of mediation.; De Jong M, (2017) p 142-143

¹⁵⁵ De Jong M, (2017) p 143; Brand *et al*, (2016) p 38 concur that parties are more open to communicate if they ‘are not afraid of repercussions.’

¹⁵⁶ De Jong M, (2017) p 143

¹⁵⁷ *Ibid*

¹⁵⁸ De Jong M, (2005). An acceptable, applicable and accessible family-law system for South Africa – some suggestions concerning a family court and family mediation. TSAR. (1), p 33-47. Throughout this article, De Jong provides for an expanded role of the family advocate that will best suit the office of the family advocate.

¹⁵⁹ Boniface AE, (2015). Family Mediation in South Africa: Developments and Recommendations. THRHR. 78(3), p 398

¹⁶⁰ Section 71 of the Children’s Act



from adversarial court process".¹⁶¹ All the while, in child-centred mediation the mediator opens discussions for parties to balance the best interests of the child against their own interest to move parties towards a realistic outcome for the family in their particular circumstances. With a child-centred approach, mediators are trained to understand that sometimes children speak through silence, their voice is often depicted through behavioural expressions, drawings and use of role-plays.¹⁶² De Jong submits that mediators be schooled in the social and behavioural sciences in addition to work with professions who are specifically trained to working with children.¹⁶³

The litigious interactions between divorcing parents are, often referred to as a battle with an outcome of a winner and a loser at the expense of a child's well-being.¹⁶⁴ However divorce and family mediation has been practiced in South African since the 1980s and 1990s.¹⁶⁵ The courts in this era, prior to the Children's Act being promulgated, when faced with contact and care arrangements in *Van De Berg v Le Roux*¹⁶⁶ and *Townsend-Turner v Morrow*¹⁶⁷ ordered mediation. It is submitted that the Children's Act envisaged a better, less destructive forum in which to handle disputes involving children in more amicable, collaborative and conciliatory manner by including Section

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¹⁶¹ Ozah, R., & Hansungule ZM. (2017). Upholding the Best Interests of the Child in South African Customary Law. In *Child Law in South Africa*. Juta. p 298.

¹⁶² Robinson T. (2015). *The Silenced Child: Secrets and Lies*. Partridge. In this book Robinson illustrates examples in which she works beyond the silence of the child to uncover the voice of the child by using her practitioner skills.

¹⁶³ De Jong M. (2010). A Pragmatic look at Mediation as an Alternative to Divorce Litigation. TSAR. (3), p 519

¹⁶⁴ SALRC Issue Paper 31, December 2015 available at http://www.justice.gov.za/salrc/ipapers/ip31_prj100d.pdf

¹⁶⁵ Boniface AE, (2015) p 398

¹⁶⁶ [2003] 3 All SA 599 (NC)

¹⁶⁷ [2004] 1 All SA 235 (C)



6(4)¹⁶⁸ so as to uphold the best interests of the child as a paramount consideration.

Once enacted the Children's Act the sections included within the Children's Act favoured the approach of amicable dispute resolution in all matters related to children. Thus, providing an open door for parties to go through the process of mediation first to attempt to reach agreement instead of invoking adversarial proceedings. In some instances, the provisions of the Children's Act mandates mediation and in others it is conducted at the discretion of the courts.

Section 33(2) of the Children's Act states as follows:

"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 the courts, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child."

It is submitted that this provision qualifies the view that the court should not be the first choice to resolve any disputes.

Section 33 of the Children's Act provides that in the event of experiencing these 'difficulties' when agreeing to the contents of the parenting plan, section 33(5) of the Children's Act states as follows:

"In preparing a parenting plan as contemplate 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."*

¹⁶⁸ Section 6(4) of the Children's Act



What is lacking though is that no provision is made should the parties fail to engage in mediation or reach agreement in mediation, other than the mediator must submit a certificate of non-attendance stating that the parties refused to use the forum or that due to lack of effort the mediation was unsuccessful.¹⁶⁹ De Jong's view that mediators must record that parties flatly refused to participate in mediation or abused the process is accepted as a step in the right direction of upholding the mandated practice of mediation when determining a parenting plan.¹⁷⁰

Section 21(3)(a) of the Children's Act makes provision that where a dispute arises as to whether an unmarried father has full parental responsibilities and rights, such dispute must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person. As much as this provision mandates mediation, the choice of mediator and co-operation and engagement at mediation sessions remains voluntary.¹⁷¹

The use of mediation is also endorsed in section 49 of the Children's Act which empowers the Children's Court to order that a lay-forum sit before deciding on a matter. According to this provision a lay forum hearing may include 'mediation by a family advocate, social worker, social service professional, or other suitably qualified person, or mediation contemplated in section 71 of the Act. However the use of mediation is subject to a consideration of the following:

- '(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

¹⁶⁹ De Jong M, (2017) p 145

¹⁷⁰ De Jong M, (2017) p 145

¹⁷¹ O'Leary J, (2014) p 4

(d) the nature of any allegations made by the parties in the matter'.¹⁷²

This then leaves the use of mediation at the discretion of the court and only utilised if the above factors have been considered. This provision further places reliance on the ability of a child to participate before the court may consider ordering mediation.¹⁷³

Section 69 (1) of the Children's Act provides that if a matter is contested and it is brought to the Children's Court, the court has the discretion to order the parties to attend a pre-hearing conference which will follow the process of mediation. This section further provides that during the process of mediation, the parties may possibly settle their dispute and define the issues to be heard by the court. De Jong submits that the intention of the legislator in these sections was clearly to encourage parties to attend mediation out of court.¹⁷⁴ However section 69(2) provides that where there are allegations of abuse or sexual abuse of a child, a pre-hearing conference will not be held. In contrast to section 69(2) De Jong submits that properly trained mediators in areas of abuse or family violence should be well equipped to mediate disputes with allegations, made by either party, of this nature.¹⁷⁵ However a mediator is duty bound to report any criminal activity committed against any participant to the mediation when brought to the mediator's attention during the process.¹⁷⁶

It is submitted that the provisions of Section 69(4) of the Children's Act¹⁷⁷ are somewhat contentious, as it sets out the manner in which the court determines the parameters of how the conference should be conducted. This provision provides that the court has the discretion to determine 'how and by whom the

¹⁷² Section 49(2) of the Children's Act

¹⁷³ The inclusion of child participation will be dealt with in more detail in Chapter 3.

¹⁷⁴ De Jong M, (2010) p 527

¹⁷⁵ De Jong M, (2017) p 148; O' Leary (2014) p 10

¹⁷⁶ Brand et al. (2016) p 25

¹⁷⁷ 38 of 2005



conference should be set up, conducted and by whom it should be attended'¹⁷⁸; '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'¹⁷⁹; and 'consider the report on the conference when the matter is heard'¹⁸⁰. Much like the role of the family advocate¹⁸¹ this raises the concern that the legislators have not abided by the principles of mediation and its characteristics. Section 69(4) which give the court the discretion to control the mediation process from afar, flies in the face of a mediated process as traditionally practiced. Confidentiality, which is a key element of mediation is disregarded throughout section 69(4).

2.9 The Benefits of Mediation

Incorporating the characteristics and principles of mediation, the benefits of mediation were expressly recognised by the South Gauteng High Court in *MB v NB*¹⁸² (also referred to as the "*Brownlee case*") in these terms:

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

¹⁷⁸ Section 69(4) (a)

¹⁷⁹ Section 69(4) (b)

¹⁸⁰ Section 69(4) (c)

¹⁸¹ Set out in section 4 of the Mediation in Certain Divorce Matters Act

¹⁸² *Brand et al* (2016) p 26



the costs and practical consequences of continued litigation, particularly if the case is a loser."¹⁸³

The court in *MB v NB*¹⁸⁴ "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".¹⁸⁵ The court was of the view that mediation should at least be attempted prior to the commencement of court proceedings, and that legal practitioners have a duty to inform their clients of this conciliatory process as provided for in Section 6(4) of the Children's Act.

The benefits of cost saving due to the direct communication between the parties during the process is further recognised in rule 84 of the Court-Annexed Mediation Rules. This rule allows parties to the mediation to share the costs equally or one party may pay the costs in full.¹⁸⁶ The set-up of mediation sessions and their frequency allows parties to reach possible resolution at a faster pace than following a litigious route subject to prescribed court days.¹⁸⁷

As ground-breaking as this judgement has been for mediation in divorce proceedings, according to Allen "*Brownlee* has not yet had any significant impact on civil practice".¹⁸⁸ "There seems a long way to go still for mediation to become a significant adjunct to civil justice in South Africa."¹⁸⁹ Allen submits

¹⁸³ *MB v NB* 2010 (3) SA 220 (GSJ) para 50

¹⁸⁴ 2010 (3) SA 220 (GSJ)

¹⁸⁵ SALRC Issue Paper 31 (2016) p 191

¹⁸⁶ Rule 84(1) Court Annexed Mediation Rules; Brand et al (2016) p 110-111

¹⁸⁷ Brand et al, (2016) p 28-29

¹⁸⁸ Allen T. (2008). *Dunnett principles emerge in South Africa: a review of Brownlee v Brownlee*, Available at <https://www.conflictdynamics.co.za/Files/281/Dunnett-principles-emerge-in-South-Africa-a-review-of-Brownlee-v-Brownlee.pdf> (accessed February 2019)

¹⁸⁹ Allen T. (2008). *Dunnett principles emerge in South Africa: a review of Brownlee v Brownlee*,

that “*Brownlee* should be celebrated and followed as a very far-sighted, revolutionary decision which properly reminds the legal profession and indeed the judiciary that civil justice exists to further the interests of their clients and not lawyers.”¹⁹⁰ Following the *MB v NB* judgement, Belville Senior Magistrate Du Toit issued a directive together with a memorandum to be followed in the Belville Magistrates Court as of 1 February 2010, that in terms of Section 54 (1) of the Magistrates Court Act 32 of 1994, a pre-trial conference will be attended to, and that futures cases will not be automatically set down for hearing if parties have not filed a certificate from an accredited mediation services provider that they have attended a mediation process.¹⁹¹ Yet family and divorce mediation has not become a popular form of dispute resolution in South Africa and the adversarial practice seen in separating and divorcing procedures remains untransformed.¹⁹²

2.10 Conclusion

It is commonly known that legal practitioners begin their legal education “schooled in the adversarial system of litigation and subscribe to the “winner-takes-all approach whenever they deal with a divorce”.¹⁹³ This approach however is not conducive to the well-being of children who have to endure and witness the constant battles between their parents.¹⁹⁴ De Jong supports the view that such adversarial proceedings are “detrimental to children” with the

Available at <https://www.conflictdynamics.co.za/Files/281/Dunnett-principles-emerge-in-South-Africa-a-review-of-Brownlee-v-Brownlee.pdf> (accessed February 2019)

¹⁹⁰ *Ibid*

¹⁹¹ Dated 10 November 2009. Available at <https://www.conflictdynamics.co.za/News/Read/17> (accessed August 2017)

¹⁹¹ Rycroft A. (2009). Why is mediation not taking root in South Africa? African Centre for Dispute Settlement Quarterly Newsletter.

¹⁹² *Ibid*

¹⁹³ De Jong M, (2018) p 52

¹⁹⁴ *TC v SC* (20286/2017) [2018] ZAWCHC 46; 2018 (4) SA 530 (WCC) (18 April 2018)

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“focus on the rights of the parent and far too little focus on the rights of children.”¹⁹⁵

It is submitted that the goal of mediation in separation and divorce disputes is not to reconcile the parties¹⁹⁶, instead it is to effect constructive negotiation¹⁹⁷ towards the creation of a realistic and effective parenting plan that should be child inclusive and child-centric. Direct communication during mediation which influences the preservation of the relationship post-divorce or post-separation has a positive impact toward the parties fulfilling their agreement.¹⁹⁸

The Children's Act makes provision for the focus from an adversarial approach in matters related to children to shift to that of a more amicable, problem solving approach.¹⁹⁹ The Children's Act is punctuated with provisions which suggest that mediation is the preferred method to introduce an amicable resolution of child-related disputes. However the Children's Act falls short of not defining mediation, nor the procedural manner in which parties should engage in mediation.²⁰⁰ The current manner often used, notably through the office of the family advocate does not fully embrace the principles of mediation.²⁰¹

In research, there are minimal arguments made against the use of mediation or its effectiveness as a dispute resolution process.²⁰² It has been submitted that mediation is not a remedy for all disputes and that power imbalances exist in mediation.²⁰³ Brand *et al* submit that the argument that power balances that are present in a mediation holds the same for power imbalance in the

¹⁹⁵ De Jong M. (2017). Child-informed Mediation and Parenting Co-ordination. In Child Law in South Africa. Juta. p 135

¹⁹⁶ O'Leary J, (2014) p viii

¹⁹⁷ *Ibid*

¹⁹⁸ O'Leary J, (2014) p 23; Brand *et al*, (2016) p 29

¹⁹⁹ Section 6(4) of the Act; SALRC Issue Paper 100 p 18

²⁰⁰ SALRC Issue Paper 100 p 19

²⁰¹ SALRC Issue Paper 100 p 19.

²⁰² Brand *et al*, (2016) p 31

²⁰³ Brand *et al*, (2016) p 31; O' Leary J, (2014) p 10

adjudication process as well.²⁰⁴ The mediator if properly trained, has the skills to handle these imbalances.

The inclusion of the Court-Annexed Mediation Rules within the civil justice system, which provides for voluntary mediation currently carried out at selected Magistrates Courts is not tailored to address the use of mediation according to the Children's Act. The voluntary use of mediation gives legal practitioners the upper hand in deciding for their clients what the best approach is to resolving disputes *despite being reprimanded for this callous behaviour in MB v NB* judgment.²⁰⁵ However the intention of the legislator in the Children's Act endorses that mediation is the best choice to first attempt to protect the interests of the child. It is submitted that mandating mediation styled practices to introduce child participation in parenting disputes does not take away the element of voluntariness, it merely brings it to the forefront of dispute resolution as the first step. It is submitted that the directive of the Belville Magistrates Court issued in 2009 should be practiced and extended to all jurisdictions countrywide for legal practitioners to understand the constructive effect and benefits of mediation in family and divorce disputes.

The SALRC's observation that a "proper evaluation of the family dispute resolution process"²⁰⁶ is needed is indeed welcomed. The SALRC Alternate Dispute Resolution Project 94 which was approved for investigation by the respective Minister at the time²⁰⁷ aims to develop an Alternative Dispute

²⁰⁴ *Ibid*

²⁰⁵ *MB v NB* para[57]; Rycroft A, (2009) p 3

²⁰⁶ SALRC Issue Paper 31 p 19

²⁰⁷ On 29 August 1994 the Minister of Justice approved Project 94 of the SALRC to investigate arbitration, on 8 July 1996 Project 94 was broadened to include the investigation of all other aspects of ADR and the civil law – John Brand *The Development Of Legislation To Promote Alternative Dispute Resolution & Access To Justice In South Africa – The Way Forward* Presented on 23 August 2017 at SAAM Conference. Available at <https://www.conflictdynamics.co.za/Files/309/The-development-of-legislation-to-promote-alternative-dispute-resolution--access-to-justice-in-South-Africa-->



Resolution Act (the envisioned ADR Act). Included will be a definition of mediation which will be referred to in conjunction with the other legislation where the mediation term is used.²⁰⁸ The process of mediation will also be set out in the envisioned ADR Act²⁰⁹ and will hopefully provide a guideline to users and practitioners on conducting the process to ensure that it remains true to its principles and characteristics. Further developments to be included in the envisioned ADR Act is the definition of “a suitably qualified person”²¹⁰. This should reduce the uncertainty as to who qualifies as a mediator, thereby placing clients at ease that they are in the company of a competent facilitator. It is hoped in light of the benefits of mediation discussed above, that the envisioned ADR Act will address the commencement of mediation as the first step to dispute resolution particularly in matters related to children.

the-way-forward-A-presentation-made-to-the-2017-SAAM-conference.pdf (accessed February 2019); SALRC Issue Paper 31, p 27

²⁰⁸ SALRC Issue Paper 31 p 27

²⁰⁹ *Ibid*

²¹⁰ SALRC Issue Paper 31 p 27



Chapter 3 – Child Participation and Mediation

3.1 Introduction

This chapter examines firstly, the child centered right in South Africa to be a participant in divorce and separation disputes particularly arising around contact and care arrangements and secondly, that the manner most appropriate to ensure direct participation of the child in a conducive and supportive environment. This chapter will highlight the national and foreign law relating to such right.²¹¹ The focus will be on the relevant provisions as contained in the Constitution²¹², the Children's Act²¹³, the United Nations Convention on the Rights of the Child (UNCRC)²¹⁴, the African Charter on the Rights and Welfare of the Child (ACRWC)²¹⁵ and the Mediation in Certain Divorce Matters Act²¹⁶ which address these two issues.

"The rights of parents to oversee the development of children is a long established principle".²¹⁷ However, there is still a "divergence of opinion about the nature of the relevant rights, their foundation and practical implications" causing the creation of disharmony between the competing right and duties of the parents, children, and the state which can ultimately prejudice children.²¹⁸ The interests of children in matters related to contact with and care of them are routinely sidelined. Their well-being lacks consistent representation in family

²¹¹ Section 39(1)(b) and Section 233 of the Constitution requires that when interpreting the Bill of Rights and interpreting legislation, a court must give due consideration to international law and any reasonable interpretation of the legislation that is consistent with international law.

²¹² The Constitution of South Africa, Act 108 of 1996

²¹³ 38 of 2005

²¹⁴ South Africa ratified the UNCRC on 16 June 1995

²¹⁵ South Africa ratified the ACRWC on 7 January 2000

²¹⁶ 24 of 1987

²¹⁷ Martin SR. (1996). A child's right to be gay; Addressing the emotional maltreatment of Queer youth. *Hastings Law Journal*. 48(1). p 167

²¹⁸ Mezmur BD. (2017). The United Nations Convention on the Rights of the Child. In *Child Law in South Africa*. Juta. p 404

disputes giving any dispute resolution process, during or post-divorce or separation a more parent-centered focus.²¹⁹ "Parents use their children as weapons in their bitter battle with their spouse"²²⁰ or partner. This proves unfortunate as the child stands to bear the brunt of the dire consequences of an ill-drafted parenting plan thus affecting the child future development and relationship with each parent and the well-being of the family as a whole.

Prior to the provisions of the Constitution and the Children's Act, a consideration of the views of the child was relatively unheard of despite national legislation providing that a child be afforded inclusion through representation in the Divorce Act 70 of 1979. Section 6(4) of the Divorce Act 70 of 1979 states that:

" 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."

Du Toit submits that the courts during this period, when sitting with a divorce matter interpreted this provision as grounds for appointing a legal representative who would act as a *curator ad litem* on behalf of the child and not as a separate legal representative.²²¹ The courts stated that in family matters the child's wishes must be taken into account to determine the best interests of that child, and in some instances where the child was of an intellectually sound mind the court placed weight on the child's preference.²²² However in practice this was not the case, despite the Divorce Act in place, the inclusion of the views of the child was given a low level of importance, or in

²¹⁹ Smithson, J., Barlow, A., Hunter, R., & Ewing, J. (2015). The Child's Best Interests In An Argumentative Resource In Family Mediation Session. *Discourse Studies*. 17(5), p 609-623

²²⁰ Zaal, N., & Skelton A. (1998). Providing Effective Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children's Courts. *South African Journal on Human Rights*. 14(4), p 539 - 559

²²¹ Du Toit C. (2017). Legal Representation of Children. In *Child Law in South Africa*. Juta p 108.

²²² *Fletcher v Fletcher* 1948 1 SA 130; *McCall v McCall* 1994 3 SA 201(C)



other instances the courts have ignored the child's views regardless of their age, and capacity to participate.²²³ This led to precedent being created in the drafting of parenting plans by legal practitioners which did not address the specific circumstances of each child. In instances where the Divorce Act refers to issues of "custody" and "access" the courts ought to have exercised their discretionary power to include child participation in every matter involving a child instead of accepting generically drafted parenting plans that did not serve the individual needs of each child before it.²²⁴

To further emphasise the importance of the child's voice the Constitution and the Children's Act make provision for child participation in all matters related to the child.

- Section 28(1) (h) of the Constitution states as follows:

"Every child has the right to have a legal practitioner assigned to the child by the state, and at state expenses in civil proceedings affecting the child, if substantial injustice would otherwise result".

- Section 10 of the Children's Act states as follows:

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

Boniface submits that the "participation principle" creates a space for a child to "think and act on their own and for adults to place more value on a child's

²²³ *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W); *Godbeer v Godbeer* 2000 3 SA 976; *Schlebusch v Schlebusch* 1988 4 SA 548 (E); *Manning v Manning* 1975 4 SA 659 (T); *Baart v Malan* 1990 2 SA 682 (E); Boniface, A. (2013). Resolving Disputes with Regards to Child Participation in Divorce Mediation. *Speculum Juris*. (1), p 132-133

²²⁴ De Jong M, (2017) p 137.



input.”²²⁵ This promotes the thought that by affording a child opportunity to participate in a manner that is appropriate to their communication level, such participation would provide valuable information that can be relied on as the true views of the child. These views would be direct, untampered and undiluted through conduits of messengers. There would be no misinterpretation of the child’s current feelings and experiences about the separation or divorce and the subsequent effects thereafter.

The ratification of the UNCRC and the ACRWC has subsequently raised awareness that more acknowledgment needs to be given by the courts to realise and implement the child’s right to participation and South Africa is obliged to adhere to contents of the Convention and the Charter. While this chapter introduces and discusses the mechanisms contained within these international instruments alongside the strides in South African legislature that bring about child participation in matters related to that child, the challenges of obtaining the child’s view are recognised. The calling for the mandatory procedural step of including children in parental disputes, through the process of mediation, is to address the “lack of opportunity” which currently exists for the majority of children.²²⁶

3.2 The United Nations Convention on the Rights of the Child (UNCRC)

The UNCRC identifies “children as the individual bearers of rights”.²²⁷ Of which one of these rights is the child’s right to participate in matters that affect them.

Article 12 of the UNCRC reads as follows:

²²⁵ Boniface AE, (2013) p 131

²²⁶ Fitzgerald, R., & Graham, A. (2011). The changing status of children within family law from vision to reality? Griffith Law Review. 20(2), p 422.

²²⁷ Du Toit C. (2017). Legal Representation of Children. In Child Law in South Africa. Juta. p 109.



1. *State Parties shall assure 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 representative or an appropriate body, in a manner consistent with the procedural rules of national law.²²⁸

Du Toit's submits that Article 12(1) affords the "child an overarching right to participate".²²⁹ The words "all matters" in Article 12(1) places no restriction on the types of matters involving children, thereby opening up opportunities for child participation to take place in any forum in which matters affect a child. This article further places a cautionary standard to weigh the views of the child given, against the age and maturity of the child before relying on the value of the child's input. Researchers have offered criticism on the legal uncertainty and clarity on what would be an appropriate age for a child's views to be considered valuable by submitting that determining the maturity of the child is open to subjective evaluation and the determination of an appropriate age by a legislator becoming a restrictive exclusionary number.²³⁰ Their views supports the adage that each case must be measured on its own merits, by holding that by not placing any specific age limit on child participation, a child's ability to participate must be varied in according to the capacity of each individual child and his or her particular circumstances.²³¹

Article 12(2) follows with a more specific endorsement of a participatory format by providing that a child be heard in judicial and administrative proceedings.

²²⁸ Available at : <https://www.unhcr.org/protection/children/50f941fe9/united-nations-convention-rights-child-crc.html> (first accessed June 2016)

²²⁹Du Toit C, (2017) p 110

²³⁰ Boniface AE, (2013) p 134; De Jong M, (2017) p 152-153

²³¹ *Ibid*

Article 12 does not place a duty on the child to request participation however it does place the onus of the state to assure a child that they will be given an opportunity to participate. It further obligates States to create the necessary legal framework to facilitate active involvement of the child and to place considerable weight on the views of the child so expressed. Thus, imposing a directive for states to effect procedural changes in its justice system to provide mechanisms for a child's view to be heard.

In the General Comment no.12 (2009) the Committee on the Rights of the Child (the Committee) provided a more explicit understanding of Article 12 its intention, interpretation and implementation.²³² The Committee reiterated that the right of all children to be heard is a fundamental value and a core principle of the Convention.²³³ The Committee brought to the forefront that Article 12 when put in practice is conceptualized as participation.²³⁴ These forms of participation include processes where children are engaged in information sharing and respectful direct dialogue with adults resulting in children having a better understanding of how their views, when taken into account, shape the outcome of such processes.²³⁵ Article 13, the right to freedom of expression and Article 17, the right to access to information are held by the Committee to be prerequisites for the right to be heard to be effective.²³⁶ The Committee has always held the view that when interpreting participation of a child, there must be no procedure put in place that discriminates against any group of children, based on their ethnicity, disabilities or their social, economic, or cultural conditions that they are living in.²³⁷

²³² Committee on the Rights of the Child General Comment no 12 The Right of the Child to be Heard CRC/C/GC/12 20 July 2009 available at <https://resourcecentre.savethechildren.net/node/5040/pdf/5040.pdf> (first accessed 15 June 2018)

²³³ General Comment 12 (2009) para [2]

²³⁴ General Comment 12 (2009) [3]

²³⁵ General Comment 12 (2009) para [3]

²³⁶ General Comments 12 (2009) paras [80 -82]

²³⁷ General Comment 12 (2009) para [87]

The Committee went in depth as to identify the nature of proceedings that will require child participation. One such issue which requires that a child be heard is when his/her parents are separating or divorcing, and it is noted that children are “unequivocally affected by the decisions of the courts” upon the breakdown of their parents’ relationship.²³⁸ The Committee suggests that children should be preferably heard “under conditions of confidentiality” over an “open court”.²³⁹ This observation from the Committee provides a foundation on the realisation that the ancillary procedures utilised in such separation or divorce proceedings should bring about the direct participation of children shrouded by the cloak of confidentiality. It is submitted that the research behind this dissertation will keep this observation as a sounding board when presenting mandatory child inclusive mediation practices as one such ancillary process, because one of the fundamental principles of mediation is confidentiality.²⁴⁰

3.3 The African Charter on the Rights and Welfare of the Child (ACRWC)

The African Charter on the Rights and Welfare of the Child (ACRWC) Article 4(2) provides the child's right to be heard in all judicial and administrative proceedings as follows:

“In all judicial and administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law”.²⁴¹

²³⁸ General Comment 12 (2009) para[50] and para [51]

²³⁹ General Comment 12 (2009) para [43]

²⁴⁰ See chapter 2

²⁴¹ Available at https://au.int/sites/default/files/treaties/7773-treaty-0014_-_african_charter_on_the_rights_and_welfare_of_the_child_e.pdf

This right restricts the involvement of a child by limiting it to participation in judicial and administrative proceedings only.²⁴² It further restricts the voice of the child to be limited to the child's capabilities of expressing their views. In these instances, Du Toit submits that by affording a child the right to have 'impartial' legal representation, that the child would be guaranteed a representative that is exclusively responsible for presenting the child's views.²⁴³ It is submitted that legal representation should alleviate the limitations a child may in their capabilities when realising Article 4(2), however within the South African context, the role and functions of the legal representative must be looked at closely.²⁴⁴

3.4 The Constitution of South Africa 108 of 1996 – (the Constitution)

3.4.1 Appointment of a Legal Representative to a Child as a Form of Participation

South Africa under its obligation as a signatory to the UNCRC addressed Article 12 by creating a right to a legal practitioner in civil proceedings²⁴⁵ to every child at the expense of the state.

Section 28(1) (h) of the Constitution which states as follows:

- *"Every child has the right to have a legal practitioner assigned to the child by the state, and at state expenses in civil proceedings affecting the child, if substantial injustice would otherwise result."*

The right to legal representation, is not an absolute right and is dependent on the result of the existence of 'substantial injustice' should such representation

²⁴² Boniface AE, (2013) p 139

²⁴³ Du Toit C, (2017) p108- 133; Section 28 (1) (h) of the Constitution

²⁴⁴ See further 3.4.1

²⁴⁵ Section 28 (1) (h) affords a child legal representation in civil proceedings and Section 35(3)(g) of the Constitution affords a child legal representation in criminal proceedings,



not be afforded. According to Zaal and Skelton, “this right is limited in scope and dependent upon a rather vague, predictive ground – the ‘substantial injustice’ test – which may prove somewhat difficult to delineate in practice”.²⁴⁶ However this right does exist and is afforded to all children, however only for the courts to test if it should be realised or not, thereby making child participation through legal representation subjective.²⁴⁷ This then presents the challenge of obtaining the views of the child to be presented in a parental dispute where no “substantial injustice” exists.

In *Christian Education South Africa v Minister of Education*²⁴⁸ the Constitutional Court held that a child's right to participate is protected by the appointment of a *curator ad litem* who represents the interests of the child. The Court held further that “a curator could have made sensitive enquiries so as to enable children's voices to be heard. The child's actual experiences and opinions would not necessarily have been decisive, but the child's views would have enriched the dialogue between the parties involved.”²⁴⁹ The Constitutional Court has since used the appointment of a *curator ad litem* for children involved in matters or affected by the outcome of matters “to create a mechanism to place the children's views before the court”²⁵⁰ and to protect the interests of children.²⁵¹ Du Toit submits that the Constitutional Court's use and interpretation of Section 28(1)(h) endorses child participation through the appointment of a legal practitioner as a *curator ad litem* to protect the interests of children should the risk of substantial injustice arise.²⁵²

²⁴⁶ Zaal N, *et al* (1998) p 541

²⁴⁷ Du Toit C, (2017) p 118

²⁴⁸ 2000(4) SA 757 (CC) p787

²⁴⁹ 2000(4) SA 757 (CC) p 787

²⁵⁰ Du Toit C, (2017) p 112

²⁵¹ *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC); *S v M (Centre of Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC)

²⁵² Du Toit C, (2017) p 111; *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) para 3



It is submitted that the appointment of legal representation in this provision does not address the appointment of 'impartial' representation as envisaged by the ACRWC. Du Toit supports the view that the appointment of a *curator ad litem* or a separate legal representative are forms of child participation, however a difference lies between the appointment of a *curator ad litem* and a separate legal representative. The choice between the two should be made according to the circumstances of each case.²⁵³ The function the legal representative provides to the child must be constructive to the child's well-being and protection and not destructive. Children are vulnerable and "require appropriately skilled and knowledgeable legal representation".²⁵⁴

How then does a court address 'substantial injustice' during family disputes and divorce proceedings, where the child's best interests are in dispute or in issue and the child's participation is imperative? *Soller NO v G*²⁵⁵ which involved the decisions to be made on the family life of the child subsequent to his parents' divorce, addressed why a child would require separate legal representation, the court stated that "The significance of section 28(1)(h) lies in the recognition also found in the Convention on the Rights of the Child, that the child's interests and the adult's interests may not always intersect and that a need exists for separate legal representation of the child's view".²⁵⁶

Du Toit submits that divorce proceedings are characterised by their adversarial nature and are "mostly heard in High Courts", while care and contact proceedings may also be heard in Children's Courts²⁵⁷. Children within these disputes will be able to realise their right to legal representative, provided that

²⁵³ Du Toit, C (2017) p 113

²⁵⁴ Zaal *et al*, (1998) p 545

²⁵⁵ 2003 (5) SA 430 (W)

²⁵⁶ Para [7]-[8]

²⁵⁷ Du Toit C, (2017) p 118 Matters arising from the care of and contact with children in a divorce or separation dispute can be heard in the High Courts or in the Children's Court in terms of s45(3) of the Children's Act.



substantial injustice can be shown if they were not afforded this right.²⁵⁸ Legal representation however does not diminish the adversarial nature of divorce care and contact proceedings heard within the forums of the High Courts and Children's Courts.²⁵⁹ It is argued that the forum matters when dealing with children because of the nature of the proceedings.

In matters, especially arising out of disputes concerning the care of and contact with a child, the courts have noted that the acrimonious nature of the parties when two warring parents pit their child against each other has an impact on the final decisions made in the daily life of the child.²⁶⁰ The Legal Aid Board and the Centre for Child Law have both been at the forefront of promoting child participation in all matters that concern them especially in instances such as this.²⁶¹ In a joint venture they developed the Guidelines for Legal Representatives of Children in Civil Matters.²⁶²

The Guidelines provide two models of legal representation currently utilised in South Africa – client directed representation and best-interests legal representation.²⁶³ The appropriate choice of legal representation will be guided by the age and maturity of the child. The role of the legal representative will be dependent on the child's capacity to give instructions and involvement as a party of the proceedings or if a child is affected by litigation.²⁶⁴ A best-interests legal representative is appointed to a child who is too young or is

²⁵⁸ Du Toit C, (2017) p 118

²⁵⁹ Du Toit C, (2017) p 118

²⁶⁰ Legal Aid Board v R 2009 (2) SA 262 (D); Du Toit C, (2017) p 119

²⁶¹ *Ex Parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T)

²⁶² Guidelines for Legal Representatives of Children in Civil Matters, Pretoria University Law Press, 2016 (hereinafter referred to as the Guidelines).

²⁶³ Guidelines for Legal Representatives of Children in Civil Matters, (2016) p 9

²⁶⁴ Du Toit C, (2017) p 131; *Centre for Child Law v Governing Body Hoërskool Fochville* (156/2015) [2015] ZASCA 155 (8 October 2015)

considered immature or unable to give instructions but still has the capacity to express his or her views and wishes.²⁶⁵

3.4.2 Appointment of a Separate Legal Representative for the Child Within a Mediation Process.

A mediated environment with its guiding principles of confidentiality and maintenance of relationships, will ensure that trust and confidentiality is upheld even when in *caucus*²⁶⁶ with the child and the child's representative. By informing the child that information will be shared, or not informing a child that information will be shared with his or her parent's, a violation will exist in the child's sense of protection from any inherent harm they might be exposed to when the return to the home environment, inevitably leaving a child reluctant to participate. This breach of confidentiality poses an obstacle to child participation.

The use of the best-interests legal representative must be conducted in a mediated environment so as to protect the well-being and emotional stability of the child both during the session and after. Further the best-interests legal representative will be cautioned by the mediator from making intuitive assumptions and decisions. By having direct contact with a child in a mediated environment, both the child and the best-interests legal representative will be subject to the communication skills of the mediator, in which a competent mediator will obtain the true views and concerns of the child.

It is submitted that the use of either of the client directed or the best interest models of legal representation, as stipulated in the Guidelines, is suitable for mediation however the choice is based on a subjective view of the child's age, maturity and ability to give instructions. It is submitted that mediation should

²⁶⁵ Guidelines for Legal Representatives of Children in Civil Matters, (2016) p 10

²⁶⁶ The procedural nature of a *caucus* session in mediation is explained in chapter 2.

be considered as the appropriate forum, for any legal representative to meet with their client, the child, to establish in cohesion if either client directed representation or best-interests legal representation will be suitable for that particular child. Mediation provides an environment that encourages participation that is protected through confidentiality which allows the child participant an opportunity to establish a *repertoire* of trust and direct communication with their legal representative.²⁶⁷

In *FB v MB*²⁶⁸ the issues in dispute and views of the court have formulated questions as to why should the courts discretion be limited to only determining whether the participation of a child through legal representation should be allowed or not but rather that child participation be legislated mandatory and that the courts discretion be exercised on the manner in which such views are obtained, with the appointment of legal representation being one such manner.²⁶⁹ It is suggested that the court take into consideration when applying Section 28 (1)(h) that such implementation and exercise of the right take place within a mediated environment.

3.5 The Mediation in Certain Divorce Matters Act 24 of 1987

The voice of the child, as recognised through Section 4 of the Mediation in Certain Divorce Matters Act, empowers the Office of the Family Advocate to hold an enquiry into the welfare of minor or dependent children. The role played by the family advocate does not fall within the ambit of the Section 28 (1) (h)²⁷⁰ right to have a legal practitioner appointed to a child, nor is the family advocate appointed as a *curator ad litem* for the child.²⁷¹ The function of the family advocate is only to monitor, mediate and evaluate in matters related to the

²⁶⁷ O'Leary J, (2014) p 52

²⁶⁸ 2012 (2) SA 394 (GSJ)

²⁶⁹ Du Toit C, (2017) p 111

²⁷⁰ Constitution of South Africa

²⁷¹ Du Toit C, (2017) p 130

contact with, care of and guardianship of the child.²⁷² The parties do have the option to initiate the enquiry via the Office of the Family Advocate, however mediation may be mandated by the courts by requesting that an enquiry be instituted by the family advocate.²⁷³

Section 4 and 5 of the Mediation in Certain Divorce Matters Act further provides that the family advocate may adopt the evaluative style of mediation by reporting and making recommendations to the court on what would be in the best interests of the child in terms of the “custody”, “access” and “guardianship” of the child.²⁷⁴ The family advocate may engage with the children to obtain their views on what they envisage their life will be after divorce. Regulation 2 (Annexure A) of the Mediation in Certain Matters Regulations, 1990 provides a template of the information the family advocate must obtain from the parties on the care of and contact with their child and the basis for ensuring the mediation is focused on the best interests of the child and not parent-centred. The recommendations made by the family advocate however may in some instances be in conflict with the views of the child.²⁷⁵ De Jong submits that the recommendations made by the Family Advocate pertaining to the care, contact and guardianship of the child must be “carefully scrutinized” to ensure that such recommendations are child-focused or child-inclusive before such recommendations are “endorsed”.²⁷⁶

3.6 Children’s Act 38 of 2005

The child’s right to participation is entrenched as a central theme in the Children’s Act.²⁷⁷

²⁷² De Jong M, (2017) p 142

²⁷³ Section 3 of the Mediation in Certain Divorce Matters Act 24 of 1987

²⁷⁴ De Jong M, (2017) p 143

²⁷⁵ Du Toit C, (2017) p 130

²⁷⁶ De Jong M, (2017) p 143

²⁷⁷ Du Toit C, (2017) p 114

Section 10 of the Children's Act states as follows:

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

It is submitted that this provision however does not expand on how to obtain the views of the child nor does it favour a particular approach.

With the right to participate being a general principle, opportunities arise throughout the Act²⁷⁸ for a child to participate and express his or her view in various sections. With the legislator including the word 'must' in Section 10 above such participation is intended to be mandatory. The court supported the right of child participation in *B v B*.²⁷⁹ Regardless of the issues related to children, Van Heerden AJ held the view that all legislation applicable to children must be guided by Section 10 of the Children's Act.²⁸⁰ The court held the view that in every situation that involves a child, the child must be given an opportunity to have a say, the method of obtaining the child's views however will vary depending on the age and maturity of the child.²⁸¹ Du Toit submits that a possible method to include participation in light of the court's views in *B v B*²⁸² is including the child in mediation proceedings, or at the stage of drafting a parenting plan.²⁸³

²⁷⁸ Regulations 8(3) (b) and 8(4) of the Children's Act

²⁷⁹ *B v B* (602/11) (2012) ZASCA 151 (28 September 2012) (not reportable). The matter involved a maintenance dispute between parents.

²⁸⁰ para (18)

²⁸¹ para (19)

²⁸² Paras (18 – 20)

²⁸³ Du Toit C, (2017) p 120; Section 21(1) (3)(a) and Section 33(5) of the Children's Act

In addition to acknowledging child participation as a right, the Children's Act and regulations makes mandatory provision for child-centred mediation to be conducted.²⁸⁴ De Jong submits that "justification for these provisions can be found in the fact that family mediation offers many advantages to all involved- the parties to the dispute, the children affected by the dispute and the judicial system in general."²⁸⁵

Section 21(1) (3)(a) of the Children's Act provides that where a dispute arises between unmarried biological parents on whether the unmarried biological father has fulfilled the requirements to obtain full parental responsibilities and rights, such dispute must be mediated by a family advocate, social worker, social services professional or other suitably qualified person. Section 33(2) read with Section 33(5) provides that if the co-holders of parental responsibilities and rights are experiencing difficulties on exercising their responsibilities and rights must first attempt to agree on a parenting plan in mediation with the assistance of a social worker or suitably qualified person or through the assistance of a family advocate, social worker or psychologist before approaching a court.

It is clear from the above provisions that the objective would be for parties in dispute over the contents of the parenting plan, to first attempt to mediate their dispute privately and informally at the same time, depending on the criteria of age, maturity and stage of development of the child, ensure that the child's input is obtained as to the contents of such parenting plan.

Regulation 8 of the Children's Act – Mediation and participation of the child concerning parental responsibilities and rights.

Regulation 8(3)(a) provides that:

²⁸⁴ De Jong M, (2017) p 143

²⁸⁵ De Jong M, (2017) p 143

*“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”.*²⁸⁶

Regulation 8(3) (b) provides that:

*“bearing in mind the child’s or children’s age 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, social worker, social services professional, psychologist or the child’s or children’s representative.”*²⁸⁷

Regulation 8 (4) provides that:

*“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 a 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.”*²⁸⁸

Regulation 11 states as follows –

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.”*
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*

²⁸⁶ Consolidated Regulations pertaining to The Children’s Act 38 of 2005; Government Gazette 1 April 2010 Number 33076

²⁸⁷ *Ibid*

²⁸⁸ *Ibid*



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."

There regulations are all encompassing of child participation however they do not prescribe the manner in which the child becomes a participant to the proceedings. Guidance in terms of the conduct expected in proceedings can be sought in Section 6(2) of the Children's Act which states as follows:

All proceedings, actions or decisions in a matter concerning a child must –

Respect, promote and fulfil the 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,

Respect the child's inherent dignity;

Treat the child fairly and equitably

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.

This further provides a guideline on how such participation must be carried out in terms of the treatment of the child as a participant to the proceedings.

When addressing the issue of how much reliance must be placed on the child's capability of expressing his or her own view, the Committee on the Rights of the Child in General Comment 12 obligates states to determine the inclusion of child participation on a case-by-case basis based on an individual assessment of each child.²⁸⁹ Boniface supports this approach and submits that "even if the

²⁸⁹ General Comment 12 (2009) para [52]



child concerned is very young every effort should still be made to hear the child's views".²⁹⁰

Section 31 of the Children's Act states as follows:

(1)(a) Before a person holding parental responsibilities and rights in respect of a child takes any decisions 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.

Paragraph (b) of Section 31 (1) of the Children's Act outlines when a child's views must be considered as follows which includes the contact with and care of the child:

A decision referred to in paragraph (a) is any decision –

(a) "affecting contact between and a co-holder of parental responsibilities and rights;"²⁹¹

(b) "regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27" ²⁹²; or

(c) "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."²⁹³

The decisions made based on these sections especially if they have an adverse effect on or significantly change the child's daily life, must be brought to the child's attention before the conclusion of any agreement. This was the view of

²⁹⁰ Boniface AE, (2013) p 132

²⁹¹ Section 31 (1)(b) (ii)

²⁹² Section 31(1)(b)(iii)

²⁹³ Section 31 (1)(b)(iv)



the court in *HG v CG*.²⁹⁴ In this case the court had to decide on an issue of relocation in which the mother wanted to move from South Africa to Dubai with the three children. Both parents had “joint custody” of the children. The court relied heavily on the wishes of the child.²⁹⁵ Chetty J took the approach to decide the case based on the circumstances of the case, the rights as contained in the Constitution and the Children’s Act instead of relying on precedent which does not support the voice of the child.²⁹⁶

3.7 The Children’s Court – Chapter 4 of the Children’s Act

Section 14 of the Children’s Act states as follows:

Every child has the right to bring, and to be assisted in bringing, a matter to a court provided that that matter falls within the jurisdiction of that court.

Matters related to care and contact, which this dissertation is focused on, can be heard in the High Court and in some instance in the Children’s Court.²⁹⁷

Section 61 (1) (a) of the Children’s Act provides that:

“The presiding officer in a matter before a children’s court must 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.”

²⁹⁴ 2010 (3) SA 352 (ECP)

²⁹⁵ Para (23)

²⁹⁶ Domingo, W. (2011). For the sake of the children: South African family relocation disputes. PER. p 157-158; Du Toit C, (2017) p 116.

²⁹⁷ Sections 45 and 46 of the Children’s Act 38 of 2005



Where a matter referred to the Children's court is contested, the court may order a pre-hearing conference to mediate between the parties and during the convening of this forum. Section 69 (3) provides that:

"The child involved in the matter may attend and may participate in the conference unless the children's court decides otherwise".

While this provision may support the inclusion of the child, it still leaves the discretion of child participation in the hands of the court, much like the right to participation afforded to the child via Section 28(1)(h) of the Constitution. By using the word "may", there is no obligation contained in the wording of this legislation that ensures the voice of the child will be heard or considered.

3.8 Child-Centred Mediation

De Jong argues that mediation would be the appropriate forum for children to "vent their feelings while telling their stories so that they feel they are being heard and understood" and that mediators world-wide have moved to include children in the mediation process, "even in cases of domestic violence".²⁹⁸ De Jong proposes that there are two forms that are child-centred, to bring the views of the child into processes that involve them; namely child-focused mediation and child-inclusive mediation.²⁹⁹

²⁹⁸ De Jong M, (2017) p 152. Critics have however expressed their views that mediation is not the appropriate forum of dispute resolution where domestic violence is prevalent in relationships; Cohen DB. (1994). The Incompatibility of Fairness and Mediation in the Presence of Domestic Violence. Women's Lawyers Journal. 81(1). p 16-17; D Loomis K. (1999). Domestic Violence and Mediation: A Tragic Combination for Victims in Californian Family Court. California Western Law Review. 35(2). p 355-370; Krieger S. (2002). The Dangers of Mediation in Domestic Violence Cases. Cardozo Women's Law Journal. 8(2). P 235-260.

²⁹⁹ De Jong M. (2018). Suggestions for a Divorce Process Truly in the Best Interests of Children. THRHR. 81(1), p 48



3.8.1 Child-Focused Mediation

Studies have shown that when parties were asked to discuss the welfare of the child in a child-focused mediation setting, such parties used the children as strategic resources when making decisions by providing their own opinion, which favours their case, of what is in the best interests of the child.³⁰⁰ The parents representations of the child's best interests becomes subjective as this form of discussion happens in the absence of the child, and the child's voice is represented by their parents or a legal practitioner in a mediation forum.³⁰¹ One parent can use their child's interests as a defence mechanism to portray the other parent as uninvolved or uncaring and derail the mediation process.³⁰²

The mediation process can be deadlocked if each parent holds on to the position that their opinion of what is best for their child is correct. One parent may take up the position of providing a structured "evidence-based" approach while the other will present a logistical approach.³⁰³ As seen in practice, parents negotiating the contents of the parenting plan with regard to contact and care do so from a perspective of showing off their parental competence, how their demeanour shows acts of reasonableness all in favour of the best interests of their child, all the while attempting to win favour with the mediator.³⁰⁴

The child-focused mediation forum may be used privately if not invoked by the provisions of the Mediation in Certain Divorce Matters Act. The courts have

³⁰⁰ Smithson, J., Barlow, A., Hunter, R., & Ewing, J. (2015). The Child's Best Interests In An Argumentative Resource In Family Mediation Session. *Discourse Studies*. 17(5), p 610

³⁰¹ *Ibid*

³⁰² Smithson J *et al*, (2015) p 613

³⁰³ Smithson J *et al*, (2015) p 615

³⁰⁴ Smithson J *et al*, (2015) p 616



regularly adopted this child-focused mediation stance by referring divorce matters to private mediation.³⁰⁵

Private mediators equally face the dilemma of disputes that are more parent-centred and not child-focused. With the onset of fathers now having an opportunity to challenge the status quo of a mother as the default primary resident parent who is involved in more of the daily care of the child, in mediation “fathers are all arguing for a greater share in parenting”.³⁰⁶ Their argument stems from the notion that they are justified in asking for equal parenting time based on their acquisition of full responsibilities and rights. Taking up a legal position and relying on research to justify why the child’s time must be divide equally between each parent. While the mother on the other hand assumes she will be the primary care giver and resident parent based on her personal experiences in parenting.³⁰⁷

Without objective criteria and the true views and wishes of the child how much reliance does the mediator place on the posturing of each parent that the child’s interests are indeed being addressed? Any acknowledgment of either parental feelings will place the mediator’s impartiality at risk and a mediators communication skills are crucial to the process.³⁰⁸ Smithson J *et al* submits the view that asking parents to consider and present the child’s best interests often exacerbates conflict between the parents instead of maintaining the focus on the child.³⁰⁹ It is submitted that this form of including the child’s voice is not the best practice where the outcome is more parent focused. A more interactive approach that includes the child directly must be considered.

³⁰⁵ *Van der Berg v Le Roux* (2003) 3 All SA 599 (NC); *Townsend-Turner v Morrow* 2004 (2) SA 32 (C); *FS v JJ* (2011) 3 SA 126 (SCA); *S v J* (2011) 2 All SA 299 (SCA)

³⁰⁶ Smithson J *et al*, (2015), p 620.

³⁰⁷ *Ibid*

³⁰⁸ *Ibid*

³⁰⁹ Smithson J *et al*, (2015) p 621

3.8.2 Child-Inclusive Mediation:

In child-inclusive mediation, the child is invited to attend mediation and may bring along a representative should they wish to do so.³¹⁰ This form of the mediation process gives the child a direct opportunity to participate in the process meaningfully. During this process the child instructs the mediator to share the views and perspectives he or she believes his or her parents should know.³¹¹ The regulations under the Children's Act provides a discretion to allow a child to participate directly depending on the age, maturity and stage of development of the child. No exact age has been provided for within the Children's Act, the Constitution, the UNCRC and the ACRWC. De Jong provides that each child must be measured individually and according to their particular circumstances.³¹²

It is common knowledge that no two children are the same in maturity and stage of development. Therefore all children should not be subject to generic decisions and agreements, as created in documented precedent on issues of contact and care can apply collectively. In practice the trend still exists in family law disputes in that a template "access" schedule and "custody" provisions are created by legal practitioners prior to the Children's Act being promulgated and current separating or divorcing parents are being misled by their legal representative that these generic terms still apply and are the most popularly court endorsed terms.³¹³ However De Jong submits that as children have different needs depending on their age group, parents and the courts cannot unilaterally decide what would be in their best interests without consulting that child.³¹⁴ It is submitted, in light of *HG v CG*³¹⁵, that since the ratification of the

³¹⁰ De Jong M, (2017) p 154

³¹¹ De Jong M, (2017) p 152

³¹² De Jong M, (2017) p 153

³¹³ De Jong M. (2010). A Pragmatic look at Mediation as an Alternative to Divorce Litigation. TSAR. (3), p 517

³¹⁴ De Jong M, (2017) p 150

³¹⁵ 2010 (3) SA 352 (ECP)

UNCRC and the ACWRC, the inclusion of Section 28(1)(h) in the Constitution and the elaboration of the right to participate in Section 10 in the Children's Act, this trend of ignoring the child's input by parents and their legal representatives should no longer be endorsed nor tolerated by the courts.

Regulations 8 and 11 of the Children's Act mandates the inclusion of the participation of the child in a mediation forum both during the creation of the parenting plan and after the contents of the parenting plan has been devised, the child is given at least two opportunities to express their views and concerns on decisions that affect their daily lives.³¹⁶ The mediator in his or her role and function controls the process and subsequently will decide when to include the child through the procedure of participation.³¹⁷ If the parents are high conflict, the child's input may be reserved to a later stage when the parents have calmed their triggers and are more open to constructive communication, the mediator will rely on the child's input as the objective criteria to minimise and test any contradicting views the parents may have on the contact and care arrangements.³¹⁸

The process of mediation in this instance, as carried out in practice, does allow for the child to express their views in the absence of his or her parents in a confidential child interview.³¹⁹ The child is afforded the presence of other professionals who will listen to and understand the child's perspective and concerns.³²⁰ The contents of the parenting plan is age appropriately explained to the child, the child then provides input as to what they believe would be a more feasible option as they have first-hand insight into their daily lives and structure. The child is made aware that the interview is conducted in confidence and the only information that the child gives permission to share is then divulged

³¹⁶ Consolidated Regulations pertaining to The Children's Act 38 of 2005; Government Gazette 1 April 2010 Number 33076.

³¹⁷ De Jong M, (2017) p 154

³¹⁸ De Jong M, (2017) p 153 - 154

³¹⁹ De Jong M, (2017) p 155

³²⁰ De Jong M, (2017) p 154-155

to the parents.³²¹ Furthermore the child is empowered with the knowledge that their views are being considered and so engage whole heartedly to give a full account of that affects his or parents decision will have on their life.³²²

Once the mediator brings these to the attention of the parents, they have a choice to consider the child's concerns and make decisions based on them or ignore these concerns. The contents of the final agreement lie in the hands of the parents. As is the function of the mediator, the mediator may reality-test with the parents the consequences of ignoring the views and concerns of the child. After the parents have made their decisions, the child is once again involved in a child interviews to hear the final contents of the agreement and in terms of regulation 8(4) may agree or disagree. Should the child disagree, the mediator must then continue to obtain the child's views and seek clarity on the child's concerns so as to convey to the parents why their decisions may not be constructive in the child's life. During this part of the process the parents may then "proceed to negotiate a more child-sensitive and child-focused parenting plan or settlement."³²³ It must be noted though, the child still does not make the final decision on the contents of the parenting plan, the parents do, afterwards such agreement must be deemed acceptable and endorsed by the court.³²⁴

The process of child-inclusive mediation is conducted with sensitivity "in a supportive and developmentally appropriate manner"³²⁵ and facilitated by an expertly skilled mediator who are trained to conduct such interviews. It is submitted in agreement with the submission made by De Jong that child-inclusive mediation facilitates a "positive child adjustment to family separation"³²⁶. According to De Jong, child-inclusive mediation "dilutes

³²¹ De Jong M, (2017) p 155

³²² De Jong M, (2017) p 152

³²³ De Jong M, (2017) p 156

³²⁴ Section 22(3), 22(4) and 22(5) of the Children's Act 28 of 2005; De Jong M, (2017) p 154

³²⁵ De Jong M, (2017) p 155

³²⁶ De Jong M, (2017) p 156

parental conflict mad increases parents' satisfaction with care and living arrangements".³²⁷ Therefore it is submitted that child-inclusive mediation should be the preferred method of including the voice of the child.

3.9 Conclusion:

The UNCRC and the ACRWC "promote a rights-based approach" for children. Since their ratification, along with the Constitution and supporting legislation, children are afforded protection under these rights enforceable against the "state, families and any person who violates them".³²⁸ The General Comment 12 holds states parties accountable for realising the right of a child to be heard by obligating states to include the right to be heard in all legislation that deals with separation and divorce including mediation processes.³²⁹

The theme throughout General Comment 12 is that it is imperative that where a child is capable of forming a view and providing such view, that child must be a participant to matters relating to proceedings that affect a child's life. To endorse the autonomy of a child's right to participate, Article 12 must be read with Article 13 of the UNCRC which deal with the child's right to freedom of expression.³³⁰ This right in the UNCRC affords a child the freedom to seek, receive and impart information and ideas of all kinds by means of oral, written, printed or artistic means.³³¹ Children will be limited in their capacity to participate and express themselves competently if they lack information on the contents of proceedings.

³²⁷ *Ibid*

³²⁸ Ozah, K., & Skelton, A. (2018). Legal Perspectives: Children, Families and the State. South African Gauge. p 46

³²⁹ General Comment 12 (2009) para[52]

³³⁰ Boniface AE, (2013) p 136

³³¹ Boniface AE, (2013) p 136



The Office of the Family Advocate, engages in child-focused mediation and in some instances may request that a child be included in the proceedings.³³² However the function and duties of the family advocate does not truly display that of an impartial mediator due to evaluative nature of the process and the reporting function of the family advocate.³³³ The impartiality of the family advocate is therefore questioned.³³⁴ Further the conduct of proceedings and adherence to the formalities of the child's input during the sessions and the at the end is relatively unknown as weight is largely placed on the family advocates recommendations.

Du Toit's submission that the objection, as raised by the mother in *FB v MB*³³⁵, that a legal representative as appointed and paid for by one parent, raises concern that an impression "of bias on the part of the legal representative in favour of the commissioning parent"³³⁶, is correct. Her averment that "as a general rule a neutral appointment is preferred"³³⁷ garners support for the appointment of a mediator who by role and function operates from a neutral position who will oversee that the child is indeed being represented by a professional who has the child's best interests at heart and not someone who is influenced by any parent.

De Jong submits that that a child's right to participate should not be diminished by the extent of the adversary displayed by his or her parents or harm that was caused to a child.³³⁸ The direct involvement of children to be heard will ensure that their views are not manipulated in favour of one party over another thus using the child as an instrument to obtain a stronger argument in litigation.³³⁹

³³² De Jong M, (2017) p 143

³³³ De Jong M, (2017) p 143

³³⁴ *Ibid*

³³⁵ 2012 (2) SA 394 (GSJ)

³³⁶ Du Toit C, (2017) p 127

³³⁷ Du Toit C, (2017) p 127

³³⁸ De Jong M, (2017) p 141

³³⁹ Platt S. (2016). Set another place at the table: Child Participation in Family Separation cases. *Cardozo Journal of Conflict Resolution*. 17(3)

The child should be given the opportunity to choose to decline participation at any point of the proceedings and not be silenced at the outset due to the adversarial nature of the proceedings. Studies have shown that a best interests approach to creating the provisions of the agreement during mediation leads to a more realistic document that benefits the children more than one created under adversarial circumstances.³⁴⁰

It is submitted that child-inclusive mediation however does not replace the child's right to representation thus ensuring no violation of any right within section 28 (1)(h) of the Constitution or Section 14³⁴¹ of the Children's Act. Instead mandatory child-inclusive mediation will provide a safe, neutral environment for the child and his or her representative to engage in non-biased and uninfluenced discussions with a neutral facilitator present to facilitate the manner in which children receive and give information that is appropriate to their understanding, age, stage of development and maturity.

Research conducted in international jurisdictions ³⁴² on child-inclusive mediation provides a presence of a progressive outlook on the parent's realisation of the impact of their child's direct involvement in the process. The parents' perspective changed and reduced the conflict, agreements reached were more developmentally appropriate.³⁴³ It is submitted that all legal instruments related to divorce and separation issues be updated to provide for child participation in various ways both directly and indirectly in accordance with the age, maturity and stage of development of the child.

³⁴⁰ De Jong M, (2017) p 141

³⁴¹ Section 14 of the Children's Act states as follows "Every child has the right to bring, and to be assisted in bringing, a matter to a court provided that that matter falls within the jurisdiction of that court".

³⁴² De Jong M, (2017) p 156

³⁴³ De Jong M, (2017) p 156

By acknowledging the input of the child's view, there is a growing shift in moving parenting styles from authoritarian to authoritative³⁴⁴, ensuring that the child is seen as a participant of the separation or divorce proceedings and not as a victim³⁴⁵ because of it. Sir Mark Potter, who has sat as the President of the Family Division of the High Court of England and Wales, holds the view that courts must heed to the damage caused by parental autonomy and authority has when promoting the rights and interests of children who within the family already experience "repression or neglect".³⁴⁶ General Comment 12 provides that for Article 12 to be effective, in promoting the child's involvement, there should not be a concept of participation that exists in legislation but rather that a framework must exist where there is direct involvement from the child in the form of 'planning, working and developing in consultation with the child' child-centred outcomes that affect the child.³⁴⁷ Bringing the voice of the child into a mediated forum provides reliability that the child's true views are relayed and not misplaced should the parents prove to be unreliable messengers. When a child asks to be involved in the mediation process so that they may express the negative impact the separation and impending divorce has on them³⁴⁸, it is imperative that such child is placed in a safe and conducive environment with the specific trained professionals who will impartially allow the child to share his or her concerns and alleviate any anxieties the child is experiencing. Research shows that child-inclusive mediation is known to be therapeutic for children and the decisions made around the contact and care of the children were stable and

³⁴⁴ Boniface AE, (2013) fn 9 p 131. Online articles have been written to educate parents on the difference in authoritarian parenting and authoritative parenting styles. Available at:

(Sainte-Marie 2015) (accessed 29 April 2015); <https://www.positive-parenting-ally.com/types-of-parenting-styles.html> (accessed 25 Nov 2017)

³⁴⁵ Boniface AE, (2013), page 131

³⁴⁶ Potter M. (2008). The Voice of the Child: Children's 'rights' in Family Proceedings. *International Family Law*. p xv-xxxvi

³⁴⁷ General Comment 12 (2009) para [86]

³⁴⁸ De Jong M, (2017) p 153



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realistic resulting in the child responding with a positive adjustment to the family separation.³⁴⁹

³⁴⁹ De Jong M, (2017) p 156



Chapter 4 – The Australian and Canadian Approach to Child Participation

4.1 Introduction

Much like South Africa, Australia and Canada are signatories to the United Nations Convention on the Rights on the Child (UNCRC). For the purposes of this dissertation, the use of methods implemented in Australia and Canada that promote child participation, (as set out in Article 12 of the UNCRC), during parenting disputes will be discussed and the challenges these jurisdictions face in their current practices. An analysis will be submitted on how these challenges are currently being addressed in each jurisdiction and how South Africa can seek guidance from the approach used by these respective jurisdictions in addressing these challenges. As illustrated below, both these jurisdictions have embedded within their legal practices a child centered approach to parenting disputes.

4.2 Australia

The current Australian legal system deals with family law disputes in a sub-divided manner with reference to the issues in dispute. The federal system uses a federal court structure to deal with parenting and property issues and state and territory courts “that are responsible for child protection and domestic violence” matters.³⁵⁰ This approach has been criticised to not meet the needs of “children and families across family law”, as it “inhibits the possibility of

³⁵⁰ Australian Law Reform Commission (ALRC) “Family Law for the Future” (Final Report) - an independent review of the family law system.” (2019) Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf

children's matters" being heard in the "same proceedings relating to family violence and/or child abuse."³⁵¹

The Family Law Act 1975 (Cth) was anticipated to have contained provisions that addressed article 12 of the UNCRC.³⁵² However major changes in the Family Law Reform Act (1995) (Cth) saw Australian family law take a revolutionary approach by "implementing child-inclusive services to families undergoing separation" as a mechanism of enacting Article 12 of the UNCRC and moving towards a "more child-centered family law".³⁵³ During this time the Australian practice in handling family disputes was influenced by a less acrimonious approach with fewer matters seeing the inside of the Family Court and more being referred to mediation.³⁵⁴ This led to the development of the Family Law Amendment (Shared Parental Responsibility) Act 2006, hereinafter referred to as the SPR Act. The Act was created to bring about a "cultural shift in the management of parental separation away from litigation and towards co-operative parenting".³⁵⁵

To implement the provisions of the SPR Act, community-based Family Resolution Centers (FRCs) were established across Australia.³⁵⁶ These centres provide various means for parents to adhere to the contents of the SPR Act which requires parents to "attempt conflict resolution" "before they can

³⁵¹ *Ibid*

³⁵² *Ibid*

³⁵³ Henry, P., & Hamilton, K. (2012). The Inclusion of Children in Family Dispute Resolution in Australia - Balancing Welfare versus Rights Principles. *International Journal of Children's Rights*. 20(4), p 584; Carson R, Fehlberg B & Millward C. (2013). Parents' Experiences of Family Dispute Resolution and Family Law Services in Australia following Shared Parenting Reform: Recent Qualitative Findings. *Child and Family Law Quarterly*. 25 p 406; McIntosh, J., Wells, D., Smyth, B., & Long. (2008). Child-focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment. *Family Court Review*. 46(1) p 129

³⁵⁴ Henry P *et al*, (2012) p 585.

³⁵⁵ Australian Government Australian Institute of Family Studies Available at <https://aifs.gov.au/publications/evaluation-2006-family-law-reforms>

³⁵⁶ *Ibid*

attend at court”, with the exception of matters where domestic violence or child abuse is alleged or established.³⁵⁷ Prof. Jennifer McIntosh³⁵⁸, an Australian clinical psychologist who specialises in family separation submits that including children invites a collaborative approach to the separation process and encourages parents to co-operate during the process, ultimately lessening the “known negative impact of separation on children’s long term well-being”.³⁵⁹

The process of the child interview is conducted by a Family Dispute Resolution Practitioner (FRDP) who works at the FRC in accordance with the “model of the child inclusive FDR”³⁶⁰ in a room that is conducive to conducting a child interview.³⁶¹ This Child Inclusive Practice (CIP) takes place within “a customary mediation process” between the parties with “an independent practitioner whose role is to assist the parties to communicate, consider their choices, and to arrive at any arrangement over family issues”.³⁶² In CIP the child is usually interviewed in person about “their wishes and feelings” which are to be considered by “the adults involved in mediation”.³⁶³

The belief that the age of the child matters in terms of their vulnerability to the CIPs shows in the lack of openness to give all children a fair opportunity to

³⁵⁷ *Ibid*

³⁵⁸ Available at <https://childrenbeyonddispute.com/jennifer-mcintosh/>

³⁵⁹ Henry *et al* (2012) p 585; McIntosh J, Wells D, Smyth BM & Long, “*Child-focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment*”, Family Court Review (2008) Volume 46(1) p 105-124; The work done by Prof. Jennifer McIntosh through the *Children Beyond Dispute* forum is an ongoing ‘journey’ in evaluating and improving the child inclusive practices in Australia and provides a welcome resource for recommendations on improved practices in South Africa.

³⁶⁰ Henry *et al*, (2012) p 587

³⁶¹ The room is set up with toys, drawing materials, low and high chairs for all ages. Australian Government- Australian Institute of Family Studies, available at <https://aifs.gov.au/cfca/publications/child-inclusion-principle-and-evidence-based-practic/section-1-mandate-child-inclusion>

³⁶² Henry *et al*, (2012) p 587

³⁶³ Henry *et al*, (2012) p 588

express their views. The age of the child being interviewed in CIPs varies between the jurisdictions within Australia, in some areas “only children 6 years and above are eligible for CIP”.³⁶⁴ Often the appropriate qualifying age for children to be interviewed are referred to as “school-aged children”.³⁶⁵

In the research conducted by Henry and Hamilton in Western Australia between 2009 and 2010, families were interviewed on their experiences of Family Dispute Resolution (FDR) at the FCRs and more significantly if the CIPs provided any difference to the outcome of the dispute.³⁶⁶ It was found in some instances that children appreciated the opportunity to “release pent-up emotions”, improve their communication with their parents and had an all-round positive experience to the practice.³⁶⁷ It was submitted by Henry *et al* that these children experienced “Immediate relief” from being heard.³⁶⁸

Henry *et al* submit that there cannot be a “blanket approach” to implementing child-inclusive practice within a mediated conflict resolution process.³⁶⁹ They submit that while the child’s right to participation is respected, their “safety and well-being” must be considered.³⁷⁰ As part of the FDR process the parents must be screened for their thoughts on how they would react if their child provided negative or disturbing information. Children, whose parents’ reacted with disdain towards their child’s potential negative views, were removed from the interview process to mitigate any potential harm it may cause to the child.³⁷¹ Further, Henry *et al* submit that directly involving key members of the family in

³⁶⁴ Henry *et al*, (2012) p 588

³⁶⁵ Australian Government-Australian Institute of Family Studies, “Child Inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors”, available at <https://aifs.gov.au/cfca/publications/child-inclusion-principle-and-evidence-based-practic/section-1-mandate-child-inclusion>

³⁶⁶ *Ibid*

³⁶⁷ *Ibid*

³⁶⁸ Henry *et al*, (2012) p 589

³⁶⁹ Henry *et al*, (2012) p 586

³⁷⁰ *Ibid*

³⁷¹ Henry *et al*, (2012) p 591



the development of a parenting plan will provide the foundation of a sustainable “post-separation parenting plan” and a “healthier family relationship” overall.³⁷² From their study they found that child inclusive practices empowered children and improved their “self-confidence with regard to communication and coping skills”.³⁷³

Critics of CIPs have claimed that involving children in a family dispute, leads the child to believe that they bear the “burden of responsibility” which will cause undue stress and emotional turmoil within the child.³⁷⁴ Henry *et al* submit that therein lies the tension between protecting the welfare of the child while realising the rights of the child.³⁷⁵ Henry *et al* submit that children must be reminded by the interviewer that their involvement in the process in no way indicates that they are responsible for the final decisions their parents make.³⁷⁶ Children must be alleviated from thinking they bear the burden to make the right decision without causing harm to either parent.

The FDR processes however still remains adult centric because not all matters related to children call for the voice of the child to be heard.³⁷⁷ In matters where the separation or divorce remains unopposed and the parents do not use the FDR processes, the child is left out of all proceedings.³⁷⁸ This silences the child’s voice even though such voice may be in opposition to the parental

³⁷² Henry *et al*, (2012) p 594

³⁷³ Henry *et al*, (2012) p 594; Barrie GN. (2013). Giving Due Consideration to Views Expressed by the Child in Family Law Proceedings: The Australian Experience and Lessons for South Africa. TSAR. 1. p136

³⁷⁴ Australian Government Australian Institute of Family Studies “Child Inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors”, available at <https://aifs.gov.au/cfca/publications/child-inclusion-principle-and-evidence-based-practice>

³⁷⁵ Henry *et al*, (2012) p 595; Banham *et al*, (2017) p 160

³⁷⁶ Henry *et al*, (2012) p 594; Barrie G, (2013) p 135

³⁷⁷ Henry *et al*, (2012) p 596

³⁷⁸ *Ibid*

agreement.³⁷⁹ Further, a child's voice may only be heard if the parents' consent to the child's participation in the mediation process. Children are not seen as independent contributors to the process but rather their parents are seen as the clients of FRC while the child is seen as an "adjunct to the parent".³⁸⁰

In order to address high conflict families where violence is involved, the Australian family law system has found a way forward, that as much as the current system aims to preserve the relationship between the parent and child, it must also weigh in the safety of the child while in contact with either parent, during and after a child interview has been conducted.³⁸¹ The *Family Law Legislation Amendment (Family Violence and Other Measure) Act 2011*, which came into effect in June 2012, attempts to address "the imbalance between the right of the children to parental contact versus their rights to freedom from harm, by giving clearer priority to the latter".³⁸² Henry *et al* submit that the inclusion of children in family mediation must be supported with the notion that the safety of the children remains paramount.³⁸³ This paramount consideration of the child's safety remains an obligation of the dispute resolution practitioner referred to as the "adviser" in Section 60D of the *Family Law Legislation Amendment (Family Violence and Other Measure) Act 2011*.³⁸⁴ CIPs must be developed to always be sensitive to 'family violence or abuse' being present in the child's life. Henry *et al* suggest that the child consultant must have follow-up systems in place to ensure that the well-being of the child is protected.³⁸⁵

³⁷⁹ Henry *et al*, (2012) p 596

³⁸⁰ *Ibid*

³⁸¹ *Ibid*

³⁸² Henry *et al*, (2012) p 598; "In March 2019, the Australian Law Reform Commission (ALRC) released "Family Law for the Future" (Final Report), an independent review of the family law system." Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf

³⁸³ Henry *et al* (2012) p 598

³⁸⁴ Available at <https://www.legislation.gov.au/Details/C2011A00189>

³⁸⁵ *Ibid*

Protecting children from parental anger after the interview has been concluded is paramount. It is important to note that the FDR process gives children the choice to stay within the interview process and express their views or when they are already in attendance and were not comfortable speaking they had the choice to prefer to be left out of the process.³⁸⁶

Henry *et al* submit that the benefits in CIPs applies to children in all disputes. In instances where family violence was prevalent the mediation model was in need of being flexible and of “better managing the risks of involving children” by not taking a “one size fits all approach”.³⁸⁷ They suggest that “mediation practitioners and policy makers” include ‘follow up services’ on the child, look into the potential of parental coaching before the interview and introduce ‘follow up services’ on the sustainability of the parenting plan to be conducted after the interview.³⁸⁸

The suggestions of the above research regarding the involvement of children contributed to the call for a holistic “structural and systemic reform in family law”.³⁸⁹ In 2017 the Australian Law Reform Commission (ALRC) were tasked to inquire into the family law system as it stands.³⁹⁰ The ALRC submitted their findings and recommendations in their final report “Family Law for the Future – An Inquiry into the Family Law System” (ALRC Report 135 dated 31 March 2019)³⁹¹.

³⁸⁶ Henry *et al*, (2012) p 593

³⁸⁷ Henry *et al*, (2012) p 599

³⁸⁸ *Ibid*

³⁸⁹ Australian Law Reform Commission (ALRC) “Family Law for the Future” (Final Report) - An independent review of the family law system.” (2019) Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf

³⁹⁰ ALRC Report 135. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf

³⁹¹ ALRC Report 135. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf

The ALRC found that the Family Law Act 1975 (Cth) was not a “comprehensive legislative framework” for family law as it dealt with “matters arising after the breakdown” of a relationship with parties having to move between jurisdictions to resolve various issues, causing an emotional and financial strain on the family.³⁹² The focus of the report was to look at the breakdown of the relationships regardless of marital status, and find “the best way to resolve disputes at the lowest financial, emotional and psychological costs, always giving primacy to the interests of the children affected by those disputes”.³⁹³ The report identified that most parenting issues are resolved prior the dispute reaching the doors of the family court through facilitated negotiations and eventual settlement.³⁹⁴

The ALRC Report 135 recommends that the following amendments be made to the Family Law Act 1975 (Cth) :

- When determining parenting arrangements such arrangements must promote the best interest of the child which include the safety of the child, “any relevant views expressed by the child”, the developmental, psychological and emotional needs of the child”³⁹⁵
- That the Family Law Act 1975 (Cth) encourage amicable resolution and courts must not hear any application unless the parties have shown “genuine steps” have been taken to attempt to resolve the matter amicably³⁹⁶;

³⁹² ALRC Report 135. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf

³⁹³ ALRC Report 135. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf

³⁹⁴ *Ibid*

³⁹⁵ Chapter 5 of the ALRC Report 135

³⁹⁶ Chapter 8 of the ALRC Report 135

- That the practice of family law and its procedures be facilitated “quickly, inexpensively and efficiently as possible, and with the least acrimony so as to minimise harm to children and their families”³⁹⁷;
- Legal practitioners in family law should complete annually “at least one unit of continuing professional development relating to family violence”³⁹⁸;
- Develop a more “efficient manner to eventually abolish first instance federal courts”.³⁹⁹

These recommendations to improve the family law system place the interests and involvement of the child at the forefront in parenting disputes calling for the family law system to be “child-centric”.⁴⁰⁰ The recommendations further promote processes that are fair outside the courts which will reduce conflict which in turn contributes to the “welfare of the children”.⁴⁰¹

4.3 Canada

The Canadian Constitution Act 1867 “allocates specific powers to the federal government” and to the provinces of Canada.⁴⁰² Under the Constitution, the provinces are given “wide family law jurisdiction” and can “legislate on most matters affecting the family relationship”.⁴⁰³ The federal government has jurisdiction over matters of divorce leaving a divided jurisdiction.⁴⁰⁴ However

³⁹⁷ Recommendation 30 of the ALRC Report 135

³⁹⁸ Recommendation 52 of the ALRC Report 135

³⁹⁹ Recommendation 1 of the ALRC Report 135

⁴⁰⁰ Chapter 5 of the ALRC Report 135

⁴⁰¹ ALRC Report 135. Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf

⁴⁰² Eaton J. (2002). Canada’s Court System. Australian Law Librarian. 10(3), p 232

⁴⁰³ Morris SR. (1981). The Constitution and Family Law in Canada: Prospects and Proposals. Canadian Community Law Journal. 5. p 109

⁴⁰⁴ *Ibid*



both the federal and provincial jurisdictions have “some degree of power to deal with custody and maintenance issues within their respective spheres”.⁴⁰⁵

The federal government introduced the Divorce Act in 1968 and later replaced it with the 1985 Divorce Act “which remains in force today”.⁴⁰⁶ Even though the Divorce Act was reformed in 1985, the focus still remained on the “spousal relationship”.⁴⁰⁷ The terms “custody” and “access” form part of the issues to be determined in the interests of the child according to the Canadian Divorce Act⁴⁰⁸, much like in South Africa’s Divorce Act.⁴⁰⁹ Bala submits that these concepts are inconsistent with the UNCRC, current social science research, cotemporary values and parenting practices when considering the importance of the views of the child.⁴¹⁰ There is a need for parenting legislation to be updated to incorporate the importance of the views of the child when decisions surrounding the development of the parenting plan are in dispute.⁴¹¹

To address the connotations of “custody and access” as being terms that “fan conflict and undermine collaboration”⁴¹², on 11 April 2019 the Canadian parliament passed the third reading of Bill C-78.⁴¹³ The key objectives of the

⁴⁰⁵ Morris SR, (1981) p 112

⁴⁰⁶ Azoulay K, Smith A, Sweeney N, “*Bill C-78: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*”, Library of Parliament (Canada), Publication No. 42-1-C78-E, Revised 19 April 2019, p 2

⁴⁰⁷ *Ibid*; Bala N. (2015). Bringing Canada’s Divorce Act into the New Millennium: Enacting a Child-Focused Parenting Law. *Queens Law Journal*. 40(2), p 426

⁴⁰⁸ RSC c3 1985

⁴⁰⁹ 70 of 1979

⁴¹⁰ *Ibid*

⁴¹¹ Bala N, (2015) p 453; Birnbaum, R., Bala, N. & Boyd, JP. (2016). The Canadian Experience with Views of the Child Reports: A Valuable Addition to the Toolbox. *International Journal of Law, Policy and The Family*. 30(2), p1

⁴¹² Azoulay *et al* (2019) p 6

⁴¹³ Commentary from the members of Parliament on the benefits of this much needed upgrade to the Divorce Act . Available at

Bill are to “promote the best interest of the child, address family violence, reduce child poverty, and make Canada’s family justice more accessible and efficient.”⁴¹⁴

With the Bill C-78 under consideration in the House of Commons, change is expected of the Divorce Act to bring the “language of the Act in line with the British Columbia Family Law Act” and “to shift the focus away from parenting rights towards parenting responsibilities”.⁴¹⁵ The comments and submissions made by the members of Parliament confirm the need of the much needed amendment of the Divorce Act to address the uniformity in practice that all provinces must adhere to when handling family disputes.⁴¹⁶ In so far as the Bill addresses the need for appropriate dispute resolution procedures that promote the well-being of the child, it still does not endorse legislated practices in obtaining the views of the child as per Article 12 of the UNCRC.⁴¹⁷

To address these challenges faced with “custody” assessments and the reluctance of the presiding officers to interview children, the ‘Views of the Child Report’ was introduced in the family justice process in Canada. In 2005, in British Columbia, the International Institute for Child Rights and Development (IICRD) undertook a pilot project and studied the “practice of neutral, non-evaluative child interviews.”⁴¹⁸ The model of this study involved the recruitment of family law lawyers and mental health professionals who were “trained in a protocol developed by the IICRD, to conduct ‘non therapeutic child interviews with children between 8 and 18 years of age whose best interests were being

<https://openparliament.ca/bills/42-1/C-78/> (accessed 24 May 2019); Azoulay *et al*, (2019), p 1

⁴¹⁴ Azoulay *et al*, (2019), p 1

⁴¹⁵ Available at

http://www.mondaq.com/article.asp?article_id=705038&type=mondaqai

⁴¹⁶ 42nd Parliament, 1st session seating of the Senate on 6th February 2019.

Available at <https://openparliament.ca/bills/42-1/C-78/>

⁴¹⁷ Azouley *et al* (2019) p 9. Ratified in 1991 and operational since 12th January 1992.

⁴¹⁸ Birnbaum *et al* (2016) p 5

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determined in family proceedings, and report back to the court and the parties on the child's views."⁴¹⁹ This pilot project received positive reviews from both judges and lawyers on the effectiveness of this approach; in that the reports were found to be useful, it shortened the time spent in the trial and it contributed to the early settlement of disputes.⁴²⁰ Due to the success of this project, the province of British Columbia established the British Columbia Hear the Child Society (BCHS). This society promotes child participation through interviews with properly trained legal professionals, mental health professionals and mediators who compile non-evaluative reports to be used in justice processes. Although no protocol for interviews exists for interviewing the children or the compilation of the reports at the time of presenting this research, this practice has spread to other provinces, Alberta, Saskatchewan, Manitoba, Newfoundland, Ontario and New Brunswick.⁴²¹

Birnbaum *et al* provide evaluative research, despite this format of a child interview being relatively "new" to Canada, on the benefits which advocate for the value of preparing a Views of the Child Report, one more mechanism that can be implemented to hear the voice of the child.⁴²² Their criticism of allowing other's to speak on behalf of the child is founded on the basis that those who represent the best interests of the child, without the child's direct input, do so to the detriment of the child.⁴²³ They submit that the courts are reluctant to place reliability on the representation each parent places before the court, without the child's direct input, as it is done with the intent on what each parent thinks is in the best interests of the child in order to "improve their positions"⁴²⁴ The writers further submit that the courts are aware that parents may submit audio recordings, letters written by their children or video recordings on what their

⁴¹⁹ Birnbaum *et al*, (2016) p 5

⁴²⁰ Birnbaum *et al*, (2016) p 5

⁴²¹ Birnbaum *et al*, (2016) p 6

⁴²² Birnbaum *et al*, (2016) p 17

⁴²³ Birnbaum *et al*, (2016) p 15

⁴²⁴ Birnbaum *et al*, (2016) p 4



child's view may be in order to manipulate their children into giving a version that best suits that particular parent.⁴²⁵

While the Canadian legislature recognizes that the views of the child may be taken into account through traditional means, no provincial and national "jurisdiction has legislation"⁴²⁶ that makes specific reference to the Views of the Child Report.⁴²⁷ The courts however have found that the Views of the Child Report is an "expeditious and inexpensive way" to obtaining the child's view while complying with Article 12 of the UNCRC".⁴²⁸

The courts are not in favour of interviewers taking the evaluative approach and providing an opinion on the "strength and consistency of the child's views".⁴²⁹ The courts in Canada are wary of professionals who author a Views of the Child Report with their own opinions included, and have expressed their concern over such opinions.⁴³⁰ In some instances the court has gone so far as to admonish a professional for using their skills as a mental health professional to provide a hearsay account of the views of the child. The court is looking for a more accurate version of the child's views not tainted by the opinions of professionals.⁴³¹ The courts prefer that any reliability and accuracy placed on the weight of child's views must be determined by the judge based on the "age and maturity of the child or in the context of the child's circumstances as a whole".⁴³²

⁴²⁵ *Ibid*

⁴²⁶ It must be noted that each province in Canada has its own statutes, forms and procedures that would need to be complied with upon dissolution of a relationship and may vary between the provinces.

⁴²⁷ Birnbaum *et al*, (2016) p 6

⁴²⁸ Birnbaum *et al*, (2016) p 6 fn 20 and fn 21; *K.L.S v J.G.M* [2012] B.C.J 282 (BCSC)

⁴²⁹ *Ibid*

⁴³⁰ Birnbaum *et al*, (2016) p 8

⁴³¹ *M.A.S v J.S.S* [2012] N.B.J 350 (NBQB)

⁴³² *M.A.S v J.S.S* [2012] N.B.J 350 (NBQB) para 37

Exceptions to this practice maybe limited in circumstances where domestic violence, neglect and abuse exist and is evident. Birnbaum *et al* have noted that in high conflict cases where parents are subject to place pressure on their child to submit to an assessment or child interview, the courts are reluctant to grant such assessment or interview. The courts have found that any input from the child may add fuel to the conflict instead of shedding light.⁴³³ Such circumstances where a child becomes subject to co-parenting with high conflict or an abusive parent who has an inability to comply with the parenting decisions, may leave the child more traumatised.⁴³⁴ In such circumstances it was held by the court in *Bekker-Warren v Denault*⁴³⁵ that in instances of high conflict circumstances a parallel parenting regime be adopted. Parallel parenting allows each parent to be “responsible for the care of the child” and daily decision-making “during the period of time” the child is with that respective parent.⁴³⁶ This would involve creating a detailed and “comprehensive parenting plan”.⁴³⁷

In light of these submissions, mediation and the method of obtaining the perspectives of the child through a Views of the Child report go hand-in-hand in implementing a child-centered approach to parenting disputes in Canada. The Views of the Child Report is usually non-evaluative, in that only the child’s submissions are included without any detailed assessment of the child’s submissions by the interviewer.⁴³⁸ The non-evaluative report does not include any opinions from the interviewer on the reliability of the child’s submissions.⁴³⁹

⁴³³ *Walton v Sommerville* (2010) ONSC 2765

⁴³⁴ Bala N, (2015) p 440

⁴³⁵ 2009 NSSC 59

⁴³⁶ Bala N, (2015) p 440

⁴³⁷ Bala N. (2015) p 441

⁴³⁸ Birnbaum *et al*, (2016) p 15

⁴³⁹ Birnbaum *et al*, (2016) p 15

According to Birnbaum *et al*, a “significant feature of the process of preparation” of the Views of the Child report is the protection of the child’s submissions made to the interviewer through confidential assurances.⁴⁴⁰ The child must be informed that only what the child gives permission to the interviewer to include in the report will be reportable.⁴⁴¹ Further the interviewer discusses with the child what the child feels comfortable to share what will be “said and how it will be phrased” in the final report.⁴⁴² It is submitted that this method of interviewing the child is similar to the second tier of confidentiality displayed in *caucus* or private sessions in mediation, in that the mediator meets with the child privately and only reveals to the other parties what he/she is instructed to reveal.

The underlying concern in child-inclusive practices in Canada is the possible effect it will have on children where their voices are not considered as being important enough to be heard. Since Canada uses parental consent as the mechanism to trigger child inclusive practices, much like in Australia, it cannot be said that parental consent will be granted in all disputes. Bala suggests that to bring family law reform in Canada, the ‘best interests for the child test’ “as endorsed by the UNCRC” must be the guidance for creating more detailed less vague practices that give judges and professionals no window to allow their own “personal biases and experiences” to influence their decisions on what the best interests of the child will be in parenting disputes.⁴⁴³ In doing so the terminology in the Divorce Act must align itself to the principles of the UNCRC while recognising that the child must be heard inevitably leading to “cultural changes to parenting in Canada”.⁴⁴⁴

⁴⁴⁰ Birnbaum *et al*, (2016) p 2

⁴⁴¹ Birnbaum *et al*, (2016) p 12

⁴⁴² *Ibid*

⁴⁴³ Bala N, (2015) p 470

⁴⁴⁴ Bala N, (2015) p 481-482



4.4 Conclusion

Where Australia has made inroads in improving family dispute resolution by supporting the mediation process and child inclusive practices, subject to exceptions, the Canadian researchers and compliers of Bill C-78 include dispute resolution processes such as mediation and negotiation within the potential reforms of the Canadian Divorce Act while placing very little focus on the voice of the child.⁴⁴⁵ It is clear from both jurisdictions however that mediation is the appropriate forum in which to introduce the child's voice.⁴⁴⁶

Fewer parenting disputes are now being resolved by judges with most parenting plans being developed through negotiation or mediation.⁴⁴⁷ Along with legal representation for children, appointment of guardians *ad litem*, extensive child 'custody' assessments prepared by mental health professionals and meetings with a judge, there has been an innovative approach currently being utilised in Canada in obtaining the views of the child through the compilation of the Views of the Child Report.⁴⁴⁸

The benefits of having such report which is "intended to describe children's views, perspectives, and wishes"⁴⁴⁹ for consideration in negotiation and mediation obtained in confidence can prove to be a useful instrument of objective criteria to maintain a constructive and informative way forward towards reaching agreement on matters concerning children in a divorce or

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⁴⁴⁵ Action Committee on Access to Justice in Civil and Family Matters [Cromwell Committee], "Access to Civil & Family Justice: A Road Map to Change", October 2013; Azoulay K, Smith A, Sweeney N, "Bill C-78: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act", Library of Parliament (Canada), Publication No. 42-1-C78-E, Revised 19 April 2019, p 5

⁴⁴⁶ Henry *et al* (2012) p 586 - Henry *et al* have submitted that "mediation has become synonymous with securing the welfare of children of divorce"

⁴⁴⁷ Bala N, (2015) p 436

⁴⁴⁸ Birnbaum *et al*, (2016), p 1

⁴⁴⁹ Birnbaum *et al* (2016) p 2

separation dispute.⁴⁵⁰ The child must however always be assured that their views will not be used as a haggling tool between their parents, especially in high conflict matters.

It is imperative that should child-inclusive mediation be made a mandatory process, that a standard exists on how to obtain the views of the child using the method as described in the Canadian approach, so as not to cause confusion between the contents as contained in a Views of the Child Report obtained in a mediated process and the contents and practices of a full evaluative assessment of the child that relates to the “custody” of the child as conducted by a mental health professional. Further there needs to be cautionary mechanism in place if a report is compiled in instances where the child was found to have been manipulated or “subject to parental pressure” that caused the child to give contradicting views during the interview,⁴⁵¹ The interviewer must be skilled enough to understand that where domestic violence, neglect and/or abuse is present in the child’s circumstances, the interviewer must have the foresight to recommend that such child be subject to a more thorough evaluative assessment with thorough investigations and the possibility of legal representation.⁴⁵²

It is not the submissions of this research to treat all children as participants with the same childhood experiences so as to create a cookie cut approach to blindly include children in all disputes related to them, but rather that sensitivity is practiced by all professionals when engaging in child inclusive practices. It is the intention of this research to highlight that each child must be included in manners appropriate to that child’s particular circumstances and extra measures must be considered if it is found that a child is in the midst of a high a conflict and potentially harmful situation. It is not the intention of this research to promote practices that would place a child under any “emotional stress” that

⁴⁵⁰ Henry *et al* (2012) p 594

⁴⁵¹ Birnbaum *et al* (2016) p 17

⁴⁵² *Ibid*



would “spark fear and anxiety”.⁴⁵³ Henry and Hamilton submit that the use of child inclusive practices must respect the child’s right to be heard at the same time it must “remain sensitive to maintaining their safety and wellbeing.”⁴⁵⁴

In keeping with the paramountcy of the child’s best interests in South Africa where the child has revealed that the interview will be harmful for the child and the family, a cautious approach must be taken beyond the introductory interview and the child’s safety must become paramount. The suggestion by the writers to include follow up procedures to after the interviews have been conducted is a welcome approach to communicating to the child after experiencing any anxiety in their interview that their well-being is paramount.

Looking at the advancements and reform of both the Australian and Canadian jurisdictions are in the throes of making to their family justice system, does the South African initiatives to include the participation of children in matters related to them suffice as they stand? Have South African legislators done enough in acknowledging Article 12 of the UNCRC within the Section 28(1)(h) right to participation found within the Constitution and the Section 10 right to participation in an appropriate way with the child’s views being given ‘due consideration’ as found in the Children’s Act? Barrie submits that these rights “leave much to the court’s interpretation” in determining what that “appropriate way in matter concerning the child” is and there is no definitive practice and protocols established on “how must views expressed by the child ‘be given due consideration?’”.⁴⁵⁵ Barrie acknowledges that South African Courts are “conservative” and “one cannot see the courts deviating much from the practice” as carried out prior to the Children’s Act 38 of 2005. Barrie suggests that international practices be the foundation for providing more detailed

⁴⁵³ Henry *et al*, (2012) p 586

⁴⁵⁴ Henry *et al*, (2012) p 586

⁴⁵⁵ “Barrie G, (2013) p 137



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practices and procedures for South African courts to realise these rights consistently and competently.⁴⁵⁶

⁴⁵⁶ Barrie G, (2013) p 137



Chapter 5 - Conclusion and Recommendations

5.1 Conclusion

This mini-dissertation posed the question of a possibility of making child participation mandatory through the process of mediation in South Africa. The research was narrowed to focus on parenting disputes particularly around the issues of care and contact. It is widely known that these two issues are the ones that most affect the daily lives of children and as such must, or at the very least attempt to, invite the input of children as to their understanding, views, needs and interests on such issues.

While parents and the legal fraternity are reluctant to embrace the autonomy of children in all matters that concern them, the courts have endorsed the child's right to be heard separate from their parents.⁴⁵⁷ In daily practice though, it is found there is still the resistance to have children involved in matters that affect them, mainly due to the ignorance of adults in understanding the value a child's view has on the outcome of decisions affecting their well-being and matters that concern them.⁴⁵⁸ Du Toit advocates that it is mandatory for a child to participate in any matter concerning that child. She submits that if a decision is made affecting a child, that child "must be given an opportunity to express his or her views in relation to"⁴⁵⁹ such decision.

It is submitted that the forum to effectively give rise to child participation is that of the process of mediation. By its very principles and characteristics, mediation fulfills the requirements of Section 6(4) of the Children's Act 38 of 2005 and complies with the procedural requirements of Section 33(2) read with Section

⁴⁵⁷ *Centre for Child Law v The Governing Body of Hoërskool Fochville* 2016 (2) SA 121 (SCA)

⁴⁵⁸ Banham, V., Allan, A., Bergman, J., & Jau, J. (2017). Acknowledging Children's Voice and Participation in Family Courts: Criteria that Guide Western Australian Court Consultants. 5(3), p 158

⁴⁵⁹ Du Toit, C (2017) p 111



33(5), Regulation 8 and Regulation 11 of the Children's Act.⁴⁶⁰ Mandating child-inclusive mediation will provide the much needed intervention that places the child's needs and interests at the forefront of child-related disputes. It must be noted that the discussion within this research does not call for mediation to be mandated for all disputes but that any dispute involving children must include the child through the forum of mediation. De Jong supports this view by submitting that a change in the system of family dispute resolution is required to give children a voice by replacing the adversarial system with early intervention services that focuses on co-operation and the needs of the child.⁴⁶¹

Section 33(3) of the Children's Act read with Section 33(5) of the Children's Act mandates the use of mediation as a primary process to deciding on matters of contact with and care of children. To show that mediation should be the appropriate forum to bring out the child's voice, the benefits of mediation are highlighted in Chapter 2 as being in line with Section 6(4) of the Children's Act 38 of 2005. Mediation provides the child the benefit of confidentiality and a neutral environment to express his or her views. Making the ancillary process of child participation mandatory within the mediation forum opens the doors for the child's perspectives, views, needs and interests to be placed at the forefront of the dispute, moving away from the parent-centric approach currently practiced in divorce and separation disputes to the detriment of the child's best interests. The voluntary principle of mediation is explained in Chapter 2 as parties, including the children, have the option to attend mediation when

⁴⁶⁰ 38 of 2005

⁴⁶¹ De Jong M, (2018) p 58; McIntosh JE, "*The Children's Cases Pilot Project: An exploratory study of impacts on parenting capacity and child well-being*, Final Report To The Family Court Of Australia March 2006. Available at http://www.familycourt.gov.au/wps/wcm/connect/a04b82d0-82a1-4842-bf9e-014a5a8a3c01/McIntosh_CCP_pilot_final.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-a04b82d0-82a1-4842-bf9e-014a5a8a3c01-lhWxDS0

mandated to however continued participation and reaching agreement is voluntary.⁴⁶²

Australian psychologist Prof. McIntosh in her study of Child Practice Programs (CPP) emphasised that in order for child inclusive practices to become the norm in legal practices, the family dispute legal system must adopt an “opt out approach” rather than the current “opt in approach”.⁴⁶³ It is submitted that this supports the voluntary principle of mediation⁴⁶⁴, in that where mediation is conducted as a dispute resolution process with the mandatory inclusion of the child’s participation, such parents may decide to “opt out” of mediation with good cause shown to the court as to why continuing mediation will not benefit their child’s right to participation.

A disadvantage identified in Chapter 2 to using the mediation process is the appointment of the mediator. Should an unskilled mediator who lacks also knowledge and understanding of the particular issues in dispute be appointed to the mediation, the family as a whole will not gain the benefit of the process with a possibility that such mediator will frustrate the process and cause irreparable harm to the trust the parties place in the mediator.

With Regulation 8 of the Children’s Act providing for the mandatory inclusion of children, thus making it a possibility in South Africa, there has to be a framework

⁴⁶² Brand *et al.*, (2016) p 24; General Comment 12 para 134(b) which states as follows “Voluntary – children should never be coerced into expressing views against their wishes and they should be informed that they can cease involvement at any stage”.

⁴⁶³ McIntosh JE, “*The Children’s Cases Pilot Project: An exploratory study of impacts on parenting capacity and child well- being*, Final Report To The Family Court Of Australia March 2006. Available at http://www.familycourt.gov.au/wps/wcm/connect/a04b82d0-82a1-4842-bf9e-014a5a8a3c01/McIntosh_CCP_pilot_final.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-a04b82d0-82a1-4842-bf9e-014a5a8a3c01-lhWxDS0

⁴⁶⁴ See Chapter 2

put in place to support this inclusion should such inclusion be deliberately ignored by disputing parents and their representatives. In Chapter 3 various mechanisms in which child participation is legislated in South Africa are highlighted. In identifying the types of legal representation children may have, chapter 3 referred to the Guidelines for Legal Representatives of Children in Civil Matters⁴⁶⁵ which provided for client directed legal representative and the best interest legal representative⁴⁶⁶. It is submitted that either choice of representative in mediation will have a front row view of the child's wishes and desires as a neutral observant participant in child inclusive mediation sessions. In this way, the child's view will not be lost in translation through the eyes and voice of an adult nor will it be influenced by the opinion of the legal representative. It is submitted that the guidelines would need to be supplemented so as to incorporate the procedural nature of the mediation process in which legal representatives may consult with their child clients in a safe and conducive environment.

Case law in South Africa illustrates an acknowledgment of child participation as essential to any process that involves decisions made on behalf of children.⁴⁶⁷ It is submitted that this should not be intermittent and dependent at the discretion of the court but rather form part of a mandatory ancillary process to determining the best interests of the child.

A reformation of the currently family and child law system in South Africa would not be out of the ordinary but rather consistent with the objectives of the General Comment 12.⁴⁶⁸ The Committee proposed requirements to "combat negative

⁴⁶⁵ Guidelines for Legal Representatives of Children in Civil Matters, Pretoria University Press, 2016

⁴⁶⁶ Guidelines for Legal Representatives of Children in Civil Matters, Pretoria University Press, 2016

⁴⁶⁷ *Soller NO v G* (2003) (5) SA 430 (W); *S v M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC); *Centre for Child Law v The Governing Body of Hoërskool Fochville* 2016 (2) SA 121 (SCA)

⁴⁶⁸ De Jong M, (2018) p 58

attitudes which impede the full realization of the child's right to be heard" and places an obligation on the state parties to regulate and firmly anchor in laws that place considerable weight on the views of the child.⁴⁶⁹ It further obligates state parties to evaluate the effectiveness of these regulations and law in realizing such right.⁴⁷⁰ The General Committee recommends that parents need to be educated on the child's right to participate equally

Boniface submits that "participation of a child in matters affecting them is mandatory in South Africa".⁴⁷¹ Du Toit shares this view and submits that the child, who is the subject of a parenting plan is "likely the most important party" to that parenting plan as it involves that child's daily life structuring and expectations, further that "it is therefore crucial that the child is in agreement with the parenting plan".⁴⁷² The poignant submission that Du Toit makes with regard to child participation is that "it is necessary, and in fact mandatory, that a child participate in all matters concerning the child. This means that a child must be given the opportunity to express his or her views in relation to a decision which will affect the child".⁴⁷³

In chapters 2 and 3 it is shown that mediation and the inclusion of children in parenting disputes go hand-in-hand as the appropriate forum to give rise to child's right to participate, there are no current statutes or guidelines that exist to create a uniform procedural standard on how to obtain the views of the child in South Africa within the mediated process. Chapter 4 sets out the inroads made within the Australian and Canadian jurisdictions towards realising Article 12 of the United Convention of the Rights of the Child.

⁴⁶⁹ General Comment 12 (2009) para[49]

⁴⁷⁰ General Comment 12 (2009) para[49]

⁴⁷¹ Boniface AE, (2013) p 142

⁴⁷² Du Toit C, (2017) p 111

⁴⁷³ Du Toit C, (2017) p 111

Like South Africa, Australian and Canada have included mediation as a dispute resolution process for parenting disputes within their legislation. However like South Africa, implementing the child's right to participation is still a work in progress for both Australia and Canada, particularly in getting the buy in from legal professionals. It is recognised within these jurisdictions that not all children, even of the appropriate age, stage of development and maturity, are afforded the opportunity participate in matters directly affecting their daily lives.

De Jong supports the Australian approach of community based-family centres being the "first port of call" for resolving family disputes.⁴⁷⁴ The intake procedure of handling family disputes should begin at these centres and a South African procedural change is necessary in the duties of the Registrar and the clerk of the court to direct the relevant disputes to these centres.

A cautionary approach to addressing the views of the child is followed in the practices of compiling the Views of the Child Report in Canada. The benefits of obtaining this report as discussed in chapter 4 show that there is a place for such report to be used as part of a proactive and confidential process in obtaining the child's perspective. It is imperative to note the submission by Birnbaum *et al* when placing weight on the value of the Views of the Child report. Birnbaum *et al* submit that the Views of the Child report assists in "identifying the need for a more in depth assessment" that allows the child time to speak and engage appropriately.⁴⁷⁵ By creating an environment cloaked with safety and confidentiality in mediation, children are more open to disclosing sensitive information which can assist mediators, where necessary, to recommend to the child's legal representative or parents that the child would be in need of in depth psychological assessment.

⁴⁷⁴ De Jong M, (2018) p 59

⁴⁷⁵ Birnbaum *et al*, (2016) p 6

It is submitted that by using mediators trained in the process of mediation and interviewing of children leading to the compilation of the Views of the Child Report, access to such services within a FRC will be more feasible to all disputing parents regardless of socio-economic background. Further the suggestions made to reach out to children located remotely can be followed with co-operation from mobile networks.⁴⁷⁶

5.2 Recommendations

Where section 33(3) read with section 33(5) of the Children's Act mandates the use of mediation to decide on matters of contact with and care of children, it is recommended that practitioners and the courts use this mandatory inclusion of mediation as a process to ensure that children are invited to participate in the mediation as provisioned in Regulations 8 and 11 of the Children's Act. Such participation being protected by the principles and practice of mediation and the assurance of an appropriately skilled mediator. Further that legal representatives so appointed under Section 28(1)(h) "be trained to effectively represent clients in mediation".⁴⁷⁷

To endorse an amicable resolution of parenting disputes, it is recommended that the approach to using the "opt out system" of participation rather than the current implementation of the voluntary "opt in system" will require that current South African family law and child law statutes be amended in instances that call for child participation.⁴⁷⁸ Such statutes must further include provisions that

⁴⁷⁶ Birnbaum *et al*, (2016) p 16

⁴⁷⁷ Sanders FE. (2007). Another View of Mandatory Mediation. *Dispute Resolution Magazine*. p 16

⁴⁷⁸ Sanders FE, (2007) p 16; McIntosh JE, "Final Report to the Family Court of Australia – The Children's Cases Pilot Project", Family Transitions, (2006) Available at http://www.familycourt.gov.au/wps/wcm/connect/a04b82d0-82a1-4842-bf9e-014a5a8a3c01/McIntosh_CCP_pilot_final.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-a04b82d0-82a1-4842-bf9e-014a5a8a3c01-lhWxDSO

requires parties to show “good cause” as to why they should be exempt from including the child’s views within the process that relates directly to the welfare of the child.⁴⁷⁹

Further by making child inclusive mediation a mandatory process that is regulated and implemented, supporting mechanisms need to be put in place to afford children appeal and complaints procedures, and remedies when such mandatory inclusion is breached and their right to participate is violated.⁴⁸⁰ It is recommended that the practicality of accessing these provisions of relief must come from paragraph 46 of the General Comment 12 (2009).

It is recommended that since it has been acknowledged throughout the research presented, that children are one of the parties directly affected by the contact and care terms of the divorce or separation agreements, reforms to the South African family and child law system must incorporate more explicit and detailed practices and procedures that makes it imperative that the child’s voice is heard regardless of whether the process has been uncontested or not. This would further ensure that child inclusive practices remain child-centric and not parent-centric.

It is recommended that prior to involving children in the mediation process, parents are thoroughly educated on the child’s involvement and the resultant outcome as being merely the views of the child and not a vendetta against any parent. It is recommended that the *Australian Family Law Legislation Amendment (Family Violence and Other Measure) Act 2011*, which came into effect in June 2012, and addresses “the imbalance between the right of the children to parental contact versus their rights to freedom from harm, by giving clearer priority to the latter”⁴⁸¹ be a starting point in developing practices within

⁴⁷⁹ Sanders FE, (2007) p 16

⁴⁸⁰ General Comment 12 (2009) para [46-47]

⁴⁸¹ Henry *et al* (2012) p 598; Australian Law Reform Commission (ALRC) “Family Law for the Future” (Final Report), an independent review of the

South Africa that protect the interest of the child in the mandatory child inclusive mediation process.

It is recommended that using the research of Canadian writers as presented in chapter 4 who advocate for the use of the Views of the Child Report and the expectant mannerisms of the interviewer, thus creating a format of standards and expectancies that protect the confidentiality of information shared by the child and the impact such perspectives have in the development of the parenting plan.

It is recommended that South Africa look to the proposals as contained in the Canadian Bill C-78⁴⁸² for guidance on the amendments that should be made to the South African Divorce Act 70 of 1979. The Bill C-78 addresses the need for the focus to shift from “regulating the breakdown of the spousal relationship” to addressing the parent-child relationship.⁴⁸³ By seeking reformation guidance from Bill C – 78 the provisions of the South African Divorce Act, the Matrimonial Affairs Act, the Mediation in Certain Divorce Matters Act and the Superior Courts Act will align itself with the intention and practices as contained within the Children’s Act related to the contact with and care of children and child participation, making all child related provisions child-centric

The right to participate and the “having the responsibility to make decisions” must not be blurred.⁴⁸⁴ It is recommended that children must never be placed in the position of being or led to believe that they are the decision makers in the child inclusive mediation process as it will overburden them with the

family law system.”(2019) Available at https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf

⁴⁸² Azoulay K, Smith A, Sweeney N, “*Bill C-78: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*”, Library of Parliament (Canada) , Publication No. 42-1-C78-E, Revised 19 April 2019.

⁴⁸³ Azoulay *et al* (2019) p 2.

⁴⁸⁴ Henry *et al* (2012) p 595

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overwhelming feeling of being responsible for the outcome as opposed to empowering them to express their views.

To show conviction to a child-centric approach to parenting disputes in South Africa, it is recommended that the model of the Family Resolution Centre (FRC) as used in Australia be the foundation for moving away from the adversarial initialisation of dispute resolution in family and child law in South Africa while endorsing a socio-legal approach to family disputes. This will encourage parties especially those who lack adequate access to resources to spend less time and costs, narrow the issues in dispute and obtain the appropriate specialist services required for their particular circumstances and that of their children.

In keeping with the child-centric approach to parenting disputes, it is recommended that blanket caution must be applied when interviewing the child. This will address any information that has been withheld from the child interviewer by the parents especially when involving a child who has experienced trauma of any kind or where there is apprehension by the interviewer that the child will be viewed negatively by the parents after they have participated in the child inclusive process.

For mandatory child inclusive mediation practices to give robust effect to the child's right to participation, it is recommended that the service providers involved, including that of the mediator and legal representative, undergo extensive specialist skills training that enables them to engage during the interviews with children cautiously and age appropriately. the child for the sake of the parenting feud.

In weighing the general principle of participation⁴⁸⁵ against the principles of safety, it must be noted that the recommendations above are not to be

⁴⁸⁵ Barrie G, (2013) p 124



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construed as a blanket endorsement of mandatory child inclusive mediation in all circumstances related to family disputes regardless of the circumstances of each child.⁴⁸⁶ Instead it is recommended that the continued direct participation of the child within the mediation process may be halted and the child's participation may be facilitated by the representation of a legal practitioner as per the Guidelines of Legal Representation.⁴⁸⁷

South Africa already has within its grasp evolutionary legislation that mandates the participation of children. At the same time South African legislature mandates mediation as a form of dispute resolution to reduce conflict and the negative impact a divorce or separation has on children. The possibility of making child participation mandatory through the process of mediation in South Africa exists within the legal framework. With the addition of the practical advances made in Australia and Canada to realise child participation it will not take a lengthy period of time to reform the practices of family and child law to make child inclusion a reality for all children as a primary consideration of their best interests.

⁴⁸⁶ Henry et al, (2012) p 586

⁴⁸⁷ Guidelines for Legal Representatives of Children in Civil Matters, Pretoria University Press, 2016

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