SOUTH AFRICAN LAW REFORM COMMISSION

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PROJECT 100D

ALTERNATIVE DISPUTE RESOLUTION IN FAMILY MATTERS

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Introduction

The South African Law Commission, now known as the South African Law Reform Commission, was established by the South African Law Reform Commission Act 19 of 1973.

The members of the South African Law Reform Commission are:

The Honourable Mr Justice Narandran (Jodie) Kollapen (Chairperson)
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Adv. Johan de Waal SC
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Prof. Karthigasen Govender
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Adv. Anthea Platt SC
Adv. Tshepo Sibeko

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

The members of the Advisory Committee are:

The Honourable Mr Justice Deon van Zyl (Chairperson)
Prof. Wesahl Domingo (Member of SALRC, Project Leader)
Adv. Francis Bosman SC
Ms Neliswa Cekiso
Prof. Madeleen de Jong
Prof. Tshepo Mosikatsana
Adv. Mahlape Sello (until August 2018)

Correspondence should be addressed to:

The Secretary
South African Law Reform Commission
Private Bag X668
0001 PRETORIA

The researcher allocated to this project is Ms Ananda Louw.

Telephone: 012 622 6348
Email: analouw@justice.gov.za
Website: http://justice.gov.za/salrc

Preface

This Discussion Paper, which reflects information accumulated up to the end of January 2019 (except where otherwise indicated), is prepared in order to elicit responses from interested parties and to serve as a basis for the deliberations of the South African Law Reform Commission (SALRC), taking into account any responses already received. Accordingly, the views, conclusions and recommendations in this paper are not to be regarded as the SALRC's final views.

The Discussion Paper (which includes draft legislation) is published in full so as to provide persons and bodies that wish to comment or make suggestions for the reform of this branch of the law with sufficient background information to enable them to make focused submissions to the SALRC. Respondents are requested to respond as comprehensively as possible and are invited to raise additional issues not covered in this paper, should they wish to do so. Comments submitted to the SALRC previously should not be repeated. Instead, respondents should merely indicate that their previous comments still stand, if that is the case. The SALRC assumes that, unless representations are marked confidential, respondents agree that the SALRC may quote from or refer to their comments and may attribute comments to the respondent concerned. Respondents should bear in mind that the SALRC may in any event be required to release information contained in the representations under the Promotion of Access to Information Act 2 of 2000.

The SALRC will take public response to the Discussion Paper into account and will test public opinion about solutions identified by the SALRC. On the strength of such responses, a report containing the SALRC's final recommendations will be prepared. The report (with draft legislation, if necessary) will be submitted to the Ministers of Justice and Correctional Services and of Social Development for their consideration for tabling in Parliament.

Respondents are requested to submit written comments, representations or requests to the SALRC by 3**1 January 2020** at the address appearing on the previous page. Any enquiries should be addressed to the Secretary of the SALRC or the researcher allocated to this project, **Ms Ananda Louw**.

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

EXECUTIVE SUMMARY

Project 100D involves the development of an integrated approach to the resolution of all family law disputes, with specific reference to disputes relating to the care of and contact with children after the breakdown of their parents' relationship.

In the past, there has always been an assumption that the courts were best suited to decide questions of custodial rights and access to children and to decide family disputes in general. However, this assumption has come to be questioned in recent years. The limitations associated with adversarial litigation have become firmly acknowledged, while mediation as an effective dispute resolution mechanism seems to have become a preferred procedure.

The terms of reference of this investigation as set out in Issue Paper 31 are as follows:

> To develop recommendations for the further development of the family justice system that will –
>
> a) be orientated to the needs of all children and families;
> b) foster early resolution of disputes; and
> c) minimise family conflict.

One of the challenges in the family law system identified in Issue Paper 31 is that there is a lack of adequate alternative dispute resolution mechanisms for family disputes.

It is argued that the parties concerned should have the freedom to tailor the procedure to be followed to meet the needs of their particular dispute.

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

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

The preliminary proposals of the SALRC as set out in this Discussion Paper and the Family Dispute Resolution Bill accompanying this document as Annexure B can be summarised as follows:

Part A of the Discussion Paper is divided into two chapters.

Chapter 1 describes the SALRC's mandate, the composition of the Advisory Committee for this investigation, and the interrelationship of this investigation and other SALRC initiatives.

Chapter 2 sets the stage for the SALRC's preliminary reform proposals. It explains why the adversarial system is not suitable for resolving family law disputes. This chapter also emphasises the importance of stable and supportive families. It is noted that more people are touched by family law disputes than by any other single area of the law. The quality or adequacy of a family's encounter with the justice system can change their lives and influence their well-being for the long term.

Part B/Chapter 3 of the Discussion Paper deals with the need for the development of standardised information and education programmes to be made available to the public, free of charge. It is proposed that parties in any family law dispute be obliged to attend such a programme before any other proceedings may commence.

Part C of the Discussion Paper consists of four chapters dealing with various aspects of family mediation.

Chapter 4 explains the nature and importance of mediation as an aid to promoting access to justice.

Chapter 5 examines the question whether mandatory mediation could be regarded as unconstitutional. The content and scope of section 34 of the Constitution, which deals with the right of any person to have a dispute which can be resolved by the application of law decided in a fair public hearing before a court, is entrenched in the Bill of Rights. In addition to this right, there are the wider concept of access to justice, the protection of the rights of children, the right to privacy and the right to dignity, all of which are important rights. A mandatory mediation programme should therefore be developed with the utmost care and sensitivity to address all of these concurrent rights sufficiently.

Chapter 6 deals with the cost perspective of mandatory mediation. The distinction between implementation costs and engagement costs is highlighted. Whereas the implementation costs would be mostly funded by the state, the engagement costs would be carried by the parties themselves if they can afford it. Where parties are indigent according to the means test used by LASA, the mediation services will be provided free of charge by the state.

Chapter 7 sets out a design for a mandatory mediation model. Once parties to a family law dispute have attended an information and education programme and received a certificate as

proof of their attendance, the next step is to take part in mediation to attempt to resolve the dispute. Parties are allowed to opt out of the process after attending one mediation session. The court may impose a cost sanction if, during a subsequent trial, it decides that a party has unreasonably refused to engage in mediation.

Chapters 8, 9 and 10 deal with other forms of alternative dispute resolution in which parties can engage voluntarily.

Part D/Chapter 8 proposes the regulation of voluntary collaborative dispute resolution. Collaborative dispute resolution is a four-way “mediation” process in which each party is represented by his or her own legal practitioner. The legal practitioners sign an agreement in terms of which they are disqualified from handling any subsequent litigation if the mediation negotiations fail.

Part E/Chapter 9, which deals with voluntary family arbitration, sets out the required amendment of section 2 of the Arbitration Act, 1965, to the effect that family disputes not affecting the rights and interests of children are to be regulated by the Arbitration Act. It is proposed that family disputes affecting the welfare of children be dealt with by a chapter in the Alternative Family Dispute Resolution Bill. No award affecting the rights and interests of children will come into effect unless it has been confirmed by the High Court upon application.

Part F/Chapter 10 discusses voluntary parenting coordination. The proposals make provision for the appointment of a parenting coordinator who will be able to assist parents who are unable to agree on issues that require joint decision-making. The parenting coordinator will use mediation techniques to attempt to resolve the dispute, but if he or she does not succeed, he or she will issue a binding directive. The directive is binding subject to review by a court.

The preliminary proposals and draft legislation need to be examined thoroughly. The SALRC invites feedback regarding all its proposals as set out in the proposed draft Bill. To facilitate a debate respondents are requested to respond as comprehensively as possible. Respondents are also welcome to add any additional issues that may need to be considered.

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International Covenant on Civil and Political Rights adopted by the United Nations General Assembly on 16 December 1966 and in force from 23 March 1976

American Convention on Human Rights (also known as the “Pact of San Jose”), date of entry into force on 18 July 1978, adopted by the United Nations General Assembly on 19 December 1966 and entered in force on 23 March 1976

PART A: BACKGROUND

Chapter 1: Introduction

1.1 History and methodology of the investigation

1.1.1 The South African Law Reform Commission (SALRC) is currently involved in an investigation entitled "Care of and contact with children" (Project 100D). The family mediation subproject (previously a part of Project 94) has been incorporated in this investigation.

1.1.2 Project 100D involves the development of an integrated approach to the resolution of all family law disputes. However, in some instances specific reference is made to disputes relating to the care of and contact with children after the breakdown of the relationship of the parents.

a) Reasons for including the investigation in the SALRC programme

1.1.3 The following four developments gave impetus to the decision to include this investigation in the SALRC's programme:

(i) The SALRC's 2002 investigation Review of the Child Care Act, Project 110.[1]

1.1.4 The SALRC's Project 110 Report reviewed the then existing Child Care Act, 1983, and provided the basis for the enactment of the new Children's Act in 2005[2] (which came into operation in June 2007). The Children's Act, consisting of 22 chapters and 315 sections, deals with various aspects of childhood in South Africa.

1.1.5 Besides the investigation into, and the review of, the Child Care Act, the SALRC report also recommended that a further investigation, into new divorce legislation, be introduced.[3]

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1 South African Law Commission ***Review of the Child Care Act*** Report Project 110 December 2002, which included a draft Children's Bill (hereafter referred to as "SALRC Project 110 Report").

2 Children's Act 38 of 2005.

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

This additional investigation was meant to deal with the protection of children affected by the adversarial nature of divorce or separation proceedings.

1.1.6 The SALRC also highlighted the plight of children affected by the divorce or separation of their parents in the Discussion Paper[4] that preceded the Project 110 report.[5] In Chapter 14 of the Discussion Paper the SALRC made several proposals regarding the protection of such children.[6] These proposals primarily involved amendments to the Divorce Act 70 of 1979 and not to the Child Care Act 74 of 1983, and were, therefore, not included in the Project 110 Report.[7]

1.1.7 Some of the problems discussed in Discussion Paper 103 were the following:[8]

- Reducing conflict (the negative effect of adversarial and protracted court proceedings on children);
- the limited capacity of the Office of the Family Advocate (established in terms of the Mediation in Certain Divorce Matters Act of 1987);
- parenting education;
- hearing the voice of the child; and
- the process to be followed when allegations of child abuse are raised during divorce or separation proceedings.

(ii) Request from Office of the Family Advocate, Bloemfontein

1.1.8 Secondly, the SALRC recommendation that this investigation be included in its programme also took into consideration a separate request for an investigation into the problems experienced with regard to access to children after a divorce. This request was received from the Bloemfontein Office of the Family Advocate.[9]

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4 South African Law Commission ***Review of the Child Care Act*** Discussion Paper 103 Project 110 2001 (hereafter referred to as "***SALRC Project 110 Discussion Paper***").

5 The ***SALRC Project 110 Discussion Paper*** stated as follows at 642 with reference to Burman S, Derman L and Swanepoel L "Only for the wealthy? Assessing the future for children of divorce" 2000 16 ***SAJHR*** 535:

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

6 See par. 1.1.7 below.

7 South African Law Commission ***Functioning of the Commission: Children affected by the divorce or separation of their parents: Inclusion of investigation in Commission's programme*** Committee Paper 1012 26 November 2002.

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

9 EM Venter in a letter dated 7 June 2002.

(iii) Civil Justice Review Project 2010

1.1.9 Thirdly, in 2010, Cabinet endorsed an initiative by the Minister of Justice and Constitutional Development to undertake a comprehensive review of the civil justice system. The Civil Justice Review Project (CJRP) proposes, inter alia, the optimal use of alternative dispute resolution (ADR) to improve access to justice. This new development changed the tone of the discussion of all aspects of ADR. It also identified the following aspects of the civil justice system as being problematic:[10]

aa) Access to courts, particularly by persons in rural communities;

bb) family law disputes, including divorce and matrimonial disputes, which are protracted by the fragmented court system; and

cc) the optimal use of ADR to enhance access to justice.

(iv) Access to Justice Conference, 2011

1.1.10 Finally, in 2011, at the Access to Justice Conference,[11] it was noted that many of South Africa's citizens do not enjoy the full benefit of the right to access to justice enshrined in section 34 of the Constitution. It was also noted that depriving citizens of this important fundamental right is a consequence of various factors, including, but not limited to –

- systemic challenges in the administration of justice in the courts;
- the prevailing inequities of poverty, lack of information and paucity of adequate legal representation affecting, in particular, the most vulnerable sectors of our society, namely the poorest of the poor, rural inhabitants and women and children; and
- inadequate coordination among role players in the justice cluster.

1.1.11 The Conference therefore resolved, inter alia, as follows:[12]

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[10] In terms of the CJRP it was envisaged that the SALRC would form part of the research team responsible for investigating these issues.

[11] Department of Justice and Constitutional Development Access to Justice Conference, 2011.

[12] The full resolutions adopted by the Conference are as follows:
The conference realizes that it is the responsibility of government as a whole to ensure that access to quality justice for all is realized. The judiciary under the leadership of the Chief Justice accepts primary responsibility for the realization of this objective as set out in the conference resolutions set out below.
1. Judicial case management shall be implemented;
2. All measures necessary to enhance access to affordable justice must be taken. This would involve sufficiently restructuring and reasonably resourcing small claims courts, community courts and traditional courts;

- The justice to which South Africans are given access should be of a high quality and should be delivered with reasonable speed (Resolution 3);
- steps shall be taken to introduce alternative dispute resolution, preferably, court-annexed mediation or the CCMA kind of alternative dispute resolution into the court system (Resolution 7);
- rules and legislation that stand in the way of access to quality justice for all should be suitably amended or new ones made (Resolution 10);
- more attention should be given to sexual violence cases and cases affecting children (Resolution 12);
- advanced court technology, audio-visual postponements and electronic filings shall be introduced and widely implemented (Resolution 15);
- a pool of *pro bono* services should be rendered to the poorest of the poor (Resolution 16); and
- innovative ways of raising public awareness about access to quality justice shall be explored (Resolution 17).

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3. The justice to which South Africans are given access should be of a high quality and should be delivered with reasonable speed;
4. Education and training shall be prioritized for both judicial officers and support staff;
5. Closer cooperation shall be fostered between the Ministry and the Judiciary in relation to programmes and all important matters of mutual interest;
6. The three branches of government, namely, the executive, the legislature and the judiciary will continue to carry out the constitutional mandate in a manner that is sensitive to the doctrine of separation of powers;
7. Steps shall be taken to introduce alternative dispute resolution, preferably, court-annexed mediation or the CCMA kind of alternative dispute resolution into the court system;
8. More use shall be made of restorative justice and diversion programmes in the effective and efficient implementation of the conference resolutions;
9. Heads of courts shall be empowered to effectively and efficiently implement these conference resolutions;
10. Rules and legislation that stand in the way of access to quality justice for all should be suitably amended or new ones made;
11. Structures which monitor access to justice and the functioning of the courts shall be established at a national, provincial, sub-cluster, and district level;
12. More attention should be given to sexual violence cases and cases affecting children;
13. All steps necessary shall be taken to facilitate the institutional and functional independence of the judiciary;
14. Judicial integrity, collegiality and accountability must and shall be enforced;
15. Advanced court technology, audio-visual postponements and electronic filings shall be introduced and widely implemented;
16. A pool of pro bono services should be rendered to the poorest of the poor;
17. Innovative ways of raising public awareness about access to quality justice shall be explored;
18. There shall be a structured interaction between the judiciary and the media;
19. The prosecutors, the public defenders and private profession shall participate in all efforts designed to enhance access to the delivery of quality justice for all;
20. A committee, comprising all key stake holders in the justice system shall be established to monitor the implementation of these resolutions.

b) Approval of investigation and appointment of Advisory Committee

1.1.12 The Minister approved the inclusion of the investigation in the SALRC's programme and, at the request of the SALRC, appointed an advisory committee to deal with this investigation.

1.1.13 The Chairperson of the Advisory Committee is Mr Justice Deon Van Zyl. The other members appointed are Adv. Francis Bosman SC; Ms Neliswa Cekiso (from 16 December 2015); Professor Madeleen de Jong (from 16 December 2015); and Professor Tshepo Mosikatsana. [13] Prof. Wesahl Domingo, who was an ordinary member of the Committee before being appointed as a member of the SALRC in August 2018, replaced Adv. Mahlape Sello as delegated Commission member and project leader of the Committee, when the latter's term as SALRC member ended. The Committee brings together experts from various constituencies. The choice of members reflects an appreciation of the importance of involving all stakeholders in the process of drafting legislation.

c) Consultation process

1.1.14 In accordance with the SALRC's policy to consult as widely as possible, every effort has been made in this investigation to publicise the investigation and to elicit responses from interested persons and organisations as well as from members of the public. Considerable effort has furthermore gone into obtaining the input from all government departments, especially from the Departments of Justice and Constitutional Development and of Social Development.

1.1.15 In December 2015 the SALRC published a comprehensive Issue Paper for information and comment.[14] The publication of this Issue Paper was the first step in the consultation process. The problems that had given rise to the investigation were explained and possible ways of solving these problems were stated. A copy of the Issue Paper was also made available on the SALRC's website.

1.1.16 The closing date for comments on the Issue Paper was extended (by public request)

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[13] Other members were Prof. Elsje Bonthuys (until November 2015) and Prof. Ignatius Maithufi (until his passing in 2015).

[14] South African Law Reform Commission ***Family dispute resolution: Care of and contact with children*** Project 100D Issue Paper 31 December 2015 (hereafter referred to as "SALRC Issue Paper 31") access at http://www.doj.gov.za/salrc/index.htm.

from 30 June 2016 to November 2016. Written comment was received from 47 persons and institutions.[15] Numerous follow-up discussions, meetings and presentations resulted from this publication.

1.1.17 A consultative meeting was held in Centurion on 5-6 April 2016, attended by 100 delegates, where various aspects of the Issue Paper, including ADR, were discussed.

1.1.18 An experts meeting dealing specifically with family dispute resolution, attended by 40 delegates, was held in Cape Town on 16 February 2017. The due date for written submissions was extended, by request, to June 2017.

1.1.19 On 30 October 2017 the SALRC Project 94 Committee[16] hosted an ADR experts meeting, where contributions were made from a family dispute resolution perspective.

1.1.20 In all instances members of the Advisory Committee were present to explain and discuss the proposed options for law reform being developed in Project 100D and to note comments.

1.1.21 Both written and oral input received as a result of the meetings have been incorporated in this Discussion Paper. Many submissions contained constructive criticism and helpful suggestions to improve the proposals of the SALRC. The SALRC duly considered each contribution and incorporated the ideas put forward in this Discussion Paper, where appropriate.

1.1.22 The SALRC would like to take this opportunity to thank all who responded to the Issue Paper and took part in the Commission's further consultation process.

1.2 Interrelationship of this investigation and other SALRC initiatives

1.2.1 There are currently a number of family law investigations on the SALRC's programme. The family law subprojects are as follows:

a) Project 100D: Care of and Contact with Minor Children / Family Dispute Resolution (FDR);

b) Project 100B: Review of Aspects of Matrimonial Property Law;[17] and

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15 A list of respondents is enclosed as ***Annexure A***.

16 See discussion below in par. 1.2.

c) Project 100C: Review of the Law of Maintenance.[18]

1.2.2 Family dispute resolution (FDR) is dealt with in the context of all three of these SALRC investigations. The proposals developed in Project 100D will inform the contextual FDR discussions in these investigations.

1.2.3 FDR is, however, also being considered in the SALRC's Project 94 (Alternative Dispute Resolution).[19] The interrelationship and coordination of these investigations with this project are important.

1.2.4 The aim of Project 94 is to consider the development of legislation to promote the optimal use of alternative dispute resolution (ADR), including mediation, in order to provide citizens with an additional avenue of access to justice.[20] This is the aim of the Project 100D Committee as well, but with specific reference to family dispute resolution (especially in so far as children are concerned).

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17 The Minister appointed an advisory committee with Mr Justice D van Zyl as Chairperson. The SALRC designated Mr Irvin Lawrence the SALRC Commissioner responsible for this investigation and Prof. E Bonthuys was appointed a member.

18 The Minister appointed an Advisory Committee with Prof. M de Jong as Chairperson. The SALRC designated Mr I Lawrence the SALRC Commissioner responsible for this investigation. Other members appointed to the Committee are Ms S Erasmus, Ms L Mbatha and Mr D Thulare.

19 The Minister appointed an Advisory Committee with Judge President Mr Jutice Dunstan Mlambo as Chairperson. The SALRC designated Adv. Anthea Platt SC the SALRC Commissioner responsible for the ADR investigation. Other members appointed to the Committee are Mr Justice Zukisa Tshiqi, Mr Justice Cassim Sardiwalla, Mr John Brand, Prof. David Butler, Adv. Hendrik Kotze and Adv. Paul Pretorius SC.

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

- the desirability of just, quick and cost-effective resolution of disputes through the use of mediation and other forms of dispute resolution in appropriate contexts;
- the proper role of legislation, contract and other legal frameworks in promoting models for consensual or mandatory, statutory and court-annexed ADR;
- the need for precise definitions in order to ensure legal certainty;
- issues of referral powers (including timing of referrals), prescription, confidentiality, and the status and enforcement of agreements reached;
- the required proper protection of the parties, mediators, and others involved in dispute resolution through training and the implementation of appropriate standards;
- the right to information and legal assistance;
- the termination of mediation;
- ADR in criminal cases (restorative justice);
- international ADR;
- community dispute resolution;
- a review, where necessary, of the existing statutory provisions that provide for mediation and other forms of ADR with a view to updating those provisions or incorporating them in ADR-specific legislation where necessary;
- consideration of the place of family dispute resolution as an integral part of ADR in South Africa; and
- any related matters the SALRC considers appropriate.

1.2.5 The ADR Committee will, as a first step, be concentrating on the development of a generic Mediation Act for South Africa. It may be appropriate to identify and develop the basic definitions and basic principles pertaining to mediation that should be included in a piece of generic legislation.[21] Such definitions and principles could then serve as a nucleus of or basis for any ADR-related projects and legislation. Practical considerations will determine how any existing ADR legislation will be integrated in, or linked with, overarching ADR legislation.

1.2.6 Project 100D will, therefore, in the procedural section of the investigation, deal with those aspects of ADR that either are not covered by the generic Mediation Act proposed to be developed in Project 94, or that would, in the family law context, have to deviate from the general principles set out in that Act.[22]

1.3 Terms of reference

1.3.1 The terms of reference of this investigation as set out in SALRC Issue Paper 31 are as follows:[23]

> To develop recommendations for the further improvement of the family justice system that will –
>
> a) be orientated to the needs of all children and families;
> b) foster early resolution of disputes; and
> c) minimise family conflict.

1.3.2 The following three areas have been identified and discussed in the Issue Paper:[24]

- **Policies** that provide support to parents, children and the extended family structures during and after the breakdown of relationships;[25]
- **processes** to support the policies;[26] and

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21 Generic aspects that may be dealt with in the Mediation Act are as follows: definition of mediation; accreditation and training of mediators; mediator's fees; interruption of prescription; admissibility of evidence emerging from the mediation process in court or arbitration proceeding; confidentiality of mediation process; right to legal representation; termination of the mediation process; and enforcement of outcomes of agreements.

22 See Part C below.

23 SALRC Issue Paper 31 at 5.

24 SALRC Issue Paper 31 at 5.

25 As discussed in Chapter 2 of SALRC Issue Paper 31.

- **structures** necessary to accommodate these policies and processes.[27]

1.3.3 It has been argued[28] that appropriate policies, processes and structures would ensure a well-structured and cohesive family law legislative framework to enable families to resolve their disputes both collaboratively (outside the courtroom) and by adjudication (in the courtroom). In this context, therefore, case management and alternative dispute resolution methods go hand in hand.[29] Parties should have the freedom to tailor the procedure they follow to their needs in the dispute/s concerned. For this reason, Project 100D includes the development of proposals for court options and alternative dispute resolution (ADR) options for *all family disputes*, including both private and public family law disputes.

1.3.4 The SALRC has decided to follow an incremental approach in this investigation. This Discussion Paper will therefore primarily deal with the second identified area referred to above, namely the procedural aspects of family dispute resolution, and, more specifically, with alternative dispute resolution.[30] The other areas discussed in SALRC Issue Paper 31[31] will be dealt with in separate Discussion Papers to be published in due course.[32]

1.3.5 The SALRC identified the need to investigate the possibility to assist families with procedural issues arising out of separation or divorce, and child welfare. Processes have to be considered that will encourage parties, and their lawyers, to resolve problems in a collaborative manner. Family dispute resolution processes include mediation, collaborative dispute resolution, family arbitration and parenting coordination.

1.3.6 The SALRC will also consider the need to have all of these processes preceded by parties' attending mandatory information and education programmes.

1.3.7 In this Discussion Paper, family dispute resolution is discussed with particular

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26 As discussed in Chapter 3 of SALRC Issue Paper 31.

27 As discussed in Chapter 4 of SALRC Issue Paper 31.

28 SALRC Issue Paper 31 at (vii).

29 De Vos, W le R & Broodryk, T "Managerial judging and alternative dispute resolution in Australia: An example for South Africa to emulate? (Part 1) 2017 (4) ***TSAR*** 683 (hereafter referred to as "De Vos & Broodryk Part 1") at 683.

30 Case management will be dealt with in full in a subsequent report.

31 Policies that provide support to parents, children and the extended family structures during and after relationship breakdown and the structures necessary to accommodate these policies and processes.

32 The work of the DOJCD Task Team on an Integrated Family Law System put in place in June 2017 should also be noted.

reference to the nature of families and family disputes (Part A) information and education (Part B), family mediation (Part C), collaborative law (Part D), family arbitration (Part E) and parenting coordination (Part F). In each case reference is made to the position set out in the Issue Paper, followed by an overview and evaluation of the submissions received on the Issue Paper, and, in conclusion, the proposals of the SALRC (with draft legislation where necessary). Part G contains a draft Family Dispute Resolution Bill that aims to give effect to the proposals set out in the Discussion Paper.

PART A: BACKGROUND

Chapter 2: Exposition of the problem

2.1 The nature of families and family law in South Africa today

2.1.1 In its White Paper on Families in South Africa,[1] the Department of Social Development (DSD) defines a "family" as a societal group that is related by blood (kinship), adoption, foster care, or the ties of marriage (civil, customary or religious), civil union or cohabitation, and indicates that it goes beyond a particular physical residence.[2]

2.1.2 The following statistics with respect to the position of families in South Africa were gathered from the DSD White Paper;[3] Statistics South Africa[4] and written submissions to the SALRC's Issue Paper 31:

a) Non-marital childbearing[5] is prevalent. Accounting for 58 per cent of all births in the country, this figure ranks among the highest in the world.

b) The majority of divorces in South Africa involve children. In 2017, 55,6 per cent of divorces granted involved children younger than 18 years, whereas 44,4 per cent of divorcees had no children.

c) Only 34,9 per cent of children were living with both biological parents in 2017, whereas 21 per cent lived with neither parent.

d) Most single-parent households are headed by women. In essence, the inequalities that afflict women in society are magnified in female-headed households, where dependency and vulnerability combined with a sexist societal attitude ensure that

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1 Department of Social Development ***White Paper on families in South Africa*** approved by Cabinet on 26 June 2013 (hereafter referred to as "DSD ***White Paper on families*** 2013") at 3 and 11.

2 DSD ***White Paper on families*** 2013 at 11; it states, however, that it is important to note that household and family are not necessarily synonymous. According to the United Nations (1989), a household comprises either (i) a single person who provides the household with food and other essentials for living, or (ii) a group of at least two people living together who jointly provide the food and other essentials. "This means that a household can contain a family, but that household members do not necessarily have to be a family…The household performs the functions of providing a place of dwelling and of sharing resources; these functions can be performed among people who are related by blood and people without any such relationship".

3 Extracts from DSD ***White paper on families*** 2013 at 13 and references made there.

4 Statistics South Africa ***Marriages and divorces*** P0307 2017 28 February 2019; Statistics South Africa ***Vulnerable groups indicator report*** Report No. 03-19-02 (2016) 2017; Statistics South Africa ***General household survey*** P0318 21 June 2018; Hall K & Mokomane Z "The shape of children's families and households: A demographic overview Part 2" Chapter 2 in Hall K *et al* (eds) ***South African Child Gauge 2018*** Children's Institute University of Cape Town Cape Town access at ***www.ci.uct.ac.za/ci/child-gauge/201.***

5 That is, babies born to mothers and fathers who are not married.

these households are typically poorer than those where the male partner is present. Accordingly, a gender dimension is evident with regard to poverty in families. Women continue to be marginalised compared with men in terms of socio-economic opportunities, such as employment.

e) In 2010, 7,6 per cent of all children lived in skip-generation households.[6] Skip-generation households are particularly prevalent in African communities. This situation is exacerbated by the high prevalence of HIV and AIDS, but is also the result of the fragmentation of African families associated with labour migration.

f) The trend of absent (living) fathers is another common and growing phenomenon affecting families in contemporary South Africa. African families have the lowest proportion (31,1 per cent) of fathers living with their children, and Indian families have the highest (83 per cent), with white families following closely (80,8 per cent). For Coloured families the proportion is 53 percent.

g) At present, the prevalence and other characteristics of gender-based violence (GBV)[7] cannot be estimated with precision. The lack of data stems from under-reporting, owing to fear or shame, and from inadequate services for victims. However, the problem is known to be prevalent and is a cause for public concern, because it permeates every level of society.

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

i) With regard to living standards, 52 per cent of people in rural areas are unemployed and 32 per cent of households in the rural areas depend on government grants as their main source of income.[8]

j) In so far as divorce is concerned –

(i) only 6,8 per cent of divorces were initiated by both husband and wife;

(ii) 44,5 per cent of divorcees were from the African population group, 23,8 per cent from the white population group, 17,8 per cent from the coloured group and 5,51 per cent from the Asian group;

(iii) in up to 80 per cent of all family law disputes one or more of the parties are unrepresented; and

(iv) only approximately 5 per cent of cases go to trial.

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6 "Skip-generation households" refers to families in which grandparents raise children and parents are absent from the household.

7 Gender-based violence (GBV) is broadly defined as physical, sexual and psychological violence that targets individuals or groups (mostly women) on the basis of their gender.

8 Http://www.statssa.gov.za/ (accessed on 27 June 2017).

2.1.3 Family law has undergone a profound transformation over the years. The following developments have taken place because of political and social paradigm shifts:

a) A new no-fault ground for divorce was introduced by legislation in 1979, namely the irretrievable breakdown of the marriage. The notion that divorce is a social evil and a sign of personal failure has fallen by the wayside.

b) The rights of unmarried fathers have been addressed in the context of the matter being an exception to the rule. See, however, the statistics cited above indicating that most children are born to unmarried parents.

c) In 1994 we have seen the statutory abolition of the marital power of the husband and equal powers relating to the management of the joint estate; spouses sharing in the accrual of each other's estates and provision made for divorced parties to share in each other's pension benefits in certain instances. These statutory changes were extended to marriages in respect of all race groups.

d) Gender roles have evolved dramatically, and the idea of the male wage earner and head of the household and the female homemaker has to some extent become extinct. Society has also seen many changes to family structures as a consequence of separation, for example blended families, single-parent families and the possibility of access to minors by interested persons. There has also been a large increase in the number of domestic partnerships.[9]

e) The existence of various forms of relationship has resulted in legislation on Jewish divorces,[10] the Recognition of Customary Marriages Act[11] and the Civil Union Act.[12]

f) The enactment of the Children's Act of 2005[13] addressed the position regarding surrogate motherhood and the status of children. Reproductive technologies are forcing society to rethink historically immutable concepts such as parentage.[14]

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9 Action Committee on Access to Justice in Civil and Family Matters ***Meaningful change for family justice: Beyond wise words*** Final Report of the Canadian Family Justice Working Group of the Action Committee April 2013 (hereafter referred to as "Action Committee") at 13 (text).

10 Divorce Amendment Act 95 of 1996.

11 Recognition of Customary Matters Act 120 of 1998.

12 Civil Union Act 17 of 2006.

13 Children's Act 38 of 2005.

14 Action Committee at 13 (text).

g) Procedurally speaking, the use of mediation, collaborative law and other ADR processes has grown substantially over the last 20 years, and there is much greater recognition of the value of early cooperative resolution of family disputes.[15] A very important development was, of course, the institution of the Office of the Family Advocate.[16] In addition, the jurisdiction of the Regional Court has been extended to include civil law and especially family law matters.[17] Most recently there has been a Rules Board initiative through which voluntary court-annexed mediation was incorporated in South African law.[18]

2.2 Unique nature of family law disputes

2.2.1 Understanding the unique nature of family justice problems – that is, how they differ from other forms of civil disputes – is essential for determining how they should be dealt with.[19] As Bala, Birnbaum and Martinson observe:[20]

> Traditional adversarial approaches used by the court for civil litigation have not worked well for family law cases. Understanding the difference between family cases and other types of litigation is essential for an effective response to family disputes

2.2.2 Family dispute resolution (FDR) differs from commercial ADR in various important respects:

a) Whereas the interests of the two parties involved in the resolution process have to be considered in commercial ADR, the best interests of a third party (the child) who is not a party to the resolution process has to be incorporated as the main consideration in FDR when children are involved.[21]

b) FDR is relational in nature, whereas commercial ADR is transactional in nature. Money is in most instances the real object of disputes between merchants, but money and claiming victory in a dispute are often mistaken symbols for divorcing

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15 Action Committee at 13 (text).

16 Mediation in Certain Divorce Matters Act 24 of 1987.

17 Jurisdiction of Regional Courts Amendment Act 31 of 2008.

18 Rules Board for Courts of Law Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa Government Notice No R 740 of 23 August 2010 and Government Notice R 183 of 18 March 2014.

19 Action Committee at 14 and further (text).

20 Bala N, Birnbaum R & Martinson D "One judge for one family: Differentiated case management for families in continuing conflict" 2010 26 ***Canadian Journal of Family Law*** 395 (hereafter referred to as "Bala 2010") at 396.

21 SALRC Issue Paper 31 at 20 and the references it contains.

spouses that manifest the pain, humiliation, anger and latent psychological conflicts resulting from the broken relationships. For this reason additional dispute resolution methods (other than mediation) are often required adequately to address family conflict.[22]

c) As a result, family cases are often highly emotional and characterised by significant financial, interpersonal and psychological stress for family members. The non-legal (emotional, interpersonal and relational) problems often fuel and complicate the legal problems. This is particularly true in high-conflict cases.[23] While small in number, these cases take up a disproportionate volume of the resources of the justice system and have devastating effects on the children.[24]

d) Relationships are ongoing. It is the restructuring of familial relationships rather than their termination that is the central objective of the family law process.[25] Unlike parties to other types of civil case, parties in family law cases must frequently sustain a long-term working relationship after the legal issues have been resolved. Family relationships seldom actually end; they are simply reorganised. Spouses must continue to parent while jointly navigating problems and renegotiating obligations as personal and financial circumstances change. This implies both a need for dispute resolution processes that sustain relationships and a need for post-resolution support mechanisms.[26]

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22 Ibid.

23 Action Committee at 14. High-conflict cases have been defined in Action Committee at 15 to be those with the following indicators:
- either of the parties has a criminal conviction for (or has committed or is alleged to have committed) a sexual offence or an act of domestic violence;
- child welfare agencies have become involved in the dispute;
- several or frequent changes in lawyers have occurred;
- issues related to the court proceedings have gone to court several times or frequently;
- the case has been before the courts a long time without an adequate resolution;
- there is a large amount of collected affidavit material related to the divorce proceeding; and
- there is repeated conflict about when a parent should have access to the child.

24 Action Committee at 15.

25 Bala N "Reforming family dispute resolution in Ontario: Systemic changes and cultural shifts" in ***Middle Income Access to Justice*** University of Toronto Press 2012 271 at 275 as noted in Action Committee at 15.

26 Action Committee at 14 and further; In Canada it has been reported that family law cases constitute about 35% of all civil cases. They take up a disproportionate amount of court time, with many more events per case, three times more adjournments, and twice as many hearings. At the same time, only 1% of divorce cases go to trial, suggesting that the greatest volume of the work of family courts involves non-trial appearances and negotiated resolutions. See Action Committee at 12 (text) with reference to Statistics Canada, Divorce Cases in Civil Court 2010/11 (Ottawa, March 2012) access at www.statcan.gc.ca/pub/85-002-x/2012001/article/11634-eng.htm#a1. Anecdotal evidence referred to at the workshops seems to suggest a similar position in South Africa.

e) In non-family civil cases, the judicial task typically involves the retrospective assessment of fixed, historical facts followed by the application of legal principles to those facts in order to arrive at a final judgment. In family cases, the facts upon which adjudication is based are commonly in a state of flux, and the dispute resolution process often involves a prospective assessment of these unknown and uncertain future facts based on existing obligations and dependencies. Outcomes are provisional and subject to revision as needs, capacities and obligations change with circumstances.[27]

f) The parties in a family matter can also be particularly vulnerable. This vulnerability involves at least three dimensions:[28]

(i) Violence and physical safety – involving spouses as well as children – are often part of the relationship dynamic;

(ii) family law disputes are not infrequently characterised by significant powerimbalances between the parties; and

(iii) parties must negotiate complex law and complicated procedures without representation.

g) The changing modern social and political views of "family" and the fact that the population is diverse cause differences in deeply held values about the structure of the family, gender roles, parenting, and the acceptability and consequences of divorce. It cannot be assumed that the assumptions embedded in family law about what is fair or right following the breakdown of a marriage are universally shared.[29] The English judge Mr Justice Nigel Fricker observed: [30]

> The substantive law and practice of law must recognise and address the dilemmas arising from differing cultural expectations in our society.

h) In criminal cases, the state is always represented and many civil cases involve sophisticated, recurring litigants such as insurers and banks. Typically, parties to family matters are one-time users of the justice system who lack a

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27 Action Committee at 15.

28 Action Committee at 16.

29 Action Committee at 16.

30 Fricker, N "Family law is different" ***Family Court Review*** (1995) 33, 403 at 406.

sophisticated understanding of the law and legal processes.[31] Such parties also have less of a stake in the justice system. Bala notes:

> The lack of institutional litigants in domestic cases means there is less commitment by the parties – especially those who are unrepresented – to the integrity of the justice system.[32]

2.2.3 Our understanding of how best to conceive of and manage family conflict has to be informed by the unique nature of family disputes. Justice systems are also obliged to respond to important information provided by the social sciences about, for example, the nature and prevalence of family violence and the impact of conflict on children.[33]

2.2.4 Finally, one should attempt to retain a common-sense approach. When a family is together, members take care of each other on the assumption that the family can solve its own problems. Unless someone behaves criminally or puts children at risk, the family is treated as an autonomous unit. However, when spouses separate, new assumptions sometimes take over. Actions are based on assumptions that might strike one as odd if one was not so accustomed to them:[34]

- That a family's issues are best resolved by strangers;
- that family members should consider themselves adversaries; and
- that interpersonal problems should be understood in terms of competing rights.

2.2.5 Family autonomy could perhaps rather be supported by providing services and processes to help families resolve their disputes themselves, using a collaborative dispute resolution process.[35]

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31 Action Committee at 16. Child protection cases are different in this regard as they may involve repeat institutional litigants. Government ministries or child protection agencies are always involved and the parents in these cases are usually represented by legal practitioners funded by legal aid, which offers a further element of repeat use.

32 Action Committee at 14 and further with reference to Bala 2012.

33 Action Committee at 13 (text).

34 BC Justice Review Task Force ***A new justice system for families and children*** Report of the Family Justice Reform Working Group to the BC Justice Review Task Force May 2005 (hereafter referred to as the "BC Justice Review Task Force Report") at 10 access at http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf

35 SALRC Issue Paper 31 at (vi).

2.3 Should the resolution of family disputes be prioritised?

2.3.1 An established body of research findings from various parts of the world has shown that stable and supportive families are associated with several positive outcomes. These include higher levels of self-esteem; lower levels of anti-social behaviour such as crime, violence and substance abuse; higher levels of work productivity; lower levels of stress; and greater self-efficacy in dealing with socio-economic hardships.[36] Stable families, irrespective of how they are constituted, demonstrate high levels of social capital and resilience, and contribute to the smooth functioning of society and, hence, to social cohesion.[37]

2.3.2 Overall, the family, through its instrumental and emotional roles, therefore has the potential to enhance the socio-economic well-being of individuals and society.[38]

2.3.3 Family law has a very broad reach. It is probable that more people are touched by family law disputes than by any other single area of the law, especially when considering the broad range of relatives, friends, employers and colleagues whose lives are affected by a single family separation.[39] The quality or adequacy of a family's encounter with the justice system can shape their lives and influence their wellbeing on the long term.[40]

2.3.4 So-called "friendly" or "amicable" divorces are presumed to be difficult for children, but not necessarily permanently damaging.[41] The main factor that predicts poor adjustment in children after a divorce or separation is continued conflict.[42]

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36 SALRC Issue Paper 31 at 9; DSD ***White Paper on families in South Africa*** 2013 at 5 with reference to Amoateng, 2004.

37 SALRC Issue Paper 31 at 9; DSD ***White Paper on families in South Africa*** 2013 at 5 with reference to Ziehl, 2003.

38 SALRC Issue Paper 31 at 9; DSD ***White Paper on families in South Africa*** 2013 at 6.

39 Action Committee at 4 (executive summary).

40 Action Committee at 12 (text) with reference to Statistics Canada, Divorce Cases in Civil Court 2010/11 (Ottawa, March 2012) access at www.statcan.gc.ca/pub/85-002-x/2012001/article/11634-eng.htm#a1. Also see the discussion on family disputes in par. 3.1 of Issue Paper 31.

41 SALRC Issue Paper 31 at 132; Adler RE ***Sharing the children: How to resolve custody problems and get on with life*** Authorhouse Clearwater Florida USA 2001 (hereafter referred to as "Adler") at 17. Also see De Jong M "An acceptable, applicable and accessible family-law system for South Africa – Some suggestions concerning a family court and family mediation" 2005 ***TSAR*** 33 (hereafter referred to as "De Jong 2005 ***TSAR***"); De Jong M "A pragmatic look at mediation as an alternative to divorce litigation" 2010 ***TSAR*** 515 (hereafter referred to as "De Jong 2010 ***TSAR***") 516–517 with regard to the negative effects of the adversarial system in family matters).

42 Other risk factors are diminished or incompetent parenting, father absence, and a drop in the standard of living of the care-giving parent. See De Jong M "Suggestions for a divorce truly in the best interest of

2.3.5 Unresolved legal problems further tend to generate additional problems:[43]

- Family relationship problems are among the most difficult, complicated and time-consuming to resolve;
- unresolved family issues tend to trigger further legal problems, resulting in complex clusters of interrelated legal issues;
- there is a causal relationship between unresolved legal issues and increased health, social-welfare and economic problems; and
- while unmet legal need is widespread and pervasive, the most vulnerable individuals in society experience more frequent and complex interrelated civil legal issues.

See the discussion in Chapter 3 below[44] regarding the connection between poverty and vulnerability as well as unmet legal needs.

2.3.6 It is clear, therefore, that it is of the utmost importance that family disputes be resolved expeditiously.

2.4 Is the current adversarial legal system functioning well?

2.4.1 The South African civil-procedure system is of common-law origin and is characterized by the adversarial system of litigation. The introduction of the Constitution of the Republic of South Africa, 1996 (hereafter "Constitution"), did not affect the basic common-law features of the South African civil-justice system, but it does give full recognition to the procedural guarantees of civil litigants. Thus civil-procedure law obtained a constitutional dimension.[45]

2.4.2 The traditional adversarial system implies that the judge is accorded a passive role, especially during the pre-trial phase, while the parties, through their legal practitioners, play an active role during both the pre-trial and trial stages. The parties are in charge of preparing their cases for trial and presenting their evidence and arguments at the trial. During the pre-trial

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children (Part 1)" 2018 (81) ***THRHR*** 48. At the SALRC meeting of experts in February 2016 Dr Lynette le Roux referred to the fact that even so-called "happy divorces" that go through the unopposed roll may end up in the offices of health care practitioners after three years, because the children may have been alienated from one or both the parents and suffered great damage.

43 Action Committee at 32 (text).

44 Par. 3.1.3.

45 De Vos W le R & Broodryk T "Managerial judging and alternative dispute resolution in Australia: An example for South Africa to emulate? (Part 2)" 2018 (1) ***TSAR*** 18 (hereafter referred to as "De Vos & Broodryk Part 2") at 24.

phase the judge will only intervene if a party seeks interlocutory relief, and even during the trial the judge assumes the role of a passive arbitrator, ensuring that the legal practitioners conduct themselves in a seemly manner and comply with the rules of court.[46]

2.4.3 Civil-procedure reforms in the United Kingdom[47] and Australia have led to curtailment of the principle of party control, firstly, by providing judges with new case management powers,[48] and, secondly, by diverting civil cases to a process of alternative dispute resolution. In this context, therefore, case management and alternative dispute resolution methods go hand in hand.[49] This transformation was caused by a change in the mind-set of all participants, namely the courts, law reformers and the broader legal profession as a whole. Instead of steering towards litigation and finally a trial to obtain a judicial determination, as in the past, the focus now is on finding ways to resolve the dispute, either before instituting proceedings or, if that fails, as soon as practicable after that.[50] In South Africa these developments have been slower.

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46 De Vos & Broodryk Part 1 at 683.

47 In the United Kingdom the Civil Procedure Rules 1998 are a procedural code with the "overriding objective", contained in Rule 1.1 of Part 1 of the Rules, of enabling the court to deal with cases justly and at proportionate cost. The code states that dealing with cases justly includes, so far as practicable –

(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate to the -
    (i) amount of money involved;
    (ii) importance of the case;
    (iii) complexity of the issues;
    (iv) financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Rule 1.2 states that the court must seek to give effect to the overriding objective when it –
(a) exercises any power given to it by the Rules; or
(b) interprets any rule.
Finally, the Rule 1.3 also imposes a duty on the parties "to help the court to further the overriding objective". All the rules regarding case management is based on this code.

48 See Rule 1.4 of the United Kingdom Civil Procedure Rules, 1998; De Vos & Broodryk Part 1 at 683 states that under the case management regime, which has been adopted in all the different jurisdictions in Australia, judges have been accorded wide powers to control and manage the proceedings throughout the whole pre-trial phase up to the trial. Even certain facets of the trial became subject to judicial management. The traditional passive judge in the adversarial mould has made way for an active managerial judge firmly in control of the proceedings. The underlying motive for this change of approach was to address the main ills of the traditional adversarial system, namely, delays and concomitant high costs.

49 De Vos & Broodryk Part 1 at 683.

50 De Vos & Broodryk Part 1 at 700.

2.4.4 De Vos[51] refers to a presentation made by Ngcobo CJ in 2011 in which he described the current state of the South African civil-justice system, particularly with reference to the "overly adversarial" nature of civil proceedings, as follows:

> Our civil justice system is still characterised by cumbersome, complex and time-consuming pre-trial procedures, overloaded court rolls, which necessitate postponements, delays in matters coming to trial and, at times, compels litigants to conclude settlements not acceptable to them. It is expensive, slow, complex, fragmented, and overly adversarial.

2.4.5 The strengths of the adversarial system as an effective truth-finding system, as a locus for the public resolution of intractable private disputes, and as a forum to establish or clarify legal principles of wide applicability are, however, still recognised and respected.[52] The courts are a valued last resort for those who simply cannot resolve their disputes on their own. However, this does not mean the family justice system needs to be court-focused and it is important to understand how the traditional adversarial culture sometimes not only fails to alleviate conflict, but often exacerbates it.[53]

2.4.6 The reason why we are searching for alternative solutions is that effective government is largely dependent on a respected legal system. The challenge facing the democratic state is therefore to ensure that the justice system is acceptable and accessible to the larger community.[54]

2.4.7 The New Brunswick Access to Family Justice Task Force Report, 2009, puts it bluntly:[55]

> It [the adversarial system] is effective in criminal and civil cases, but it is the worst model to resolve family law cases.

The negative impact of excessive adversarialism on family justice problems is compounded by the broader trend in modern society to legalise human relationships and emphasise rights-based thinking.[56]

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51 De Vos & Broodryk Part 2 at 25.

52 See par. 3.2 of SALRC Issue Paper 31 for a discussion of the conflicting views on the extent to which family law in South Africa is still dominated by an adversarial atmosphere.

53 Shaw E ***Family justice reform: A review of reports and initiatives*** Paper prepared for the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters April 15, 2012 (hereafter referred to as "Shaw") at 6.

54 South African Law Commission ***Alternative dispute resolution*** Issue Paper 8 Project 94 1997 (hereafter referred to as "ADR Issue Paper 8") at 15; IDRA presentation at 2; Presentation by Mr Justice Thina Siwendu at SALRC meeting of experts on 30 October 2017 at 1.

55 Shaw at 6.

2.4.8 Since South Africa does not have a dedicated family court, it has been argued that there are a limited number of judges who are experts in family law matters. The majority of judges have limited experience in family law.[57] It must be borne in mind that South African High Court judges do not, in general, specialise in family law, as do specialist family judges in other jurisdictions.[58]

2.4.9 A further general complaint about the current formal civil-justice system in South Africa is that the cost of litigation is prohibitive. This prevents meaningful access to courts and even those with access are often victims of delay. For most litigants, delay means added expense and for many people justice delayed is justice denied. Delay combined with the cost of litigation has put justice beyond the reach of the ordinary citizen.[59]

2.4.10 Many people, therefore, do not use the formal legal system to address their legal problems[60] and many of those who attempt to use it encounter insurmountable barriers. These barriers include –[61]

- the complexity of law and of procedure;
- lack of knowledge about their rights;
- lack of understanding of how rights are asserted;
- lack of capacity (for example, illiteracy); and
- fear of becoming involved in the legal system.

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56 See par. 3.2.4 of SALRC Issue Paper 31 for a list of negative elements of litigation.

57 Mr Justice Deon Van Zyl noted at the SALRC meeting of experts in February 2016 that some judges may have come from a criminal-law background and do not have experience of children or family disputes. It would be important for judges to get proper training regarding the value of alternative dispute resolution processes.

58 Van Zyl DH "21 years of dealing with family law matters on the Bench" Paper read at Miller du Toit Family Law Conference Cape Town 2007.

59 ADR ***Issue Paper 8*** at 15. The current challenges were discussed in Issue Paper 31 and worded as follows:

(i) There is a multiplicity of fora with the concomitant duplication of resources and costs.
(ii) An unfortunate hierarchy of justice exists. By allowing people to choose between the High Court and the Regional Court a situation has been created where the Regional Courts effectively serve poor, quite often unrepresented parties, whereas most well-off, represented parties use the High Court.
(iii) Court budgets are getting smaller and lawyers are costly.

60 See par. 2.1.2(j)(iii) and (iv) above: Only 5% of cases land in court and in up to 80% of family law disputes one or more of the parties are unrepresented.

61 Action Committee at 17.

2.4.11 It is important to note that the breakdown of a relationship is not a legal event that has some potential social consequences; it is a social phenomenon that has some legal consequences.[62] However, mandatory pleadings and going through the court process, regardless of how amicable the separation, contribute to the public and professional perception of family restructuring as primarily a legal matter governed by the courts. This perception is at odds with policies promoting out-of-court dispute resolution.[63]

2.4.12 BC's Family Justice Reform Working Group cited research on the impact of conflict on families and went on to say:[64]

> The language of affidavits—a primary tool of custody litigation—can encourage parents to depersonalize each other and cast each other in the role of the enemy. Instead of supporting a shared understanding of a parenting problem and a cooperative attempt at resolution, legal procedures can be used to lay blame and cause lasting hurt… We manage cases as if they will all go to trial, even though most never will. This means that the tools available to families who need to work towards settlement are those that were designed as preparation for court.

2.4.13 Although it is true, furthermore, that a marriage may be currently terminated only by a court order, and the court itself has a legal responsibility to ensure the welfare of children of separating spouses, we have seen from the statistics provided that the parents of 60% of the children in South Africa are not part of the formal system. The lawyer-court-divorce scenario is simply not applicable.[65] These families require access to services that facilitate problem-solving and future planning, services that perhaps need not be provided through the courts.[66]

2.4.14 The broad notion of access to justice is articulated by Mr Justice Cromwell [67]as follows:[68]

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62 Action Committee at 14 (text).

63 Action Committee at 17.

64 BC Justice Review Task Force Report as referred to by Shaw at 7.

65 At the Cape Town meeting of experts on 16 February 2017, Dr Ronel Duchen stated that the discussion should not only be about mediation in divorce cases. A great number of clients are not there because of a divorce. Although it is important to determine the process to be used when there is a divorce, one should also address other cases. Parents may have been separated a long time. She referred to the late Judith Wallerstein, who has shown that the trajectory of parents' relationships with their children changes dramatically over time and no one could have envisaged that at the start. There are many junctures where the disputes arise and therefore also many reasons why parties go to mediation. Furthermore, mediation does not take place only between parents; grandparents and other family members are also involved. One would exclude many people if one only concentrated on the divorce and separation arena.

66 IDRA presentation at 2.

67 Cromwell TA Presentation delivered by the Honourable TA Cromwell, Justice of the Supreme Court of Canada, at the 33rd Viscount Bennet Memorial Lecture reprinted as "Access to justice: towards a collaborative and strategic approach" 2012 63 ***University of New Brunswick Law Journal*** access at

> …in general terms, members of our society would have appropriate access to civil and family justice if they had the knowledge, resources and services to deal effectively with civil and family legal matters. I emphasize that I do not have a "court-centric" view of what this knowledge and these resources and services include. They include a range of out-of-court services, including access to knowledge about the law and the legal process and both formal and informal dispute resolution services, including those available through the courts. I do not view Access to Justice...as simply access to litigation or even simply as access to lawyers, judges and courts, although these are, of course, aspects of what Access to Justice requires.

2.4.15 It has been argued[69] that having "the knowledge, resources and services to deal effectively with civil and family legal matters" includes providing people with the knowledge and skills that will allow them to take responsibility – or as much responsibility as is possible and appropriate – for the resolution of their own disputes.

2.4.16 A proposal to move from a court-focused system to one in which the court plays an important role but is just one option among several others and almost never the first should perhaps be supported.[70]

2.4.17 In South Africa, as in various other countries,[71] our courts are faced with the mounting pressure of unmet family legal needs arising from large numbers of self-represented and unrepresented litigants[72] struggling to use a system designed for highly trained professionals.[73]

2.4.18 At the Family Dispute Resolution meeting of experts,[74] respondents[75] referred to the fact that a high number of divorces in Cape Town are dealt with by the Regional Courts, where parties sit in long queues and are not attended to by legal practitioners or anyone else. The

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https://www.thefreelibrary.com/Access+to+justice%3a+towards+a+collaborative+and+strategic+approach–a0302776655

68 Action Committee at 1 (Executive Summary).

69 Action Committee at 2 (text).

70 BC Justice Review Task Force Report at 21.

71 Action Committee at 6 (text).

72 Action Committee at 6 (text) pointed out that it was important properly to distinguish between the minority who could be represented but elect to represent themselves ("self-represented litigants") and those who, usually for reasons of affordability, have no choice but to represent themselves ("unrepresented litigants").

73 Hard data on the number of self-represented litigants are not generally available and what data we do have are not particularly reliable.

74 SALRC meeting of experts held in Cape Town on 16 February 2017.

75 For example Ms Sunelle Beeslaar, Cape Town attorney.

Clerks of the Court provide the parties with rudimentary information and assist them in completing the necessary forms.

2.4.19 This position was again confirmed at the ADR meeting of experts held in Pretoria.[76] Furthermore, in a written response to Issue Paper 31 it was stated that the effect and impact of divorce on the status of a party and on children are so severe that parties should not try to deal with their divorce cases by themselves. In most instances where parties are trying to obtain a divorce without the assistance of a lawyer, the matters are plagued with problems to the extent that parties are prejudicing their rights, unnecessary costs are incurred owing to non-compliance with the rules of court, and badly drafted pleadings are submitted because of a lack of knowledge of their rights and the applicable laws. These matters more often than not are delayed unnecessarily as a result.[77]

2.4.20 It was also mentioned that many people will "buy" divorce pleadings from certain bookshops or online as the so-called standard or roneoed forms to be used in a DIY divorce. The forms and information provided are however often incorrect or outdated. The process could eventually cost parties more than it would have if they had obtained the assistance of a legal practitioner. Assistant Registrars at the Regional Courts are, however, encouraged to ensure that people are informed of the available options – legal aid, campus law clinics and *pro bono* services – in order to ensure they get professional assistance.[78]

2.4.21 Perhaps the adversarial court system should be reserved for truly contested proceedings, enforcement and protection. As far as family law is concerned, one should indeed ask whether the balance of families in transition needs to be part of the adversarial court system at all.[79] See also ***Mmamphsika ao v Mmamphsika ao,***[80] a case dealing with a family dispute between siblings, in which the judge stated that it is a sad reality that disputes between siblings have to be adjudicated by the courts, whereas mediation may be a better option.[81]

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76 Pretoria on 30 October 2017.

77 Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division.

78 Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division.

79 IDRA presentation at 2.

80 ***Mmamphsika ao v Mmamphsika ao*** (1932/2017) [2018] ZAGPPHC 628 (16 August 2018) at par. [33].

81 Par. [33] reads as follows:

> [33] It is a sad reality that disputes between siblings have to be adjudicated by the courts. I am of the view that the strife and discord between the siblings affected in this matter will lead to further and drawn-out, costly litigation. All the parties involved, and particularly the legal representatives of the parties, should consider that if further disputes between the siblings and other family members are to be adjudicated, whether mediation should not rather be considered as the preferred method of dispute resolution to assist the parties to resolve the issues between them, and to facilitate a harmonious

2.4.22 The problem in South Africa is, however, that there currently is a lack of adequate alternative dispute resolution machinery for family disputes to supplement the crippled court system. The Rules Board initiative may have made some improvements, but it is once again a loose-standing ad-hoc initiative available only to a small minority.[82] It is necessary to determine the root causes of the low levels of mediation.[83]

2.4.23 There is, therefore, a need for deliberation on appropriate mechanisms for the adjudication of all family disputes and a fundamental reconsideration of the support communities offer to separating and divorcing families.

2.4.24 Perhaps one should consider the opening remark in Hazel Genn's book:

> I would like to see more access to justice and less access to courts.[84]

2.5 New paradigm (proposed service delivery model for the family justice system to support the resolution of family disputes)

2.5.1 It is unfortunately true that South Africa, despite seemingly having all the necessary ingredients at its disposal, has not yet succeeded in establishing a comprehensive family law system. Various government and ad hoc bodies have been trying to find practical solutions to the service delivery inefficiencies, but these initiatives have been less than successful, most probably since they lack an overarching plan and address symptoms, not the cause.[85]

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relationship that is indispensable if siblings are to settle disputes. Mediation is not only considerably less costly than litigation, but it promotes reconciliation and often offers a speedy resolution of disputes. (See the unreported judgment of Brasey AJ in the High Court of Gauteng Local Division Brownlee v Brownlee: 2008/25274).

82 On 22 January 2019, Advocate Michael Masutha, Minister of Justice and Correctional Services, announced members of a court-annexed mediation advisory committee that will deal with matters pertaining to alternative dispute resolution mechanisms in courts. The Chairperson is Ms Nosidima Ndlovu and the Deputy Chairperson Mr Prince Kekana. The other members are Ms Nondumiso Ngonyama, Ms Renuka Subban, Mr Langelihle Mtshali, Ms Onica Phahlane, Ms Naomi Engelbrecht, Prof. John Faris and Mr Julian Marsh. The role of the Mediation Advisory Committee includes –

- liaison with universities and training institutions, including Justice College, for the purpose of designing training programmes for mediators, mediation clerks and any other users of the system;
- assisting the Department in investigating the desirability of legislation on compulsory mediation; and
- advice on any matters pertaining to the implementation and roll-out of the project as well as the use of alternative dispute resolution (ADR) broadly.

83 See the discussion below in Chapter 4 and further.

84 Genn H ***Paths to justice: What people do and think about going to law*** Hart Publishing Oxford 1999.

85 SALRC Issue Paper 31 at 324.

2.5.2 There has been a remarkable international convergence of ideas about what an ideal service delivery model for the family justice system should look like. The language used to describe the model and the way the pieces fit together are not always the same, and debates on and experimentation with the details of the model are ongoing. Nonetheless, some common themes can be identified. The basic service delivery model comprises these components:[86]

- Entry points to the family justice system
- Information
- Triage
- Dispute resolution
- Improved court processes
- Post-resolution support

2.5.3 This basic- model seems to be a useful example and will be used in this investigation.[87]

2.5.4 In evaluating the model described above, a number of common guiding principles emerge. Application of these principles has implications for all aspects of the model: substantive law, procedural law and service delivery. The following principles have been identified:[88]

a) The best interests of the children are paramount. While this matter has long been part of the substantive law, it is also relevant to the process of resolving cases.

b) The value of family relationships should be recognised, nurtured and supported.

c) Families should, as far as possible, be supported (or empowered) to resolve their own disputes.[89]

d) Conflict should be minimised.

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86 Shaw at 16. Family Law Pathways Advisory Group ***Out of the maze: Pathways to the future for families experiencing separation*** Report of the Commonwealth of Australia July 2001 (hereafter referred to as "***Australia pathways report***") at 22, access at http://www.ag.gov.au/Publications/Documents/FamilylawsystemOutoftheMazeAugust2001/FLPReport.pdf.

87 The last two components, namely court processes and post-resolution support, will be dealt with fully in the next Discussion Paper. See, however, the discussion on parenting coordination in Chapter 10 below.

88 Shaw at 12.

89 This idea is based on the belief that solutions built by families will lead to better outcomes than those imposed by courts.

e) The family justice system should accommodate the diversity of families.

f) The response to families' experiencing family restructuring should be integrated and multidisciplinary.[90]

g) The safety of family members from violence should be assured.[91]

2.5.5 Interesting to note in South Africa is the People's Family Law Centre initiative of 2002 and 2003.[92] The generic flow of service provision at these Centres was as follows:[93]

a) Screening or problem identification

b) The use of videos in adult education

c) Reinforcement of adult education and route selection via the traditional legal route or alternative dispute resolution

d) Information extraction and document generation

e) Formalisation, filing and take-home information booklet

f) Telephonic support

2.5.6 The service delivery model was designed to bridge the gap between the "top end" – but unaffordable – services provided by the formal legal profession, on the one hand, and, on the other hand, the services provided free of charge, but less effectively, by under-resourced advice offices and the State.[94]

2.5.7 Two primary barriers to change, identified internationally,[95] which apply in local circumstances as well (and were, in particular, also detrimental to the PFLC initiative) are the following:[96]

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90 Family justice problems should not only be addressed in an integrated manner, both in terms of the courts' jurisdiction and the services delivered in the family justice system, but also in a multidisciplinary approach to service delivery. This multidisciplinary response reflects the recognition that family law issues often trigger, and are clustered with, other non-family civil problems, and the family justice system needs to collaborate with service providers from other sectors to provide "linked solutions" to families' multifaceted problems.

91 Many reports highlight the prevalence of violence, especially during family restructuring. Despite principles of family autonomy and support for the value of family relationships, there is broad recognition that family justice systems should address issues of inequality, power and violence.

92 The PFLCs were created as section 21 companies in non-funding public-private partnership with the DOJCD. They opened their doors in Cape Town in March 2002 and in Johannesburg in 2003. See the discussion in Issue Paper 31 at 315 and further.

93 SALRC Issue Paper 31 at 315.

94 SALRC Issue Paper 31 at 317. The strategic direction of the PFLC was to assist its own mainstreaming into the DOJCD programme of strengthening the pilot family courts. The family court pilot project was, however, discontinued with the extension of civil jurisdiction to the Regional Courts.

95 Action Committee at 3.

a) Limited resources are available for the family justice system. Despite the pervasiveness of family justice problems, the general public, media and politicians are far more concerned with criminal-law matters. This heightened interest fuels criminal-law reform efforts and often translates into funding support for criminal justice as a priority over family law.

b) The implementation gap is also a function of the culture of the justice system and its incomplete embrace of non-adversarial or consensual dispute resolution processes. While progress has been made on this front, the potential of non-adversarial programs and consensual processes in family law has not yet been fully realised. Accordingly, a further culture change can be identified as one of the more important options for enhanced access to family justice.

2.5.8 It is reassuring, however, that government has given an indication that it currently supports the idea of the incorporation of ADR processes[97] and that the DOJCD is engaged in a new project aimed at developing an integrated family law system.[98]

2.5.9 Another important aspect of the service delivery model referred to above is the emphasis many reports place on the importance of early, front-end services for separating families. It is widely recognised that the provision of services early in a dispute helps to minimise both the cost and duration of the dispute and so mitigates the possibility of protracted conflict and the corresponding harm to family relationships.[99]

2.5.10 This means, however, that a fundamental shift of resources and services to the "front end" of the family justice system is necessary to provide coordination and support for the broad range of services currently provided in the public and private sectors, as well as for enhanced access to consensual dispute resolution processes.[100]

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96 Madam Justice Belinda van Heerden, in an oral submission at the SALRC meeting of experts held in Cape Town on 16 February 2016, stated (to loud support of the audience) that one of the things she found troubling in the High Court and the Supreme Court of Appeal is that family law generally is regarded as the poor relation. When any money or resources become available, they are not channelled to family law or child law. It is channelled to commercial law. A number of the judges also have the attitude of being reluctant to hear family law cases since family law is not important or significant. She stated that that mind-set has to change. Families are most important in society. A family law case is much more important than any commercial case.

97 See the discussion of court-annexed mediation in Issue Paper 31 at 221.

98 DOJCD ***Integrated family justice system project.*** In a parallel process, South African courts are beginning to adopt case management as a valuable tool to achieve speedier dispute resolution.

99 Action Committee at 36.

100 BC Justice Review Task Force Report at 21.

2.5.11 State subsidising needs to be refocused so that less is spent on litigation and more on those dispute resolution processes that encourage families to take responsibility for their own arrangements, while offering safeguards for adults and children who may be at risk. This is a realistic expectation if significant numbers of cases can be kept out of court and if the courts can operate more efficiently in dealing with the family when necessary.[101]

2.5.12 Appropriate early and ongoing assessment, screening and referral systems – sometimes collectively referred to as "triage" – further allow resources to be tailored to the needs of individuals and families, saving them and the system time and money.[102]

2.5.13 Triage in the family justice system typically includes –[103]

- an early and ongoing assessment of each party's unique situation and needs;
- effective referrals to appropriate and proportionate services;
- information about available family services;
- identifying a pathway to resolution; and
- reducing the possibility of gaps and overlaps in services by serving as a point of integration for the legal and non-legal family services in the justice system and in the broader community.

2.5.14 Families should also be assessed and screened for family violence or other problems.[104] Safety issues can be identified at this stage. Skilled assessors can recognise adults and children who are at risk. Research and experience both show that spouses are often at the greatest risk of violence from a spouse or partner in the period immediately

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101 BC Justice Review Task Force Report at 21. Other issues that have been identified in Issue Paper 31 and that will be considered in a separate Discussion Paper in future include –
a) the unfortunate hierarchy of courts;
b) multiplicity of forums (courts);
c) adjudicating officers; and
d) case flow management in the courts.

102 Judges referring the parties to alternative dispute resolution processes in terms of a case management system would also fall under the term "triage".

103 Action Committee at 41.

104 De Jong M "Australian family relationship centres: A possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?" (2017) 2 ***TSAR*** 298 (hereafter referred to as "De Jong ***TSAR*** 2017") at 317.

following separation.[105] An assessment worker may refer such a person to legal and other support services.[106]

2.5.15 The use of some form of triage also improves efficiency in the administration of justice by helping to reduce duplicative, ineffective or inappropriate use of registry staff and the courts.[107] From the justice system's perspective, resources are limited and need to be applied where they can do the most good.[108] The interaction between judicial case management and alternative dispute resolution methods would have to be managed.

2.5.16 Determining the aims and goals of a programme also includes the need to address two crucial issues: the language barriers and sensitivity to the cultural differences arising from the multi-ethnic composition of the population. The vision of the legislator should accord with the country's fundamental concepts of justice.[109]

2.5.17 In this investigation, each of the following procedural matters are dealt with in sequence:[110]

a) Information and education;

b) various forms of alternative dispute resolution (ADR); and

c) the courts.[111]

2.5.18 As illustrated by the graph below, the first of these components is the one that underlies and supports the others. Information, assessment and referral logically come first –

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105 See SALRC Issue Paper 31 for a discussion of family violence as one of the policy aspects to be discussed in future papers.

106 Shaw at 29.

107 Action Committee at 41.

108 BC Justice Review Task Force Report at 34.

109 Nawi NF & Hak NA "Towards the development of a mandatory family mediation program in the Malaysian civil legal system" Paper delivered at the 6th World Congress on Family Law and Children's Rights in Sydney, Australia, 17-20 March 2013 at 17.

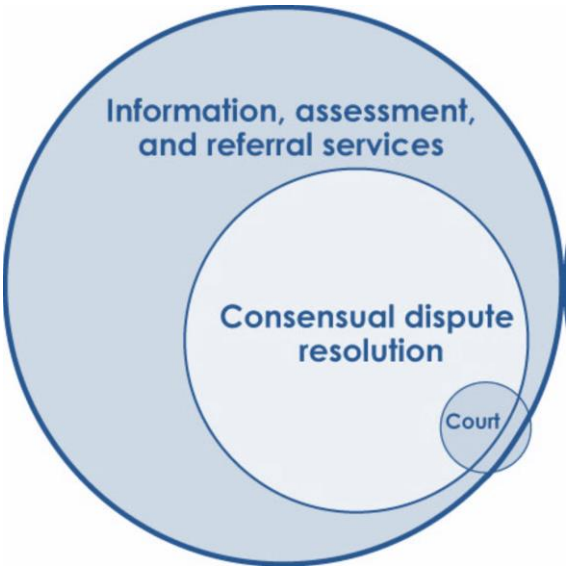
110 As explained above, the discussion in this paper will be restricted to the family dispute resolution process, and, more specifically, to the alternative dispute resolution process. It will not deal with court processes or with the structures necessary to support the ADR process. However, a discussion of the ADR processes will not be possible without a cursory overview of the system within which these processes have to be considered.

111 For a broad overview of legislative developments that have shaped family law in past forty years, see SALRC Issue Paper 31 at 16 and further.

no one can act effectively without appropriate information – but these services should remain available at any time as the parties progress towards resolution.[112]

2.5.19 Most disputes will be resolved by consensus. A judge will be called upon in relatively few cases, and generally only after other options have been exhausted. In just a few cases should a court be the first and perhaps the only resort.[113]

The Components of a Family Justice System [114]



2.6 Structures to support the family justice system described above

2.6.1 Even though this paper does not intend to deal with structural issues, it is impossible to deal with the processes identified without providing some preliminary indication of the structure that would possibly be needed to support these processes.

2.6.2 What follows is therefore a preliminary, general discussion. Comment on this preliminary discussion is welcome, though, even at this stage. The detail will be explored in subsequent discussion papers once agreement has been reached on the processes to be implemented.

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112 BC Justice Review Task Force Report at 21.

113 Ibid.

114 Ibid.

2.6.3 The question of how best to facilitate early access to pertinent information and services (so-called front-end services) in the family justice system is critical. [115]

2.6.4 In South Africa, existing entry points to the family justice system include family and friends, schools, churches, NGOs, social workers, paralegals, traditional leaders / chiefs, elders in the community, registered law clinics, advice offices, the Office of the Family Advocate, officials at lower courts, legal practitioners, Legal Aid South Africa, a governmental list of mediators and maintenance officers.

2.6.5 Four specific demographic areas can furthermore be identified that have to be catered for, namely, the urban formal, the urban informal, the rural informal and the village traditional.[116] This implies that any legislation should be formulated in such a way that it is user-friendly in all circumstances when implemented with specific guidelines, codes or regulations.

2.6.6 The term "family justice system"[117] has on occasion been given a broad definition. It is defined to include any programme or service that meaningfully contributes to the resolution of a family law issue, including – [118]

- public institutions such as the courts, government ministries, family advocates and legal aid service providers;
- individual professionals, such as judges, legal practitioners, mediators, social workers, counsellors and administrators who work in these public institutions; and
- non-governmental agencies and private services that help families by giving advice, information, assistance or orientation designed to assist in the resolution of issues arising out of separation or divorce.

2.6.7 Possible options for structures to support the process described above include the following:

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115 Shaw at 16.

116 Prof. John Faris at the SALRC ADR meeting of experts held in Pretoria on 30 October 2017.

117 The family justice system also includes the laws that govern marriage, cohabitation, separation, divorce, parenting responsibilities, financial obligations flowing from marriage or relationship breakdown, property division, and child protection. Action Committee at 3 (text).

118 Action Committee at 3 with reference to the BC Justice Review Task Force Report.

a) Family courts

2.6.8 Contrary to developments in most other jurisdictions, and despite a number of false starts, the idea of a family court was never realised in South Africa.[119] Even though the question whether family courts should be promoted has been raised once again, the question whether the court is in any event the best forum for the resolution of family disputes has also been asked. We have also seen that our court system is in need of reform (something that will be addressed later in this investigation).[120] Court time should perhaps be reserved for truly contested proceedings, enforcement and protection. The focus should rather be on access to services that facilitate problem-solving and future planning, services that perhaps need not be provided through the courts.

b) Office of the Family Advocate

2.6.9 Should mediation in all family disputes (and therefore also in care and contact disputes) be made mandatory by way of statute, it would be necessary to formulate a strategy to enable the currently unregulated and under-capacitated family mediation structure in the Office of the Family Advocate to manage effectively the thousands of contact and care disputes that would require mediation. It is inevitable that the Office of the Family Advocate, in its current form, would not be able to carry the workload on its own. Hence, a well-trained and regulated private family mediation stream will be necessary.[121]

2.6.10 The conflicting role of the Family Advocate was considered in Issue Paper 31 and the following responses were received:[122]

i) The Family Advocate should play a supervisory or mentoring role, particularly in outlying areas.[123]

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119 See discussion in Issue Paper 31 at 314.

120 See the discussion in De Jong, M "Suggestions for a Divorce Process Truly in the Best Interests of Children (Part 2)" 2018 (81) ***THRHR*** at 179 and further on less adversarial court processes in New Zealand (parenting hearing programmes), which are based on an inquisitorial rather than an adversarial model, and in Australia (the less adversarial trial [LAT] and the Child Responsive Program [CRP]). Legislative provision is made for the LAT in Division 12A (entitled "Principles for conducting child-related proceedings") of Part VII (dealing with children) of the Family Law Act 1975 and Chapter 16 of the Family Law Rules 2004. In terms of the CRP, each family is assigned a family consultant, who uses child-inclusive mediation and remains a constant presence for that family throughout the process.

121 See par. 3.8.50 of Issue Paper 31. For further discussions on whether mediation should be privately or publicly managed and executed, refer to the discussions below.

122 Question 60: What role, if any, should the Family Advocate play in light of the mediation provisions of the Children's Act.

123 Dr Astrid Martalas, clinical psychologist, Cape Town; Mr Craig Schneider, attorney, Cape Town; FAMAC.

ii) The family advocates may also mediate matters, but the mediator must then be precluded from continuing to act in an enquiry.[124] An important aspect of the mediation guidelines would be that no one can act in multiple, sequential roles.[125] Family advocates may indeed mediate, but it does cause a conflict of interests with their other roles.[126] Both the mediatory and adversarial role of the Family Advocate should be retained. [127]

iii) Should suitably qualified and registered mediators be involved in a matter, the Family Advocate should defer to such mediator and act in a strictly supervisory role.[128]

iv) Currently presiding officers in the Children's Court in many regions prefer to refer matters to social workers of NPO or NGO child protection organisations rather than the Office of the Family Advocate. The reasons given are that cases can be more speedily dealt with and a better quality of report provided by an agency with known credentials in the field of child protection.[129]

c) Mediation in private sector

2.6.11 Parties may also make use of the services of a mediator practising in the private sector, the courts or any community-based or non-governmental organisation that offers a mediation service.

d) Legal practitioners

2.6.12 The position of legal practitioners should be considered since legal practitioners will be many parties' first port of call.[130] However, experience has shown[131] that family legal

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124 Dr Astrid Martalas; Mr Craig Schneider; FAMAC.

125 Dr Astrid Martalas.

126 Cape Law Society (Ms Zenobia du Toit, attorney, Cape Town); LSSA.

127 Office of the Family Advocate.

128 FAMAC.

129 Child Welfare South Africa (Ms Julie Todd).

130 ***Australia Pathways Report*** at 47.

131 In 2001, the Legal Services Commission (LSC; responsible for the operational administration of legal aid in England) in the UK introduced a new pilot scheme, the Family Advice and Information Network (FAInS), which recognised that family law clients typically face a cluster of legal and non-legal issues. Family lawyers involved in FAInS were encouraged to address a client's legal problems and then refer the client

practitioners are not necessarily the most appropriate gatekeepers and that other alternatives to providing a multi-agency approach to resolving family law issues may be necessary.[132]

e) Family justice centres

2.6.13 A single, highly visible entry point has always seemed to be the best option to assist parties. In response to the question in Issue Paper 31,[133] a number of respondents[134] referred to the Australian Family Relationship centres, which were established in 2004 as a possible solution to the problem.[135] It has been argued[136] that one should perhaps, instead of trying to establish a court with add-ons such as the family courts referred to above, rather investigate the possibility of instituting "compulsory clearing houses" to assist parties before any family matter commences. Whenever a family dispute arises parties should be referred to such a centre, where various services, including information, education and mediation services, are provided. In Australia, the centres are publicly funded but privately operated.

2.6.14 In Malaysia the incorporation of family justice centres were considered, but since it would have required the establishment of a new institution, the reassigning of roles of programme providers, and the allocation of resources needed for the provision of the required qualified staff, training and infrastructure, it was decided to postpone this development to a later stage in the programme and run their programmes through the courts.[137]

f) Multiple entry points[138]

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to other services for assistance with non-legal issues. In this way, family law clients were to be offered a holistic service, with the lawyer acting as a "case manager", who helped match services to their clients' individual needs. However, the service was discontinued in 2007. Lawyers did not regularly refer their clients to other services, and referrals were largely limited to mediation.

132 Melville A & Lang K "Closing the gate: Family lawyers as gatekeepers to a holistic service" ***International Journal of Law in Context*** Cambridge June 2010 167.

133 SALRC Issue Paper 31, Chapter 4, Question 13.

134 For example Prof. Amanda Barratt; ProBono. See also De Jong ***TSAR*** 2017 298 and further for a full discussion of the Australian Relationship Centres.

135 See the discussion in SALRC Issue Paper 31 of the South African version of these community-orientated centres, called People's Family Law Centres, opened in 2002 in Cape Town and in 2003 in Johannesburg.

136 ProBono's written submission to SALRC Issue Paper 31.

137 Nawi & Hak at 18.

138 Shaw at 22.

2.6.15 Some reports[139] recommend a "no wrong number, no wrong door" policy in terms of which all service providers in the justice system are equipped to carry out an assessment in any case and to guide clients to the appropriate pathway.[140] They rely on various "gatekeepers"[141] and "trusted intermediaries"[142] to help guide people to the right place. Multiple entry points are said to acknowledge the diversity of people using the family justice system, differences in rural and urban needs, the digital divide and the diverse factors that influence when and where someone might enter the system. This need for multiple access points is seen as particularly acute in rural and remote areas and for vulnerable linguistic and cultural communities.

2.6.16 In-person assessment services should be available in as many communities as possible. This will be a challenge where geography complicates service delivery. Where it may not be possible to provide it economically to rural communities, more creative service delivery models will have to be found for rural and remote communities: telephone assessment services, a "circuit court" approach, webcam conferencing and video conferencing are potential tools.[143]

2.6.17 An examination of the various factors that influence people to use one entry point or another, and extensive consultations with stakeholders about their needs may emphasise the need for multiple entry points to the family justice system and for a "system", as opposed to an "entity".[144]

2.6.18 A lack of resources may limit the ability of governments to establish full service entry points in all locations, but people from cultural and linguistic minorities have particular

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139 Access to Justice Task Force, Attorney-General's Department ***A strategic framework for access to justice*** Government of Australia 2009 access at http://www.ag.gov.au/a2j (hereafter referred to as "***Australia Access to Justice Report***") at 58, 79 and further.

140 Shaw at 21.

141 ***Australia pathways report*** at 21. See also Commonwealth of Australia ***Government response to the family law Pathways Advisory Group report*** 13 May 2003 (hereafter referred to as "***Australia government response to Pathways***"**)** access at http://www.ag.gov.au/Publications/Budgets/Budget2003/Pages/GovernmentresponsetotheFamilyLawPathwaysAdvisoryGroupReportMay2003.

142 Cohl K & Thomson G ***Connecting across language and distance: Linguistic and rural access to legal information and services*** Final report of the Linguistics and Rural Access to Justice Project conducted at the request of the Law Foundation of Ontario, Toronto, December 2008 (hereafter referred to as the "***LFO Connecting report***") at 21 and 44 access at http://www.lawfoundation.on.ca/wp-content/uploads/The-Connecting-Report.pdf.

143 BC Justice ***Review Task Force Report*** at 34.

144 Shaw at 21.

challenges accessing centralised services. A clear theme that emerged throughout the project was the need to foster more formal relationships between legal and non-legal service providers to help community organisations ("trusted intermediaries") to provide better legal information and referral for vulnerable clients.[145]

2.6.19 It is common for both linguistic minorities and people in rural or remote areas to turn to the organisations they know and trust when they have a problem. In the course of helping clients, community workers are often the first to recognise that a problem has a legal component and to provide basic information or a referral. Trusted intermediaries include organisations that focus on social services, services to people with disabilities, immigrant settlement, health care, education, advocacy, or a particular faith or ethno-cultural group. They also include agencies that serve the public generally, such as libraries, community centres, health centres, information and referral services, and hotlines.[146]

2.6.20 Improving linguistic and rural access to justice therefore requires a system response, and it was concluded that no single organisation, existing or new, may or should "own" that response. The preferred solution is to provide multiple points of access to an integrated system, which, from the client's perspective, is seamless.[147] An effective system response should encompass the array of community organisations to which target groups turn for assistance. These organisations could be essential partners in an integrated system.[148]

2.6.21 Multidisciplinary paths to family justice, therefore, envisage a conjunction of multidisciplinary family services (involving a diverse profile of professionals) and the provision of low-level family legal services (orientated towards legal information, legal consultation, and informal community mediation and other forms of dispute resolution). It calls for a holistic service delivery system[149] rather than one built around single entry points.[150]

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145 Shaw at 21, with reference to LFO ***Connecting report*** at 21 and 44.

146 LFO ***Connecting report*** at 55; Shaw at 21.

147 LFO ***Connecting report*** at 54.

148 LFO ***Connecting report*** at 44; Shaw at 21.

149 ***Australia pathways report*** at ES6.

150 Shaw at 21.

2.6.22 The Law Commission of Ontario,[151] in considering the 2001 Australia Pathways Report recommendation that multiple entry points to the justice system be recognised and that assessment, screening and referral take place at all of them, stated as follows:[152]

> Consultations helped clarify that the most basic screening that should take place at all entry points is whether the entry point is able to respond to the users' needs. This step already requires that people or organizations realize that they are an entry point to the family justice system and that they identify the users' needs … The next step is to respond to users' needs by treating different needs differently or, when impossible to offer the required services, to refer users to other appropriate services.

2.6.23 Both the Law Commission and the Law Foundation reports identified the need for the person conducting the assessment to be properly trained. However, developing and implementing a consistent assessment tool for use at multiple entry points by qualified individuals pose considerable challenges and have not been done yet in any Canadian jurisdiction.[153]

2.7 Conclusion

2.7.1 As was stated in Issue Paper 31,[154] the challenge seems to be to pull together the most valuable past initiatives to ensure a judicial system that is both more efficient and more likely to serve therapeutic justice. The challenge for the future is not a choice between mediation and litigation, but a plan to integrate the two. The therapeutic-justice process should empower families through skills development, assist them to resolve their own disputes, provide access to appropriate services, and offer a variety of dispute resolution forums within one unified system that enables the family to resolve problems without additional emotional trauma. The full range of existing dispute resolution options should be readily accessible to families.[155]

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151 Law Commission of Ontario ***Voices from a broken family justice system: Sharing consultations results*** September 2010 (hereafter referred to as "***LCO Voices Consultation Paper***") access at: http://www.lco-cdo.org/en/family-law-process-consultation-results at 58; Shaw at 31.

152 At 59.

153 Shaw at 32.

154 SALRC Issue Paper 31 at par. 4.9.79 at 324.

155 Action Committee at 32 (text). Compare the multiple entry points concept with the concept of the "multi-door courthouse" that was originally articulated in 1976 by Harvard Law professor Frank Sander (see address by Frank E.A. Sander at the National Conference on the Causes of Dissatisfaction with the Administration of Justice [April 7-9, 1976], reprinted in Sander FEA "Varieties of Dispute Processing" 70 ***F.R.D.***111 [1976], which since then has been the basis for reform in many jurisdictions).

2.7.2 The graph below[156] illustrates the broad spectrum of services and structures that constitute the current family law system in South Africa and indicates the proposal, set out further in this paper, about services and procedural options that should be made available to families in order to assist them in resolving their disputes. The proposed service to be provided and the system within which it will be provided are provisionally set out below.

2.7.3 The services that are proposed to be made available and that are discussed in this paper include the following:

a) Reception, including standardised information and education at all entry points;
b) triage throughout the process;
c) mandatory mediation (including collaborative dispute resolution);
d) family arbitration; and
e) parenting coordination.

2.7.4 The structures (entry points)[157] to be considered within which the services will be provided would include the following:

a) Courts (court-annexed information, education and mediation);
b) legal practitioners (taking into account that 80% of parties are unrepresented);
c) Legal Aid SA (64 justice centres, 64 satellite offices);
d) traditional leaders (Traditional Courts Bill, still to be enacted);
e) community advice centres (European Union through the Amarightza - Socio-Economic Justice for All (SEJA) programme of the Foundation for Human Rights is funding 100 community-based advice offices (CAOs) that are linked to communities and provide advice and paralegal services to marginalised and vulnerable groups; public funding under consideration);
f) Office of the Family Advocate;
g) DSD social workers;
h) university law clinics;
i) Thusong multi-purpose centres (six government departments [DOJCD not currently included] offering services, access to technology, government resources and sponsor and donor funds. It is a Government Communication and Information System (GCIS) initiative, and a wide range of services are provided to communities at 55 centres countrywide);

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156 At 42.

157 To be considered fully in the forthcoming Discussion Paper on structure.

j) Therisano Centres (a DOJCD initiative to provide rooms dedicated to mediations that "will provide a welcoming atmosphere that facilitates constructive discussion"); and

k) churches, schools and police stations.

2.7.5 It will be proposed that –

a) services be available to all parties in a family dispute at any stage of the dispute;

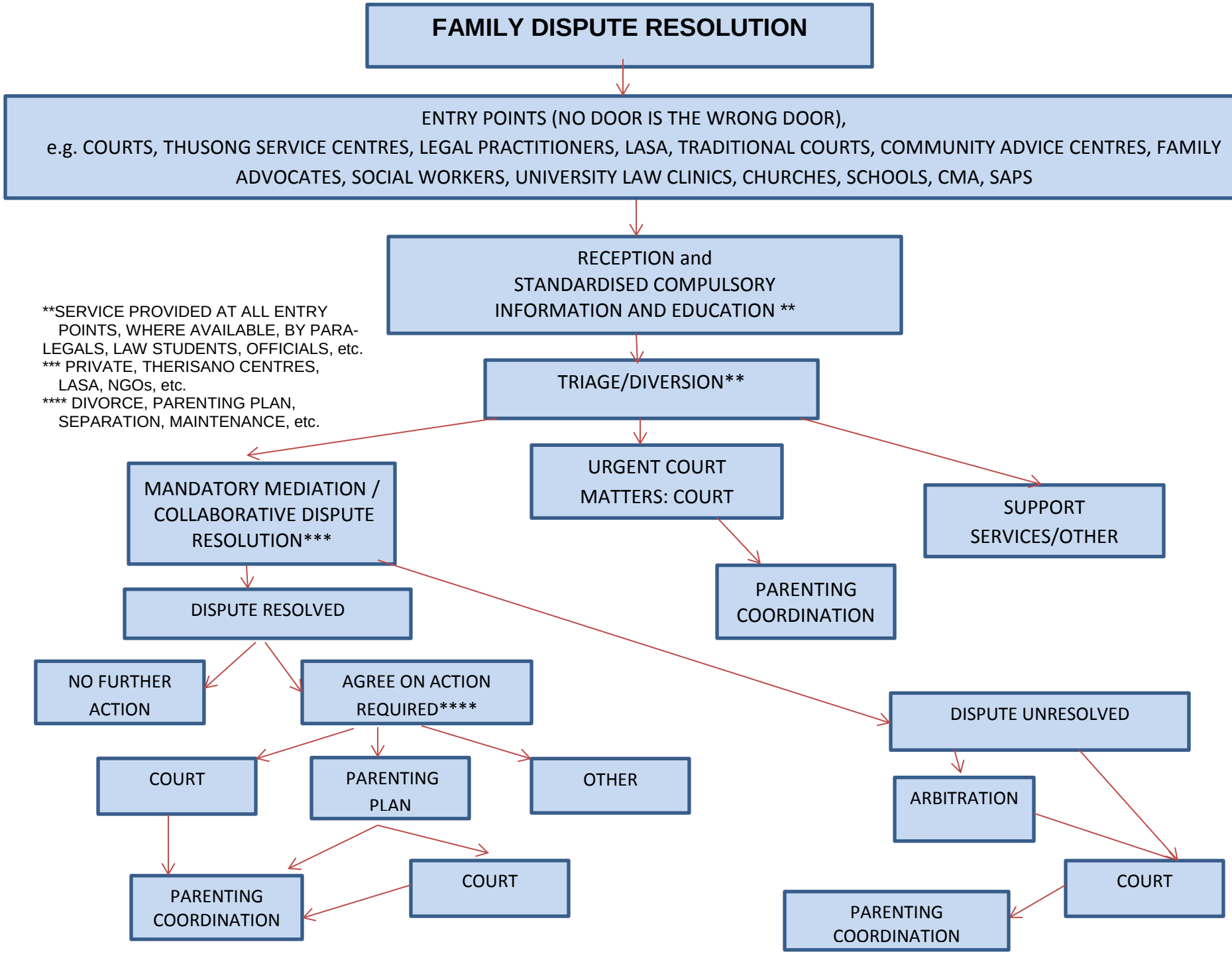
b) services be provided at all entry points; and

c) horizontal referrals be possible at every stage.

2.7.6 LASA, the courts, the traditional courts, the Office of the Family Advocate, Department of Social Development social workers, and Thusong MPCs are all state-funded, whereas legal practitioners, community advice centres, university law clinics among others are either privately funded or donor-funded.

2.7.7 An approach to family justice that gives family members the information they need, helps them to assess their situation and choose among options, and provides dispute resolution processes so that they can arrive at agreements that meet their family's needs, is supported. When necessary, a judge will be available to adjudicate, but usually not until there has been an attempt at consensual resolution.[158]

158 BC Justice Review Task Force Report at 21.


FAMILY DISPUTE RESOLUTION
ENTRY POINTS (NO DOOR IS THE WRONG DOOR),
e.g. COURTS, THUSONG SERVICE CENTRES, LEGAL PRACTITIONERS, LASA, TRADITIONAL COURTS, COMMUNITY ADVICE CENTRES, FAMILY ADVOCATES, SOCIAL WORKERS, UNIVERSITY LAW CLINICS, CHURCHES, SCHOOLS, CMA, SAPS
RECEPTION and STANDARDISED COMPULSORY INFORMATION AND EDUCATION **
**SERVICE PROVIDED AT ALL ENTRY POINTS, WHERE AVAILABLE, BY PARA-LEGALS, LAW STUDENTS, OFFICIALS, etc.
*** PRIVATE, THERISANO CENTRES, LASA, NGOs, etc.
**** DIVORCE, PARENTING PLAN, SEPARATION, MAINTENANCE, etc.
TRIAGE/DIVERSION**
MANDATORY MEDIATION / COLLABORATIVE DISPUTE RESOLUTION***
URGENT COURT MATTERS: COURT
SUPPORT SERVICES/OTHER
PARENTING COORDINATION
DISPUTE RESOLVED
NO FURTHER ACTION
AGREE ON ACTION REQUIRED****
DISPUTE UNRESOLVED
COURT
PARENTING PLAN
OTHER
ARBITRATION
PARENTING COORDINATION
COURT
PARENTING COORDINATION
COURT

PART B: INFORMATION, EDUCATION AND REFERRAL

Chapter 3: Information and education programmes

3.1 Need for information and education programmes (project rationale)

3.1.1 Members of the public often experience the legal system as alienating and confusing. South Africa has a weak foundation of rights awareness and a legacy of poor access to justice. Many citizens approach the justice system with very little or no accurate understanding of how family disputes can be resolved.[1] Prospective litigants therefore enter the judicial process unaware of their legal responsibilities and rights as parents and the responsibilities and rights of their children. The majority of litigants further lack education in basic parenting skills and capacity.[2]

3.1.2 Over the past three decades a changed understanding of the consequences of separation and divorce has further led to a characterisation of family relationships as ongoing – although with different emphases compared to those applied to the intact family.[3] Parents are, however, not necessarily aware of this changed understanding of the post-separation family and, therefore, unable to align themselves with these state-endorsed views.

3.1.3 In South Africa most parents accessing courts are furthermore indigent. The connection that exists between poverty and vulnerability, on the one hand, and unmet legal needs, on the other, should therefore be noted:[4]

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1 Department of Justice and Constitutional Development Business Unit: Court Services Family Court Task Team ***Family courts in South Africa: Interim policy and implementation plan*** 17 December 2002 (prepared by Chaskalson and De Jong Consulting) (hereafter referred to as "Family Court Task Team") at 36. See also SALRC Issue Paper 31 at par. 3.14.1.

2 Submission to SALRC Issue Paper 31 by Ms Suzette Rubain, an attorney acting for children as mandated in terms of section 55 of the Children's Act and employed through Legal Aid South Africa (LASA), currently stationed at the Athlone Justice Centre, but responding in her individual professional capacity, and Ms Juana Horn, a clinical psychologist with a special interest in contact and care and other forensic assessments, with the assistance of Advocate Paul Jethro and attorney Tom Blyth, who specialises in the field of family law (hereafter referred to as the "Rubain, Horn, Jethro & Blyth submission").

3 Kierstead S "Parent education programs in family courts: Balancing autonomy and state intervention" 2011 49 ***Family Court Review*** 140 (hereafter referred to as "Kierstead") at 149.

4 Buckley M ***Access to legal services in Canada: A discussion paper*** unpublished April 2011 at 5 as referred to in Shaw at 8.

- There is an important connection between unresolved legal problems and broader issues of health, social welfare and economic well-being;
- age, country of birth, disability status, personal income and level of education are statistically independent predictors of reporting legal events;
- in some studies, gender, ethnic or racialized background has also been shown to influence the experience of civil legal problems;
- legal problems tend to "cluster", meaning that problems tend to co-occur and can be grouped together;
- people who experience one legal problem are much more likely to experience more than one and this is especially true for low income people and members of disadvantaged groups; and
- while every group experiences civil needs, the poorest and most vulnerable experience more frequent and more complex, interrelated civil legal problems.

3.1.4 Indigent parties, furthermore, have no access to legal representation.[5] Most indigent litigants also have no access to other resources, such as mediators, psychologists or social workers. Litigation is therefore unaffordable.[6]

3.1.5 Many of the challenges faced by, and arguably caused by, unrepresented litigants[7] stem from the fact that the justice system is built around and designed for trained professionals with well-understood roles. Unrepresented litigants do not fit comfortably into that mould.[8]

3.1.6 The demands made on judges, legal practitioners and court staff to respond to the needs and expectations of unrepresented litigants push them into unfamiliar roles.[9] Presiding officers are burdened with advising, mediating, informing and educating litigants, which taints

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5 See the statistics in this regard in Chapter 2.

6 Rubain, Horn, Jethro & Blyth submission. See also South African Law Reform Commission ***Investigation into Legal Fees*** Issue Paper 36 Project 142 2019.

7 See par. 2.4.17 above for the difference between unrepresented and self-represented litigants.

8 Rubain, Horn, Jethro & Blyth submission.

9 Shaw at 10.

the role of the presiding officer, with the focus becoming multi-faceted and working solutions often surfacing too late in the judicial process.[10]

3.1.7 Even where legislation exists that requires parents to mediate their disputes prior to litigation, such as care and contact litigation, specifically in the case of section 21 applications,[11] experience has shown that all subsequent procedures fall short because of a lack of capacity stemming directly from a lack of information and education. The failure to deliver appropriate legal and parenting education consequently also reduces the likelihood of sustainable outcomes for even constructive mediation.[12]

3.1.8 Uninformed and poorly educated litigants place children at risk.[13] There is an unambiguous understanding that high parental conflict can have serious and permanent adverse effects on children. The main predictor of poor adjustment in children after a divorce or separation is continued conflict.[14]

3.1.9 This effect is not only felt by children at the time of the conflict itself, but continues to affect children's adult and particularly parenting functioning as they mature. The long-standing nature of the early effects of high parental conflict therefore takes a toll on individuals and their communities throughout the life cycle, and dysfunctional adult and parenting functioning therefore lead to an ongoing drain on an already over-burdened and under-resourced judicial system. In addition, high parental conflict and other dysfunctional parenting behaviour are correlated with, among other negative outcomes, learning difficulties in children, higher rates of adult criminality, alcohol and substance abuse, and adult depression.[15]

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10 Rubain, Horn, Jethro & Blyth submission.

11 Section 21 application refers to an application by an unmarried father for parental responsibilities and rights in respect of (biological) children in terms of the Children's Act 38 of 2005.

12 Rubain, Horn, Jethro & Blyth submission.

13 Rubain, Horn, Jethro & Blyth submission.

14 SALRC Issue Paper 31 at par. 3.1.1. See discussion in Chapter 2 above. Other risk factors are diminished or incompetent parenting, father absence, and a drop in the standard of living of the caregiving parent. See De Jong (Part 1) 2018 at 48.

15 Ms DD Leppan, Presiding Officer Children's Court: Wynberg, in her submission about Question 101 and Question 104 and references it contains.

3.1.10 There is a common understanding amongst professionals working in the area of the care of and contact with children that information for, and education of, parents are vital to support the adaptive separation or divorce of parents, and to mitigate the potentially negative effects of parental separation on children. The Issue Paper recognises this link and states that providing parents with information is important to defuse family disputes between parties, both during and after a divorce or separation.[16]

3.1.11 Providing parties with the necessary information to build awareness of their own rights and obligations as well as insight into the way the family law system works may ameliorate the situation. Among the stated goals of such an information programme would be –[17]

a) raising public confidence in the family law system;
b) assisting unrepresented individuals;
c) promoting alternative dispute resolution;
d) reducing overburdened family court dockets; and
e) reducing children's exposure to conflict.

3.1.12 Parties should be provided with information and education at the outset (the so-called "front end" of the family justice system). Government's energies and resources have the most potential for producing positive results at this stage of the process.[18] See the discussion in this regard in Chapter 2.

3.1.13 In response to SALRC Issue Paper 31 respondents provided examples of the success that has been already attained with information programmes. It was explained[19] that soon after the commencement of the Children's Act it became apparent to the children's court in Cape Town that parents were uninformed about the provisions of the new Act and, in particular, the father's parental responsibilities and rights and how these are "acquired". The court found great resistance from mothers and maternal family members to fathers' being allowed to exercise their parental responsibilities and rights. The court attempted to resolve this by embarking on an education programme in collaboration with the Office of the Family Advocate in Cape Town. In

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16 SALRC Issue Paper 31 at 3.5.21.

17 Kierstead at 141.

18 BC Justice Review Task Force Report at 23.

19 DD Leppan, Presiding Officer Children's Court: Wynberg.

all matters where fathers or other family members approached the court for assistance with a parenting plan or a section 23 care or contact order, the applicant and parents or other parent, AND whichever family members were involved in caring for the child, were invited to attend an information workshop, held at the court, on a Saturday. It was found that grandparents who were assisting the mother to care for the child were the biggest obstacle to the successful conclusion of parenting plans, because of the well-established opinion in South Africa that "unmarried fathers have no rights". Educating the whole family, and not only the parents, was essential. These workshops were presented approximately once a month for a period of approximately six months. Attendance of these workshops was astonishing. More than 90% of parties to applications attended merely upon invitation issued by the clerk of the court, and delivered by the applicant to the other parent or parents. The family advocates presenting the workshop would then arrange consultation dates for mediation with the families who attended the workshops. Regrettably, these workshops were discontinued owing to capacity constraints in the Office of the Family Advocate. The success and high attendance rate of these workshops were proof of the need to educate parents and the communities in respect of parental responsibilities and rights.

3.1.14 The view was further held that significantly improved cost efficiency can be achieved through a preventative approach that emphasises education and empowerment rather than treatment and litigation. In addition, if litigants have not been made aware of their rights and responsibilities in the mediation process they are involved in, the process cannot be regarded as fair.[20]

3.1.15 It would therefore seem as though there is a great need to provide relevant information to parties to a family dispute, but in as non-coercive a manner as possible. Where children are involved in a family dispute, it might also better prepare parents and encourage them to be proactive in relation to a process that may ultimately result in an order that is quite intrusive.[21] Schepard rightly noted that we should not somehow characterise custody awards, particularly those that award sole custody to one parent over the objection of another, as involving no intrusion.[22]

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[20] Rubain, Horn, Jethro & Blyth submission.

[21] Kierstead at 143.

[22] Schepard A "Taking children seriously: Promoting cooperative custody after divorce" 1985 64 ***Texas Law Review*** 687 (hereafter referred to as "Schepard") at 771.

3.2 Should attendance of information and education programmes prior to engaging in mediation or litigation be compulsory for all parties seeking to resolve family disputes?[23]

3.2.1 While mandatory attendance of post-separation education programmes has become increasingly commonplace, it is not unanimously supported.[24]

3.2.2 In a survey of information and education programmes, three types of attendance policies have been noted,[25] namely –

a) mandatory;
b) judge-determined; and
c) invited attendance.

3.2.3 In determining whether these programmes should be mandatory or not, the following two key issues need to be determined:[26]

a) whether parent education programmes have the potential to encourage informed, child-focused approaches to post-separation legal and parenting decision-making without sacrificing respect for parental autonomy; and
b) whether and, if so, to what extent, the perceived benefits of parent education programmes justify a shift in our understanding of acceptable levels of state interference with parental functioning.

In this regard a distinction should be made between a preventative educational approach and a therapeutic one.[27] Added to these key issues is the question whether family disputes in which no children are involved should also be targeted.

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23 This question was also posed as Question 101 in SALRC Issue Paper 31.

24 Kierstead at 150.

24 Dennill I ***The evaluation of a psycho-education and skills building program at the time of divorce/separation*** DLitt et Phil Dissertation University of Johannesburg 2012 (hereafter referred to as "Dennill thesis") at 137 with reference to Blaisure and Geasler.

26 Kierstead at 140.

27 Dennill thesis at 116.

3.2.4 The degree of state intervention warranted in relation to the way parents conduct their parenting roles has been construed as depending on the risk of harm to which children are subjected. Providing all separating parents who seek to access the family law system with mandatory information about the dangers of continued exposure to parental conflict to children,[28] and about the need to keep these factors in mind when they consider the range of dispute resolution options available to them, is likely to be considered a justified level of state intervention.[29]

3.2.5 Concern about emotional harm to children as a result of parental conflict, particularly since that conflict can be exacerbated by the dispute resolution process, has been described as a public-health matter.[30]

3.2.6 However, it is generally accepted that, except in cases where a harmful level of maladaptive behaviour that causes a significant risk of harm to a child is found to exist, courts and legislatures should be reluctant to interfere with parental autonomy with regard to child-rearing practices.[31]

3.2.7 It has been argued that, given current understanding of the appropriate limits on state interference with parental autonomy as regards child-rearing practices, programmes aimed specifically at changing parental skills and behaviours should be made mandatory only on a case-by-case basis when a judge considers such changes necessary.[32] If not considered necessary, courts and legislatures should not attempt to (in Mnookin's words)[33] "control child-rearing through coercion".[34]

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28 Information should also be provided with respect to other risk factors of family separation for children.

29 Kierstead at 150.

30 Schepard at 771.

31 Kierstead at 150.

32 Kierstead at 141.

33 Mnookin RH "Child-custody adjudication: Judicial functions in the face of indeterminacy" 1975 39 ***Law & Contemporary Problems*** 226 at 265.

34 Kierstead at 143 with reference to Mnookin.

3.2.8 Some jurisdictions, however, see early intervention as so critical to improving outcomes that they have imposed mandatory information programmes in all instances. In comparing different jurisdictions the following has been found:

a) Forty-six states in the **USA** now offer parent education programmes.[35] In most states, at least some parents seeking a divorce or involved in custody proceedings are legally required to attend these classes, either by state statute (twenty-seven states), by judicial rules (six states), by county- and district-based mandates (five states), or by individual judges' decrees (three states). In eighteen states the mandate is universal and all divorcing parents, and sometimes all parties to custody or paternity suits, are required to attend classes. In addition, in some of the states where the statutory language is permissive, courts have created a *de facto* universal mandate by ordering all parents in their districts to take the classes. The universal mandates signal a clear departure from the few voluntary court-affiliated parent education programmes that have existed in some states since the 1970s. Courts around the country take compliance very seriously and failure to attend can cost parents their visitation rights, influence custody decisions, or even – in rare cases – land a parent in jail.[36]

b) In a number of **Canadian** jurisdictions, people commencing a family law proceeding are required to attend some form of information session. British Columbia, Alberta, Saskatchewan, Manitoba, Quebec and Nova Scotia provide mandatory parenting after separation programmes:

   (i) In **British Columbia**, some mandatory processes are used successfully. For example, most parents must attend a Parenting After Separation programme (PAS) before their first appearance in a provincial family court.[37] In some jurisdictions,

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35 Examples are Arizona Rev. Stat. Ann. §§ 25-351–25-353, 25–355 (2009); Arkansas Code Ann. § 9-12-322 (2009); Colo. Rev. Stat. § 14-10-123.7 (2009); Conn. Gen. Stat. § 46b-69b (2008); Del. Code Ann. tit. 13, § 1507(h) (2009); Fla. Stat. Ann. § 61.21 (West 2009); 750 Ill. Comp. Stat. Ann. 5/404.1 (West 2009); Iowa Code § 598.15 (2008); Kan. Stat. Ann. § 60-1626(4)(b) (2007); LA. Rev. Stat. Ann. § 9:306 (2009); MD. Code Ann. Fam. Law § 7-103.2 (West 2009); Minn. Stat. § 518.157 (2009); Mo. Rev. Stat. § 452.600 (2009); Mont. Code Ann. § 40-4-226 (2007); 2007 Neb. Laws 554 § 9 (2009); N.H. Rev. Stat. Ann. § 458-D: 1–9 (2009); N.J. Stat. Ann. § 2A:34-12.1–2A:34-12.8 (2009); Okla. Stat. tit. 43 § 107.2 (2009); Or. Rev. Stat. § 3.425 (2007); Tenn. Code Ann. § 36-6-408 (2009); Tex. Fam. Code Ann. § 105.009 (Vernon 2009); Utah Code Ann. § 30-3-11.3 (2009); Va. Code Ann. § 16.1-278.15 (2009); W. Va. Code Ann. § 48-9-104 (2009); Wis. Stat. § 767.401 (2009). Recently, several senators in Wyoming introduced a Bill that would authorise judges across the state to order divorcing parents' participation in parenting classes (2007 WLNR 1098778, WY SB 130, S.F. 130). In Alaska, California, Georgia, Indiana, Kentucky, Michigan, New Mexico, New York, Pennsylvania, Washington, and Wyoming programmes are mandated by court rules.

36 Schaefer T "Saving children or blaming parents? Lessons from mandated parenting classes" 2010 19:2 ***Columbia Journal of Gender and Law*** 491 (hereafter referred to as "Schaefer") at 495.

37 SALRC Issue Paper 31 at par. 3.14.10.

information sessions overlap with the triage services. In four provincial court registries in British Columbia, for instance, parties are required to meet with a family justice counsellor (FJC) before their first court appearance. This meeting is characterised as a triage session where the FJC will not only provide information, but will help each party to clarify their issues and understand the options available for resolving their disputes. FJCs also provide mediation services to eligible clients or may refer parties to a private mediator.[38]

(ii) In **Ontario**, parties must attend a mandatory information session before a contested hearing (some exceptions apply) where they are given information about separation, divorce and the legal process (including the effects on children), alternatives to litigation and local resources.[39]

(iii) **Quebec** imposes a similar obligation on divorcing couples with children.[40] Before proceeding with any contested application involving children, the parties must meet with a mediator, who provides information about the mediation process.

(iv) In **Alberta**, unrepresented parties filing a contested application for an order under the Family Law Act must meet with a case-flow manager who, among other things, informs parties about the process and helps them to explore options.

c) In the **United Kingdom**, mediation information and assessment meetings (MIAMs) were first introduced in the family dispute system in 2010. Since April 2014 it has been compulsory (subject to limited exceptions) for those issuing proceedings for financial relief or for a child arrangements order to attend a MIAM.[41] While the party making the application is *obliged* to attend the MIAM the respondent is simply *expected* to attend. The two parties can attend a single meeting but separate meetings appear to be the norm (if the respondent attends at all).[42] The first page of the court application form deals with the MIAMs and requires a confirmatory statement to be signed in the following terms:[43]

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38 Shaw at 27.

39 Shaw at 27.

40 Shaw at 27.

41 UK Civil Justice Council ***ADR and civil justice*** CJC ADR Working Group Interim Report October 2017 (hereafter referred to as " ***ADR civil justice report***") at 38.

42 ***ADR and civil justice report*** at 38.

43 Ibid.

1. I understand that if I have not attended a mediation information and assessment meeting (MIAM) the court cannot process my application unless there are special circumstances.
2. I understand that if I cannot show evidence that I do not need to attend a MIAM, the judge may stop proceedings until I have considered mediation.

The principal exemptions are cases of domestic violence, child protection concerns, other forms of urgency, previous attendance of a MIAM (or previous MIAM exemption) or an application simply to make a consent order. Each of these is required to be supported by evidence.[44]

3.2.9 Beyond the obvious value of orientating and helping to organise the parties, these programmes are premised on two ideas:

a) The first is that information is essential to a fair resolution.
b) The second is that information is a dispute resolution tool, or, put in the negative, misinformation can generate and prolong disputes.

3.2.10 The approaches taken by different information programmes in different jurisdictions vary in terms of what information is delivered, who delivers it, when it is delivered, where it is delivered, and who must receive it, but the underlying motives and the general objectives are similar. Early information has been demonstrated to be sufficiently effective in reducing conflict and expediting resolution for many jurisdictions to make it mandatory.

3.2.11 It has been argued[45] that programmes need to be mandatory, as parents rarely volunteer and only the most motivated may come. It was also found[46] that if a fee or attendance waivers were allowed, then, depending on the circumstances, mandating attendance seemed to be acceptable to both court workers and parents.

3.2.12 At the national Focus Group Forum,[47] the Office of the Family Advocate asked whether all parties seeking a divorce order, or an order determining care and contact arrangements,

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44 Ibid; see also discussion below.

45 Dennill thesis at 137 with reference to Arbuthnot, Seagal, Gordon and Schneider (1994).

46 Dennill thesis at 137 with reference to Blaisure and Geasler (1996).

47 SALRC ***Focus Group Forums*** held in Pretoria and Cape Town 2008.

should be compelled to attend a parent information programme.[48] After deliberations, the Office of the Family Advocate concluded that when a party serves summons for an order of divorce, or a notice of motion applying for care and contact arrangements to be determined, it should be compulsory for parties to attend a parent information or education programme prior to any order being granted, irrespective of whether the parties have concluded a parenting plan.[49]

3.2.13 This position was confirmed in the following responses to SALRC Issue Paper 31:

a) Due to the negative impact a divorce usually has on the welfare of a child, it is suggested that consideration be given to a form of compulsory counselling that all parties have to attend prior to instituting a divorce action. Therefore, no divorce action (where there are minor children) may be instituted unless the parties have first attended counselling. This will ensure that the parties are fully aware of the consequences of the divorce and the impact thereof on the children.[50]

b) Concerns were raised regarding the current system regulating care and contact disputes, and it was concurred that a dire need exists for psychological and legal education prior to the initiation of mediation or litigation. Most cases adjudicated upon at Children's Court level could be mediated and/or be resolved by other collaborative practices if the parties[51] concerned were fully aware of their responsibilities, rights, recourse and consequences of their actions, that is, if they were appropriately educated and informed in key legal and psychological issues pertaining to their matter.[52]

c) Parent Education must be mandatory. A programme like "Children in Between" has been researched (doctoral study by Dr I Dennill, University of Johannesburg) for its relevance in South Africa. This programme must be completed by parties prior to mediation as it provides a foundation that facilitates constructive

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48 SALRC Issue Paper 31 at par. 3.14.1.

49 SALRC Issue Paper 31 at par. 3.14.2.

50 Office of the Family Advocate submission.

51 The terms carer/parent/litigant/party/applicant/respondent are used interchangeably in this document as the citation of the parties depends on the forum they use.

52 Rubain, Horn, Jethro & Blyth submission.

discussion and problem solving focussing on the child and the child's best interests.[53]

d) Attendance of information and education programmes should be compulsory to all parents.[54]

e) In an ideal world attendance of information programmes should be compulsory for all parents who are confirming their custody and access arrangements BUT the question arises as to who bears the cost of this as it is likely that this would be expected to fall within the scope of the work of registered child protection organisations like Child Welfare South Africa (CWSA). However, despite having the required expertise, these organisations, due to funding constraints, lack the capacity to take on this work without adequate compensation.[55]

f) It should only be compulsory for parents who are involved in custody and access disputes, however it would obviously be recommended for all parents to attend.[56]

3.2.14 A minority view was that people might get frustrated with so many mandatory procedures and programmes. The public, instead of having to follow complicated protocol, should be made aware of processes and concepts such as mediation through wide public media coverage only.[57]

3.2.15 It would seem that both parents and children[58] should be required to attend information and education programmes whenever a family dispute arises.[59]

3.2.16 Certainly, if one agrees that the programme content provides helpful information, it seems logical to suggest that the higher the number of parents who receive the information, the greater the potential for such programmes to assist parents to make informed decisions about

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53 Family Zone (Dr Ronel Duchen and Ms Irma Schutte) submission on Question 101.

54 Ms Jakkie Wessel, Regional Court President: Limpopo Regional Division.

55 Child Welfare South Africa (Ms Julie Todd).

56 Cape Law Society (Ms Zenobia du Toit).

57 SALRC Issue Paper 31 at par. 3.14.9.

58 De Jong 2018 (Part 1) at 52.

59 De Jong 2018 (Part 1) at 60.

their separation-related issues.[60] The same would apply to all parties to family disputes, whether or not there are children involved.

3.3 How should information and education programmes be constituted? [61]

a) Nature of the information and education to be provided

3.3.1 Different people understand the whole issue of parenting information and education programmes in the South African context in different ways. A mechanism needs to be devised to determine how a uniform parent information programme could be effective. In addition, there are modern ways of accessing information, such as the Internet.[62] Early legal advice can be an important dispute resolution tool: having a realistic view of the possible outcomes can help people reach fair and enduring agreements. Some people will be able to resolve their family law issues with only summary legal advice. When cases are more complex because of their substance, the degree of conflict or the capacity of the parties, more assistance may be needed.[63]

3.3.2 In SALRC Issue Paper 31 it was stated that the content should educate parents about the advantages and availability of mediation; information about parental alienation; the best interests of the child principle; concepts of care, residency, and contact; and so on.[64]

3.3.3 As far back as 2002 the DOJCD stated its intent[65] to ensure that appropriate materials are developed to assist litigants – including those who are illiterate and innumerate – to understand their basic legal rights and obligations, as well as the procedures involved in resolving their matter.[66] With the demise of the pilot family court project, this important part of the project also succumbed.

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60 Kierstead at 150.

61 See also Question 104 in SALRC Issue Paper 31.

62 SALRC Issue Paper 31 at par. 3.14.9.

63 Shaw at 28. See also Action Committee at 6 and 38 (text).

64 SALRC Issue Paper 31 par. 3.1.4.3.

65 Family Court Task Team at 36.

66 More specifically, the particular objectives of this project were stated to be:

3.3.4 The suggestion has been made that education should be two-pronged, namely general and specific:[67]

a) General education should be available to educate the public about parenting responsibilities and rights, other family law matters and the legal processes involved. Some reports have recommended broader public awareness campaigns. For example, the Australia Pathways Report recommended a long-term public education programme and a national education package for schools. This was based on the view that a better community-wide understanding of the basic principles of the family law system was needed to change people's behaviour after separation.[68] People often do not know where to start. They need help to identify the issues to be resolved, to understand what the justice system can and cannot do for them, to know what their rights and obligations are, to know what services are available to assist them and to know the options available for resolving issues.[69]

b) Specific education or "parent information programmes" should be available if a party has, for example, already applied to court. These should be offered as workshops for groups of parties to applications already lodged with the Children's Court or the Office of the Family Advocate. These parties can be served with "notices" or "invitations" issued by the clerk of the court when the application is first brought. These workshops can also be used by the Family Advocate to make the follow-up appointment for the mediation session.

- to design and develop a set of audio-visual materials covering all four legal service areas included in interim family court policy, namely divorce, domestic violence, maintenance and the children's court;
- to reproduce the audio-visual materials in each of the most widely used languages of each pilot family court;
- to design and develop a series of information booklets for court users that supports the content of the audio-visual materials;
- to reproduce the booklets in the most widely used languages of each of the family courts;
- to design and develop a series of pamphlets for use outside of the court to inform potential court users of the services provided by the family court; and
- to reproduce the pamphlets in all of the languages identified above.

67 Ms DD Leppan, Presiding Officer Children's Court: Wynberg.

68 Shaw at 24.

69 BC Justice Review Task Force Report at 26.

3.3.5 For purposes of further analysis,[70] specific information can be grouped into the following two categories:

a) Legal knowledge (responding to the questions "Do I have a good knowledge of community sources where I can get legal information?", "Do I have a good understanding of alternatives to court action for resolving disputes around care, contact and maintenance?", and "Do I have a good understanding of the court process?").

b) "Non-legal knowledge" (responding to the questions "Do I have a good understanding of how children are affected by conflict between parents?", and "Do I have a good understanding of the needs and reactions of children to separation?"). Parents need information about how children are affected by separation and divorce in order to help their children through these difficult times. Information about separation and divorce should be available to children as well: Children need a safe place to go with questions that cannot be answered by their parents, and they need to know they can rely on the information they receive.[71]

3.3.6 Non-legal knowledge can also be differentiated according to the levels of state intervention in the family, ranging from "basic" to "therapeutic". Many parent education programmes fall in what may be labelled "basic" programmes, which offer information and advice.

3.3.7 The purpose of the rights education component (legal knowledge) is to impart a minimum level of knowledge to the users of court services so that they –

- are aware of the rights and obligations pertaining to their matter;
- understand what remedies would be feasible in their situation; and
- know what procedural steps lie before them.

Rights education gives the user of court services a frame of reference and grounding in the basic issues at play in the area of law she or he is concerned with, so as to create a foundation for the next stage of service delivery.[72]

3.3.8 Included in these programmes may also be the provision of information aimed at the children of the parties**.** Children should be informed of the process that lies ahead and the

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70 Kierstead at 146; See also BC Justice Review Task Force Report at 26.

71 BC Justice Review Task Force Report at 26.

72 Family Court Task Team.

manner in which they will be able to give their input concerning parenting arrangements throughout the process. Most important, children need to be assured that they will not have to make any decisions about or side with either of their parents.[73]

3.3.9 The second most common category is "skills-building" programmes (non-legal knowledge), which feature support and skills-building activities aimed at fostering changed parental behaviour.[74]

3.3.10 In many instances skills-building mandates informational classes that focus on the harm children suffer as a consequence of divorce and on behaviour parents should change in order to reduce the damage.[75]

3.3.11 Some authors[76] state that one can improve a child's well-being by introducing changes to parenting by means of education programmes.[77] For example, when practical information was sent to parents, it reduced the frequency with which mothers placed their children in loyalty situations and escalated the mother's support for the children's having a relationship with their father.[78] The reasons for attending the programmes would include the following:[79]

- Understanding the needs and reactions of children;
- understanding the importance of not putting children in the middle of the conflict;
- understanding how children get caught in the middle of conflict; and
- understanding the importance of taking care of oneself in order to be able to help children adjust.

3.3.12 These programmes could also inform parents of the benefits of cooperation and the skills needed to build a cooperative or parallel parenting relationship; stress the importance of

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73 De Jong 2018 (Part 1) at 60 with reference to Heaton "Parental responsibilities and rights" in Davel CJ & Skelton AM (eds) ***Commentary on the Children's Act*** Juta Revision Service 6 (2013) 3–34.

74 Kierstead at 141.

75 Schaefer at 492.

76 Sigal, Sandler, Wolchik and Braver as referred to in Dennill thesis at 16.

77 Dennill thesis at 16.

78 Arbuthnot, Segal & Schneider, 1994 as referred to in Dennill thesis at 138.

79 Kierstead at 145.

children's participation in decision-making about parenting arrangements; teach positive parenting behaviour and appropriate discipline; and alert parents to the important link between non-resident parent-child contact and compliance with child maintenance orders.[80]

3.3.13 On the other hand, lawmakers' claims that divorcing parents are unaware of and not interested in the needs of their children have been criticised. It has been argued that by identifying parental conduct as the sole source of problems for children of divorced parents, legislators ignore the structural causes of inter-parental conflict inherent in divorce and the harsh price divorce exacts from parents, especially and crucially from mothers. Financial strain and the lack of representation in legal procedures, to name two examples, are significant stress factors that accompany divorce.[81] It has been also argued that these programmes downplay the extent to which social, economic and legal conditions shape parents' behaviour after divorce, in particular gender roles and gender inequality.[82]

3.3.14 State intervention, therefore, ought to focus on helping parents adjust to the post-divorce reality, rather than on reminding them how detrimental their decision to divorce has been for their children's well-being.[83]

3.3.15 To develop the concept further for the purposes of analysing parent education programme content, it is suggested that two key requirements be highlighted:

a) Parties should be educated about processes that can assist them in resolving separation-related issues; and
b) content should be aimed at ensuring that parties understand and, very important, consent to the potential outcomes associated with their separation-related (legal and emotional) decisions and actions.[84]

3.3.16 Skills-building programmes aimed at achieving demonstrably changed parental practices should therefore be available on a voluntary attendance basis.[85] It has also been argued that

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80 De Jong 2018 (Part 1) at 60.

81 Schaefer at 537.

82 Schaefer at 494.

83 Schaefer at 537.

84 Kierstead at 148.

the design and scope of the programme should be case sensitive and sensitive to the needs of the particular family.[86] Rights-based programmes should, however, be compulsory.

b) Format of the information and education programme

3.3.17 Early information that can be particularly useful for families is the following: [87]

- Information that is accessible, in plain language, neutral and accurate;
- information that responds to the needs of self-represented litigants; and
- information that is available in a variety of forms, including in-person (through law information centres and phone lines), online, and printed.

Education can therefore take place either on a person-to-person basis, or by way of audio-visual and supporting materials.[88]

3.3.18 A considerable amount of family law information is now available as online and printed materials, through workshops and courses, and in-person government-supported information programmes, from court staff and from both private and publicly funded legal practitioners, in person or over the phone.[89]

3.3.19 However, it is not always easy for people with family justice problems to access the information they need.

3.3.20 The Working Group on Access to Legal Services in Ontario observed that there is little or no coordination of either the content of this information or the way in which the public can access it. There is considerable duplication, an overwhelming amount of information, and no

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85 Kierstead 2011 at 140 as referred to in Dennill at 137.

86 Rubain, Horn, Jethro & Blyth submission.

87 Action Committee at 6.

88 Family Court Task Team at 12.

89 The Law Commission of Ontario found there may actually be too much information available and it may not be as effective as it should be. For many individuals, online information may be hard to access.

way for people to know whether they are accessing the best source of information for the problem they are trying to deal with.[90] The same can be said of the situation in South Africa.

3.3.21 In SALRC Issue Paper 31 it was stated that the educational programme should last for 60 to 90 minutes, and should include a video, short lecture, and literature.[91]

3.3.22 Whether information is provided over the internet, in printed pamphlets, over the telephone, by means of videotapes, in courthouse signs, or any other medium, it must be done in a way that takes account of the user's needs, abilities and understanding. This means more than using simple words. It means breaking complex procedures down into simple steps, using familiar vocabulary in a consistent way, and organising material logically. For printed or internet materials it also means good design and use of tables, photographs, diagrams and any other visual device that can support and clarify the text. Web and printed information should be available in languages other than English and should also be available in formats designed specifically for people with a low literacy level and for those who are sight- and hearing-impaired.[92]

3.3.23 The envisaged information and education programme would run the risk of not meeting its desired objectives if –[93]

- the materials are not scripted appropriately for the target market;
- the language used in the materials is too complex or too informal;
- the materials are boring or repetitive;
- the materials are not translated well;
- there is an insufficient budget to translate and distribute the materials;
- the materials are poorly designed or printed or are of poor technical quality;
- the materials do not get used at the relevant points; or
- the service providers at the family courts[94] do not take the content of the materials into account when interacting with court users.

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90 MacPhail A ***Report of the Access to Legal Services Working Group*** Paper prepared for the Working Group on Access to Legal Services of the Action Committee on Access to Justice in Civil and Family Matters May 2012 at 6.

91 SALRC Issue Paper 31 at 3.1.4.3.

92 BC Justice Review Task Force Report at 31.

93 Family Court Task Team at 37.

3.3.24 Various formats for the programmes can be identified, such as the following:

(i) Electronic technology

3.3.25 Advances in technology may improve access to information. Technology definitely has a place and a role to play, especially in this day and age when technology develops almost daily. It should also be borne in mind, though, that the development and implementation of technology require an initial financial investment,[95] especially as the goal would be to have all courts equipped with it.[96]

3.3.26 Not everyone will have access to the technology, but officials will have more time to spend on people without access to the technology if those who do have access are not also standing in the queue.[97]

(aa) Internet websites

(A) Creating websites

3.3.27 An Internet-based information service has many advantages: it can be maintained centrally yet provide services at an unlimited number of locations; it is available around the clock form public places and from people's homes and workplaces; it can present the information at the level of detail that the user chooses and it can present material in many formats, including texts, photographs, animation, video and voice. Some American courts provide an internet programme that automatically generates court forms on the basis of the answers to a series of simple questions, and also provides virtual court tours by means of streaming video and a voice-over guide that speaks aloud the text that appears on the screen.[98]

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94 No family courts were instituted.

95 It also needs to be maintained and be online at all times. Technology needs to play a role, but one should be careful where and how and for what purpose it is used.

96 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD, in response to Question 15, SALRC Issue Paper 31.

97 Prof. Amanda Barratt, University of Cape Town, submission to SALRC Issue Paper 31, Question 15.

98 BC Justice Review Task Force Report at 28.

3.3.28 A number of reports recommend the creation of a central online coordination point or clearing house for legal information. In British Columbia a portal has been created, called Clicklaw, which houses legal information and education designed for the public by 24 organisations. Organised under the headings: “solve a problem”, “learn and teach”, “reform” and “research the law”, the portal provides a single point of public access to reliable and user-friendly information about civil, criminal and family law issues. An evaluation of the site is underway. Other sites focus on providing comprehensive information and self-help materials for family cases. These include New Brunswick’s Family Law NB59 and the BC Legal Services Societies’ Family Law Website.[99]

3.3.29 With regard to format, it was said that the “Do-it-yourself divorce kit” on the Australian Family Court’s website contains a lot of useful information, but that it was less user-friendly than, for example, the South African Department of Home Affairs website, which is better designed. One needs a well-designed, intuitive, user-friendly website. It should be available in all official languages. The idea of an information hub was supported as an excellent way to improve access to justice – teaching people about their rights, their children’s rights, the applicable law, and how to acquire legal assistance. The website should include videos explaining the law, the processes, the forms, and the legal terminology.[100]

3.3.30 Family law processes often require people to provide applicable official documents, including copies of their IDs, birth certificates, marriage certificates, etc. It can be very inconvenient to have copies made of these documents or have them certified by a Commissioner of Oaths. It should be possible for different government departments to “talk to each other”. It was proposed that if the DOJCD needs copies of documents held by the Department of Home Affairs, a DOJCD website should merely need to provide a link that would automatically generate a request to the Department of Home Affairs computer to provide the required documents directly to the DOJCD.[101]

(B) Internet kiosks available at entry points

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99 Shaw at 25.

100 Prof. Amanda Barratt, University of Cape Town, submission on Question 15.

101 Ibid.

3.3.31 Dedicated family justice computer kiosks located in convenient locations in the community could be considered. The envisaged kiosks would use touch-screen technology to convey information in a variety of formats, including text, audio and video. They could be stand-alone units, placed in libraries, schools, police stations, health care clinics or anywhere else where people can have free access to them. They could also be used in courthouses to supplement other information services. They could incorporate pamphlet shelves, providing take-away material.[102]

3.3.32 The Family Justice Review (Review Panel 2011)103 supported the idea of information hubs. It indicated that separating couples should first go to an information hub, where they can obtain easy access to a wide range of information and direction to further support them.104

3.3.33 The hub should be the place people will phone or visit to –

- ask a legal practitioner or staff member questions;
- get basic legal information and referrals to legal advice;
- obtain printed material;
- view informative videotapes;
- look up information or fill in forms on dedicated computer terminals;
- talk to a case assessor about services and options to meet their needs;
- attend courses, and
- participate in mediation that may be available at the same location.

3.3.34 In terms of the system set out in Chapter 2, it would make sense for government to have a physical presence in as many communities as possible. The courthouse often is a convenient location, with good access by public transport, and it is recognised by most people as a safe place.

3.3.35 Ways to make the necessary technology available to people without private access, particularly in rural areas, should be considered. Government agencies (such as magistrates' courts) could have computer terminals or hubs and officials should be available to help people

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102 BC Justice Review Task Force Report at 24.

103 Family Justice Review Panel UK Ministry of Justice Department of Education & Welsh Assembly Government ***Family justice review*** Final Report November 2011 (hereafter referred to as "UK Family justice review Final Report").

104 SALRC Issue Paper 31 at 3.5.22.

to complete the online forms. Appropriate non-governmental organisations could perhaps assist in this regard.[105]

(C) Online access

3.3.36 There is much discussion in the literature about the use of technology to deliver legal information. The Ontario Civil Legal Needs Study found that 84% of low and middle income Ontarians are connected to the internet and 93% of people living in British Columbia have access to high-speed internet. However, the Ontario Linguistic and Rural Access Report found that there is still a significant "digital divide" in Ontario. It cites a CRTC study that found that 47% of Canadian communities, mostly rural and in small towns, did not have broadband access. The Ontario report also says that even where broadband service is commercially available, many people do not have home computers or may be unable to afford the service. This report and others caution against over-reliance on technology for the delivery of legal information, arguing that this mode of delivery may not be effective for marginalised and vulnerable groups. With internet use among young people being much greater than in the general population and access to high-speed internet spreading, increased reliance on technological solutions, however, seems inevitable.[106] See the discussion on smartphones below.

3.3.37 For people who cannot easily get access to information, or who prefer to obtain services online, a virtual door to such information will be available over the internet.[107]

3.3.38 The bureaucracy and fuss of family legal matters could also be greatly reduced if people were able to complete many of the forms online.[108] Having active online forms (with relevant guiding information) will help officials or community workers when they assist people to complete the forms.[109]

(bb) Audio-visual material

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105 Prof. Amanda Barratt, University of Cape Town, submission on Question 15 of SALRC Issue Paper 31.

106 Shaw at 26.

107 BC Justice Review Task Force Report at 24

108 Prof. Amanda Barratt, University of Cape Town, submission on Question 15.

109 Ibid.

3.3.39 Making it compulsory for parents to take part in a video-based information and skills-building programme can be considered the least intrusive of interventions.[110]

3.3.40 Using audio-visual material for rights education has particular advantages and disadvantages. A key advantage is that consistent and accurate information can be provided in relation to all four legal service areas, at all courts, in all national languages. A disadvantage is that court users play a passive role in receiving the information and will have to wait to discuss the contents more actively when they meet with a real (non-virtual) legal adviser. Nonetheless, the cost of creating the applicable material is not exorbitant and would quickly be justified by the saving on staff time achieved.[111]

(cc) Smartphones

3.3.41 Any website should be smartphone-friendly so that people can access it through their phones if they do not have a computer.[112]

3.3.42 The possibility of using smartphone apps for this purpose should also be considered. A growing number of South Africans own and have access to the internet through a smartphone, and if people can provide information before they come to court, this will speed things up inside the court.[113]

ii) Information pamphlets/brochures

3.3.43 Printed material remains an important source of information for many people.

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110 Dennill thesis at 137.

111 Family Court Task Team at 12.

112 Prof. Amanda Barratt, University of Cape Town, submission to Question 15.

113 Ibid.

3.3.44 When parties get involved in a family dispute, they usually seek help at any of the many different entry points referred to in Chapter 2. Information pamphlets or information in other forms should be available at that stage as part of an information and education programme.[114]

(iii) Person-to-person interaction

3.3.45 Using staff to provide this service holds potential advantages and disadvantages. The primary advantage would be that well-trained rights educators could adjust their language use and the time spent with different users in accordance with different language preferences and visitors' previous experiences of the justice system.[115]

3.3.46 A primary disadvantage of this approach is, however, that each entry point would have to make available for this service component staff who are sufficiently proficient in all the potential language preferences of users. Using staff to render this service is also time-consuming and expensive. Staff members are faced with a recurring task of imparting the same (or very similar) knowledge over and over, an arrangement that may undermine consistency in education outcomes.[116]

3.3.47 However, research has shown that information and self-help services that are supported by person-to-person assistance significantly improve case outcomes. Facilitated self-help is particularly important for the many people who find resources in print challenging to use.[117]

(iv) Telephone

3.3.48 Telephonic access ensures privacy and gives equal access to those with limited literacy skills. See also the discussion on the use of smartphones above.

(v) Courses and workshops

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114 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

115 Family Court Task Team at 12.

116 Family Court Task Team at 12.

117 Action Committee at 38 (text).

3.3.49 The common themes that affect many people experiencing family break-up offer opportunities to provide people in groups with information. A more recent innovation in Canada, the Parenting After Separation (PAS) programme, gives parents information about the impact of separation on children and adults, and how parents can best assist their children through this difficult time; about the range of dispute resolution options available, including mediation and court procedures; and about the child support guidelines. The three-hour sessions are mandatory at British Columbia's largest Provincial Court locations for all contested cases involving children. Services are also offered on a voluntary basis in other communities and in several languages in the Lower Mainland.[118]

c) Process

3.3.50 In the UK, the Family Justice Review[119] proposed that there should be three main "stages" of dispute resolution in family matters. First, there would be an "information hub" comprising an online resource and telephone helpline.[120] The second stage would be "dispute resolution services", and the third and final stage would be the "court process".

3.3.51 In SALRC Issue Paper 31 the following ideas regarding the process to be followed were set out:[121]

a) Only once parents have attended an information and education programme should they be allowed to proceed with the next step, and this will depend on whether or not they have reached agreement on a parenting plan.

b) Parties will have to attend the session in person. Co-parents do not have to attend the programme jointly. Part of the registration process may involve obtaining the other parent's name so that each parent is registered for a different seminar date, if so preferred. Information about one parent's scheduled attendance date is not provided to the other parent.[122]

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118 BC Justice Review Task Force Report at 30.

119 Family justice review Final Report at par. 4.70.

120 See discussion of the use of technology above.

121 SALRC Issue Paper 31 at 245.

122 Kierstead at 143.

c) Certificates should be given for attendance at both the information programme and mediation. There must be a prescribed form for this. Reasons why mediation failed (if it did) do not have to be entered on the certificate.

3.3.52 An interesting example of how information and education programmes can be used in practice is the United Kingdom Family Mediation Information and Assessment Meetings (MIAMs).[123] At a MIAM, the mediator will guide the parties with respect to the available alternatives to a court process, especially mediation, and the advantages and disadvantages of each. Ultimately it is for the parties to decide whether they want to take the mediation road, but that decision is made after discussion with the mediator and therefore on the basis of informed views. If either party is legally aided, the legal aid fund will pay for the MIAM. Otherwise parties negotiate a fee with the mediator or the mediation provider. It has been found that if the parties received an explanation of the alternatives to a court process, the majority would take them. Where mediation is chosen it appears extremely successful. According to the Ministry of Justice, in 2013 nearly two-thirds of the couples who attended a single mediation session about child arrangements reached full agreement. Almost seven out of every ten couples who opted for mediation reached agreement. See the discussion in par. 3.2.8(c) above as well.

d) Culture

3.3.53 Where cultural differences prevail, in rural areas for example, the information and education programmes ought to be adapted culturally.[124] A client-centred approach requires the deepest respect for the client's culture and language.[125]

3.3.54 The approach to law reform and judicial law-making that is proposed here should therefore be one in which African values are considered at the start of the process. This means accepting that African values exist. These values display an emphasis that differs from that of

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123 ***ADR and civil justice report*** at 38-39.

124 Dennill thesis at 142.

125 Faris JA "African dispute resolution: Reclaiming the commons for a culture of harmony" Paper read at the Lawyers as Peacemakers and Healers: Cutting Edge Law Conference Phoenix School of Law Arizona 22-24 February 2013 at 9.

the Western world, and South Africans need to accept that they have a positive contribution to make towards creating a new society.[126]

3.3.55 In Canada it was noted that in an increasingly multicultural and pluralistic society communities are not affected in the same way:[127]

> Persons with certain religious convictions, persons in smaller communities, Aboriginal persons, and persons who emigrated from more traditional societies may perceive "the family" in a different way, compared to the "mainstream" or predominant way. Traditional notions about gender roles, extended family ties, divorce or parenting may prevail. However, families from more traditional societies may adapt different attitudes under the influence of a multi-cultural environment, in particular in urban centres. While recognizing the diversity of family life, the legal system has an obligation to observe mainstream expectations – both norms and human rights and constitutional requirements – about matters such as sex equality.

3.4 Who should manage and coordinate the information and education programmes and where should they be conducted?[128]

3.4.1 In SALRC Issue Paper 31 it was stated that the Office of the Family Advocate in the Western Cape and Johannesburg are currently presenting parent education and information programmes, and these are proving to be most successful. The family advocates are mediating and reaching more agreements with such a programme in place, because people are equipped with information that enables them to make informed decisions.[129]

3.4.2 It was concluded that these information or education programmes should be uniformly implemented across the country to ensure that all persons receive equal service and quality of service.[130] The service should be developed, coordinated and managed by the Office of the Family Advocate.[131] However, since the programme is mandatory and in view of the capacity

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126 Nhlapo T "South Africa's courts and lawmakers have failed the ideal of cultural diversity" The Conversation February 14, 2018 access at https://theconversation.com/south-africas-courts-and-lawmakers-have-failed-the-ideal-of-cultural-diversity-91508.

127 Shaw at 3, with reference to Law Commission of Ontario, ***Towards a more efficient and responsive family justice system*** Interim Report (February 2012) at 9.

128 See Questions 102 and 103 of the SALRC Issue Paper 31 and the responses to them.

129 SALRC Issue Paper 31 at par. 3.14.8.

130 SALRC Issue Paper 31 at par. 3.14.3.

131 SALRC Issue Paper 31 at par. 3.1.4.4.

constraints in the Office of the Family Advocate, the presentation of the programme could be outsourced to NGOs and other community organisations or offices.

3.4.3 In response to SALRC Issue Paper 31, where the matter was addressed in the questionnaire, various suggestions were received from the respondents:

a) The programme should be conducted through accredited institutions and a certificate should be issued.[132]
b) It should be constituted by mental health experts.[133]
c) Perhaps a legal practitioner should also make a presentation on the legal situation as many parents are not aware of the law and its consequences.[134]
d) General education should be made available and presented by the Family Advocate or adequately trained persons in NGOs, at community centres already frequented by the public, such as the "Saartjie Baartman Centre", to educate the public about parenting responsibilities and rights and other family law matters as well as the legal process involved.[135]
e) Specific education or "Parent Information programmes" should be provided where a party has already applied at court or at the Office of the Family Advocate, by the Office of the Family Advocate or satellite offices established for this purpose at offices of the Department of Social Development. It should be offered as workshops for groups. This function can also be performed by social workers or NGOs trained by the Office of the Family Advocate.[136]
f) DSD in conjunction with the DOJCD should be responsible.[137]
g) The Office of the Family Advocate manages this process in matters that are relevant to its office,[138] even if outsourced. [139]

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132 Office of the Family Advocate.

133 Cape Law Society (Ms Zenobia du Toit).

134 Cape Law Society (Ms Zenobia du Toit).

135 Ms DD Leppan, Presiding Officer Children's Court: Wynberg.

136 Ms DD Leppan, Presiding Officer Children's Court: Wynberg.

137 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

138 Office of the Family Advocate.

h) On the other hand it was stated that, in reality, the Office of the Family Advocate is overburdened as is the Department of Social Development. It should therefore perhaps be private practitioners who run an accredited programme and who have special rates, perhaps on a sliding scale.[140]

i) The possibility exists of making use of existing organisational structures already offering services to parents. NGOs such as the Parent Centre, which is based in Wynberg, Cape Town, but also offers community-based services in for example Gugulethu and Mitchells Plain, do deliver parenting skills enhancement programmes to parents, particularly those who approach the Children's Court. They offer ongoing workshops on "positive parenting", workshops on specific topics such as *Factors affecting Children's Behaviour* and *Helping Children deal with their Feelings,* as well as tailor-made workshops based on individual client needs or even on request, directly from a Presiding Officer. However, their work is seriously constrained by limited finances, person power and other resources. In addition, no legal information is included in this valuable educational input.[141]

j) If it is not state-funded, then it should take place at the private person's offices.[142]

k) Legal Aid SA also has an information and education function: one of the objects of Legal Aid South Africa is to provide education and information concerning legal rights and obligations.[143]

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139 Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division; Cape Law Society (Ms Zenobia du Toit).

140 Cape Law Society (Ms Zenobia du Toit).

141 Rubain, Horn, Jethro & Blyth submission.

142 Cape Law Society (Ms Zenobia du Toit).

143 Rubain, Horn, Jethro & Blyth submission. Section 3 of the **Legal Aid South Africa Act** 39 of 2014 reads as follows:

Objects of Legal Aid South Africa

3. The objects of Legal Aid South Africa are to—
(a) render or make available legal aid and legal advice;
(b) provide legal representation to persons at state expense; and
(c) provide education and information concerning legal rights and obligations, as envisaged in the Constitution and this Act.

See also LASA website: http://www.legal-aid.co.za/selfhelp/, which provides a self-help guide to obtaining a decree of divorce (a guide designed to assist a party in obtaining a decree of divorce in a Regional Court in South Africa). The site also provides information regarding, inter alia, children's rights, maintenance and mediation.

3.4.4 The increase in the number of unrepresented parties has brought about an increased effort to support parties to represent themselves as they navigate some or all of the stages of a family law case without the assistance of a legal practitioner.[144] SALRC Issue Paper 31 refers to the People's Family Law Centres (PFLCs) model of service provision, which was premised on the belief that self-representation, preceded by a system of user education and combined with the provision of start-up documentation, is a viable alternative in family law matters. Instead of managing clients' cases, the aim is user empowerment. The client is enabled to take control of his or her problem and to see the matter through to completion him- or herself. Should the matter become opposed and require legal representation, the Centre has a panel of attorneys to whom it could refer their clients.[145]

3.4.5 However, the LFO Connecting Report found that programmes and services designed to help people act on their own are suited to people with a high level of literacy and confidence; by contrast, people who experience language, literacy or cultural barriers lack the skills needed effectively to make use of such programmes and services. Self-help services are said to be more effective if delivered in conjunction with in-person services.[146]

3.4.6 As the University of Toronto Middle Income Report acknowledges, the options are in some situations either self-help services or no services. Moreover, the studies discussed earlier in the section on unrepresented litigants suggest that self-help services do benefit users.[147]

3.4.7 The studies also show that in-court assistance supporting self-help services significantly improves case outcomes. These studies suggest both that facilitated self-help may be particularly effective and that the effectiveness of self-help services may be improved by integration with other court services.[148]

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144 Shaw at 24.

145 Burman S & Glasser N "Giving effect to the Constitution: Helping families to help themselves" 2003 19 ***SAJHR*** 486 at 487.

146 Shaw at 24.

147 Ibid.

148 Ibid.

3.4.8 The court registry staff are often the first contact for people seeking information about the justice system. With increasing numbers of people going to court without legal practitioners, the registry staff are to a large extent the face of the family justice system to many people. Registry staff also need a clear understanding of what constitutes legal information, which they are allowed to give, and legal advice, which they are not.[149]

3.4.9 The position of paralegals was also discussed in SALRC Issue Paper 31[150] in the context of the PFLC. The need for structured training, accreditation procedures and greater specialisation amongst paralegal service providers was recognised. It was envisaged that appropriately qualified paralegals would be formally recognised and play an important role in specialising in family law. The National Paralegal Institute of South Africa (the umbrella organisation) and the Police, Private Security, Legal and Correctional Services Sector Education and Training Authority (POSLEC) were identified as relevant in this regard.

3.4.10 In the United Kingdom, only mediators accredited under the aegis of the Family Mediation Council (FMC) may conduct a MIAM.[151] Many people furthermore continue to retain legal practitioners privately, while others still get assistance from a range of *pro bono* clinics and legal services, as needed.[152]

3.5 Funding of information and education programmes

3.5.1 In SALRC Issue Paper 31 it was argued that a mandatory information or education programme for parents should be funded by the State.[153] To recover costs of services, a nominal fee would be charged for citizens who do not meet the indigence test.

3.5.2 In response to SALRC Issue Paper 31 it was argued[154] that critical services like these, which go some way to addressing people's lack of access to human and financial capital, should receive greater State support.

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149 BC Justice Review Task Force Report at 30.

150 SALRC Issue Paper 31 at 361.

151 ***ADR and civil justice report*** at 37.

152 BC Justice Review Task Force Report at 29.

153 SALRC Issue Paper 31 at 3.14.5.

3.5.3 In the United Kingdom, if either party is legally assisted, the legal aid fund will pay for the UK MIAM; in other cases parties negotiate a fee with the mediator or the mediation provider.[155]

3.5.4 It would seem as though provisions regarding funding for early intervention and development programmes have to some extent already been dealt with in Chapter 8 of the Children's Act 38 of 2005.[156] The provisions and programmes that the State has to fund under that chapter are very broad, and information or education programmes would, to all intents and purposes, fall into this category. However, the Children's Act does not provide for compulsory programmes and the nature of the programmes needs to be clarified. The Children's Act does, however, provide an existing baseline for the further development of these programmes. See the discussion of the pertinent provisions of the Children's Act in the next section below.

3.6 Should mandatory information and education programmes be legislated?

3.6.1 Since the Children's Act does to some extent provide for early intervention and prevention programmes, the development of the Act should be considered to see how it can support mandatory information and education programmes as envisaged in this Chapter.

3.6.2 In their responses to SALRC Issue Paper 31 respondents expressed the view that, although there are an enabling policy environment, appropriate legislation, and suitable

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154 Rubain, Horn, Jethro & Blyth submission.

155 ***ADR and civil justice report*** at 38.

156 Section 146 of the Children's Act, 2005, reads as follows:

"146 Provision of prevention and early intervention programmes

(1) The MEC for social development must, from money appropriated by the relevant provincial legislature, provide and fund prevention and early intervention programmes for that province.
(2) Prevention and early intervention programmes must—
(a) be provided in accordance with this Act; and
(b) comply with the prescribed national norms and standards contemplated in section 147 and such other requirements as may be prescribed.
(3) The provider of prevention and early intervention programmes only qualifies for funding contemplated in subsection (1) if the programmes comply with the prescribed national norms and standards contemplated in section 147 and such other requirements as may be prescribed.
(4) The funding of prevention and early intervention programmes must be prioritized—
(a) in communities where families lack the means of providing proper shelter, food and other basic necessities of life to their children; and
(b) to make prevention and early intervention programmes available to children with disabilities."

processes and structures available, ensuring the delivery of cost-effective, equitable, educational support to conflicted parents and their children has not yet been institutionalised.[157]

3.6.3 It was, therefore, argued that there is a lacuna in our law. This lacuna detrimentally affects the mediation and (inevitably) the litigation process, not only perpetuating the individual suffering of children that are raised in an environment of high parental conflict, but in so doing also adversely affecting such children's psychological development and eventually their capacity later in life to sustain meaningful adult and parenting relationships.[158]

3.6.4 The following provisions of Chapter 8 of the Children's Act, 2005, are of particular interest:

a) Section 45 of the Children's Act sets out matters that a children's court may adjudicate. Section 45(1)(e)(ii)[159] provides that the court may adjudicate any matter involving prevention or early intervention services.

b) Section 46 of the Children's Act sets out the orders that a children's court may make. Section 46(1)(g) makes provision for orders in respect of early intervention services and family preservation programmes,[160] but no provision is made for prevention programmes. The children's court may make child protection orders as well (section 46(1)(h)), which may include an order that a parent or care-giver undergo appropriate education.[161]

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157 Rubain, Horn, Jethro & Blyth submission.

158 Rubain, Horn, Jethro & Blyth submission.

159 "**Matters children's court may adjudicate**

45. (1) Subject to section 1(4), a children's court may adjudicate any matter, involving—
…
(e) the provision of—
(i) …
(ii) prevention or early intervention services;"

,160 "**Orders children's court may make**

46. (1) A children's court may make the following orders:

(g) an order subjecting a child, a parent or care-giver of a child, or any person holding parental responsibilities and rights in respect of a child, to—
(i) early intervention services;
(ii) a family preservation programme; or
(iii) both early intervention services and a family preservation programme;"

161 "**Orders children's court may make**

46. (1) A children's court may make the following orders:

c) Prevention and early intervention programmes are defined in section 143[162] and the purposes of these programmes are set out in section 144[163] of the Children's Act, 2005. It is important to note that the information and education programmes discussed in this report would be mostly categorised as "prevention programmes".

…

(h) a child protection order, which includes an order—

…

(iii) instructing a parent or care-giver of a child to undergo professional counselling, or to participate in mediation, a family group conference, or other appropriate problem-solving forum;"

[162] "**Prevention and early intervention programmes**

143. (1) Prevention programmes means programmes -

(a) designed to serve the purposes mentioned in section 144; and

(b) provided to families with children in order to strengthen and build their capacity and self-reliance to address problems that may or are bound to occur in the family environment which, if not attended to, may lead to statutory intervention.

(2) Early intervention programmes means programmes -

(a) designed to serve the purposes mentioned in section 144; and

(b) provided to families where there are children identified as being vulnerable to or at risk of harm or removal into alternative care."

[163] **"Purposes of prevention and early intervention programmes**

144. (1) Prevention and early intervention programmes must focus on -

(a) preserving a child's family structure;

(b) developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of their children, including the promotion of positive, non-violent forms of discipline;

(c) developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of children with disabilities and chronic illnesses;

(d) promoting appropriate interpersonal relationships within the family;

(e) providing psychological, rehabilitation and therapeutic programmes for children;

(f) preventing the neglect, exploitation, abuse or inadequate supervision of children and preventing other failures in the family environment to meet children's needs;

(g) preventing the recurrence of problems in the family environment that may harm children or adversely affect their development;

(h) diverting children away from the child and youth care system and the criminal justice system; and

(i) avoiding the removal of a child from the family environment.

(2) Prevention and early intervention programmes may include -

(a) assisting families to obtain the basic necessities of life;

(b) empowering families to obtain such necessities for themselves;

(c) providing families with information to enable them to access services;

(d) supporting and assisting families with a chronically ill or terminally ill family member;

(e) early childhood development; and

(f) promoting the well-being of children and the realisation of their full potential.

(3) Prevention and early intervention programmes must involve and promote the participation of families, parents, care-givers and children in identifying and seeking solutions to their problems."

d) The Children's Act, in section 148, vests the courts with the competence to order a child and family member of the child to participate an early intervention or family preservation programme.[164]

e) Section 146 of the Children's Act[165] provides for the funding of the prevention and early intervention programmes.

f) Section 147 of the Children's Act[166] outlines the national norms and standards for prevention and early intervention programmes.

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164 "**148 Court may order early intervention programme**

(1) Before making an order concerning the temporary or permanent removal of a child from that child's family environment, a children's court may order—

(a) the provincial department of social development, a designated child protection organisation, any other relevant organ of state or any other person or organisation to provide early intervention programmes in respect of the child and the family or parent or care-giver of the child if the court considers the provision of such programmes appropriate in the circumstances; or

(b) the child's family and the child to participate in a prescribed family preservation programme.

(2) An order made in terms of subsection (1) must be for a specified period not exceeding six months.

(3) When a case resumes after the expiry of the specified period, a designated social worker's report setting out progress with early intervention programmes provided to the child and the family, parent or care-giver of the child, must be submitted to the court.

(4) After considering the report, the court may—

(a) decide the question whether the child should be removed; or

(b) order the continuation of the early intervention programme for a further specified period not exceeding six months.

(5) Subsection (1) does not apply where the safety or well-being of the child is seriously or imminently at risk."

165 "**146 Provision of prevention and early intervention programmes**

(1) The MEC for social development must, from money appropriated by the relevant provincial legislature, provide and fund prevention and early intervention programmes for that province.

(2) Prevention and early intervention programmes must—

(a) be provided in accordance with this Act; and

(b) comply with the prescribed national norms and standards contemplated in section 147 and such other requirements as may be prescribed.

(3) The provider of prevention and early intervention programmes only qualifies for funding contemplated in subsection (1) if the programmes comply with the prescribed national norms and standards contemplated in section 147 and such other requirements as may be prescribed.

(4) The funding of prevention and early intervention programmes must be prioritised—

(a) in communities where families lack the means of providing proper shelter, food and other basic necessities of life to their children; and

(b) to make prevention and early intervention programmes available to children with disabilities."

166 "**147 National norms and standards for prevention and early intervention programmes**

(1) The Minister must determine national norms and standards for prevention and early intervention programmes by regulation after consultation with interested persons and the Ministers of Education, Finance, Health, Provincial and Local Government, and Transport.

(2) The national norms and standards contemplated in subsection (1) must relate to the following:

(a) Outreach services;

(b) education, information and promotion;

(c) therapeutic programmes;

(d) family preservation;

(e) skills development programmes;

g) Section 145 of the Children's Act[167] provides for the strategies to secure prevention and early intervention programmes.

h) Section 149 of the Children's Act[168] provides for a report to be submitted to court by social workers.

i) For the purpose of section 106(2) of the Act, the national norms and standards for child protection are set out in Part III of Annexure B of the regulations made under the Children's Act and include prevention and early intervention programmes and education and information programmes.[169]

j) For the purposes of section 147(2) of the Act, the national norms and standards for prevention and early intervention programmes are set out in Part IV of Annexure B of the regulations made under the Children's Act.

3.6.5 From the above exposition it is clear that considerable amendments would have to be effected to the Children's Act to provide for the proposal set out in this chapter. A decision will therefore have to be made about where the proposed provisions would best belong: as part of the Children's Act or as a part of a proposed Family Dispute Resolution Act.

3.6.6 Interesting examples of comparable legislation can be found in other jurisdictions.[170]

(f) diversion programmes;
(g) temporary safe care; and
(*h)* assessment of programmes."

167 "**145 Strategy for securing prevention and early intervention programmes**

(1) The Minister, after consultation with interested persons, and the Ministers of Education, Finance, Health, Provincial and Local Government and Transport, must include in the departmental strategy a comprehensive national strategy aimed at securing the provision of prevention and early intervention programmes to families, parents, care-givers and children across the Republic.

(2) The MEC for social development must within the national strategy referred to in subsection (1) provide for a provincial strategy aimed at the provision of properly resourced, co-ordinated and managed prevention and early intervention programmes.

(3) The MEC for social development must compile a provincial profile at the prescribed intervals in order to make the necessary information available for the development and review of the strategies referred to in subsections (1) and (2)."

168 "**149 Report to include summary of prevention and early intervention programmes**

When a report of a designated social worker is produced before a court in order to assist a court in determining a matter concerning a child, the report must contain a summary of any prevention and early intervention programmes provided in respect of that child and the family, parent or care-giver of the child."

169 Government Notice No. R. 261 dated 1 April 2010 General Regulations Regarding Children, 2010 (made under the Children's Act 38 of 2005).

170 See for e.g. BC Family Law Act 2013 (Duties of family dispute resolution professionals); Ontario Regulation 114/99 (Mandatory information programme); Arizona Revised Statutes (Domestic relations education plan);

3.6.7 In the United Kingdom, the Family Law Act, 1996, in section 8(2) and (5) in Part II[171] provided for the compulsory attendance of information meetings. In terms of section 8(6) the information meeting should be organised in accordance with prescribed provisions. Section 8(8) provided for Regulations to be made in terms of this section.[172] Section 8(9) dealt with the nature of the information that was to be provided.[173] Before making any regulations in terms of subsection (6), the Lord Chancellor had to consult such persons concerned with the provision of relevant information as he considered appropriate.

2011 Louisiana Laws Revised Statutes (Seminar for divorcing parents) 2017 Florida Statutes (Parenting course); Texas Family Code FAM 105.009 (Parent Education and Family Stabilization Course).

171 "**8. Attendance at information meetings**

(1)….
(2) A party making a statement must (except in prescribed circumstances) have attended an information meeting not less than three months before making the statement.
(3)-(4)…..
(5) Where one party has made a statement, the other party must (except in prescribed circumstances) attend an information meeting before—
(a) making any application to the court—
(i) with respect to a child of the family; or
(ii) of a prescribed description relating to property or financial matters; or
(b) contesting any such application."

172 "**8. Attendance at information meetings**

(1)-(7)……
(8) Regulations made under this section may, in particular, make provision—
(a) about the places and times at which information meetings are to be held;
(b) for written information to be given to persons attending them;
(c) for the giving of information to parties (otherwise than at information meetings) in cases in which the requirement to attend such meetings does not apply;
(d) for information of a prescribed kind to be given only with the approval of the Lord Chancellor or only by a person or by persons approved by him; and
(e) for information to be given, in prescribed circumstances, only with the approval of the Lord Chancellor or only by a person, or by persons, approved by him."

173 "**8. Attendance at information meetings**

(1)-(8)….
(9) Regulations made under subsection (6) must, in particular, make provision with respect to the giving of information about—
(a) marriage counselling and other marriage support services;
(b) the importance to be attached to the welfare, wishes and feelings of children;
(c) how the parties may acquire a better understanding of the ways in which children can be helped to cope with the breakdown of a marriage;
(d) the nature of the financial questions that may arise on divorce or separation, and services which are available to help the parties;
(e) protection available against violence, and how to obtain support and assistance;
(f) mediation;
(g) the availability to each of the parties of independent legal advice and representation;
(h) the principles of legal aid and where the parties can get advice about obtaining legal aid;
(i) the divorce and separation process."

3.6.8 The Family Law Act, 1996, was repealed and replaced with the Children and Families Act, 2014. Section 10 of the latter Act[174] makes provision for Family Mediation and Assessment Meetings (MIAMs). It seems as though the nature of the meetings was changed compared to those under the previous Act. The Family Procedure Rules provide for various aspects of these meetings.[175]

3.7 Conclusion: Proposed draft legislation

3.7.1 The SALRC's preliminary proposal is that legislation be developed that will provide for mandatory information and education programmes.

3.7.2 The SALRC, therefore, proposes that the mandatory information and education programmes be regulated as follows:

CHAPTER 3

INFORMATION AND EDUCATION[176]

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174 "**10. Family mediation information and assessment meetings**

(1) Before making a relevant family application, a person must attend a family mediation information and assessment meeting."

175 "**10. Family mediation information and assessment meetings**

(2) Family Procedure Rules—
(a) may provide for subsection (1) not to apply in circumstances specified in the Rules,
(b) may make provision about convening a family mediation information and assessment meeting, or about the conduct of such a meeting,
(c) may make provision for the court not to issue, or otherwise deal with, an application if, in contravention of subsection (1), the applicant has not attended a family mediation information and assessment meeting, and
(d) may provide for a determination as to whether an applicant has contravened subsection (1) to be made after considering only evidence of a description specified in the Rules."

176 The following definitions contained in the Family Dispute Resolution Bill, enclosed as Annexure B below, are specifically relevant to this Chapter:
"entry point" means the first point of access to the justice system for parties to a family law dispute, and includes –
(a) courts, social workers, legal practitioners, police stations, the Office of the Family Advocate, police stations, Thusong Service Centres, Therisano Centres; Legal Aid South Africa and community advice centres;
(b) traditional courts;
(c) community courts, university law clinics, non-governmental organisations and community-based organisations;
(d) churches and schools; and
(e) any other prescribed entry point ;

Reception at entry point

8.*(1) A family dispute resolution professional consulted by a party to a family law dispute must inform the parties about—*

(a) the mandatory and non-mandatory aspects and content of the family law information and education programme as set out in this Chapter; and

(b) the consequences of non-participation.

(2) If the dispute resolution professional concerned has not been appointed as a programme provider, he or she must refer the party to a programme provider appointed in terms of section 12(3) for purposes of participating in an information and education programme.

Information and education programme

9.*(1) The Minister, in collaboration with the Minister of Justice and Correctional Services, must develop—*

(a) minimum standards for an information and education programme for the purpose of educating family members about the effect of a family dispute

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"family" means a societal group that is or has been related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or cohabitation;
"family law dispute" means a dispute, or alleged dispute, in which one party maintains a particular point of view or claim or contention regarding the parties' respective responsibilities, interests and rights towards, or with respect to, any member of the family to which both parties belong, and the other party maintains a contrary or different one;
"family dispute resolution professional" means any of the following:

(a) A government employee tasked with dealing with family law disputes and includes a family advocate, social worker, social-services practitioner, police officer, court official and a Legal Aid South Africa employee;
(b) a legal practitioner advising a party in relation to a family law dispute;
(c) a mediator conducting a mediation in relation to a family law dispute;
(d) a collaborative legal practitioner;
(e) a parenting coordinator;
(f) an arbitrator conducting an arbitration in relation to a family law dispute; and
(g) a person providing family dispute resolution services in a class of prescribed persons, or any other person designated by the Minister;

"information and education programme" means a programme developed in accordance with this Act for the purpose of providing relevant information and education to the parties involved in a family dispute;
"Minister" means the Cabinet member responsible for social development or, where the context indicates another Minister, that Minister;
"proceedings" means any court litigation, settlement or alternative dispute resolution processes and includes the furnishing of legal advice;
"programme provider" means a person qualified and appointed in terms of section 12(3);

on adults and children, and about the manner in which such a dispute may be resolved; and

(b) an information and education programme in accordance with the minimum standards contemplated in paragraph (a) and in accordance with this Act.

(2) The minimum standards developed in terms of subsection (1)(a) must address—

(a) the nature of the programme;

(b) the funding of the programme;

(c) the effect of cultural diversity on the nature of the programme;

(d) the importance of acknowledging the voice of the child;

(e) arrangements for disputes in which domestic violence or child abuse may be a factor;

(f) the qualifications of programme providers; and

(g) the means of evaluating and maintaining the programme.

(3) Once the information and education programme has been developed, but prior to implementation, it must be submitted to the Chief Justice for consultation.

Content of information and education programme

10.*(1) The information and educational programme referred to in section 9(1)(b) must at a minimum include instruction about the following matters—*

(a) set out in Part A of the programme:

(i) Ways in which family law disputes may be resolved other than by the court;

(ii) the suitability of mediation or any other way of resolving disputes, such as family arbitration or collaborative dispute resolution, as a possible way of resolving the dispute to which the matter concerned relates;

(iii) the nature of mandatory mediation as set out in this Act;

(iv) the availability of independent legal advice and representation to a party;

(v) the conditions for obtaining legal aid and where the parties can get appropriate legal advice;

(vi) referral to other non-legal service providers or agencies;

(vii) the legal process of divorce or separation and the responsibilities and rights of the parties in all circumstances;

(viii) the nature of financial issues that may arise as a result of divorce or separation, and services that are available to assist the parties; and

(ix) protective measures available in the case of violence and all forms of abuse and how to obtain support and assistance; and

(b) set out in Part B of the programme:

(i) The role of the Office of the Family Advocate;

(ii) the emotional, psychological, physical and other short-term and long-term effects of conflict on both children and adults;

(iii) the importance of recognising the welfare, wishes and feelings of children;

(iv) how the parties may acquire a better understanding of the manner in which children can be assisted to cope with the breakdown of a relationship or any other family dispute;

(v) the importance of avoiding the placing of children at the centre of conflict;

(vi) information for children and parents about separation and divorce, and their adjustment after the separation or divorce;

(vii) the responsibilities and rights of parents and the advantages of parenting plans;

(viii) the suitability of parenting coordination; and

(ix) the role of support systems.

(2) Apart from the matters referred to in subsection (1), the information and education programme must also include instruction about the following matters set out in Part C of the programme:

(a) The developmental and psychological needs and responses of children;

(b) the positive parenting behaviour skills needed to build a cooperative parallel parenting relationship; and

(c) the importance of a parent taking care of him- or herself in order to be able to help his or her children to adjust.

Format of the programme

11.*(1) The format of the programme must include, but not be limited to, the following communication tools as prescribed:*

(a) Internet website;

(b) audio-visual materials;

(c) in-person lectures; and

(d) literature.

(2) The communication tools referred to in subsection (1) must be provided in a party's home language at prescribed locations.

Availability, administration and implementation of programme

12.*(1) The Minister must oversee the administration, adoption and implementation of the programme at all entry points, other than the courts, for use by the participants who are required to attend.*

(2) The Office of the Chief Justice must oversee the administration, adoption and implementation of the programme in the courts for use by the participants who are required to attend.

(3) An information and education programme must be offered by a person who—

(a) is qualified and appointed as prescribed; and

(b) has no financial or other interest in any aspect of the family dispute between the parties.

(4) Subject to subsection (3), nothing precludes a dispute resolution professional from acting as programme provider.

(5) The information and education programme must be available at the places and times prescribed.

(6) Information as prescribed must be provided to parties (other than during an information and education programme) in cases where mandatory participation in a programme does not apply.

Applicability of programme

13. *(1) The parties in any family law dispute that—*

(a) does not affect the rights or interests of a child must participate in the information and education programme contemplated in section 10(1)(a), as set out in Part A of the programme;

(b) affects the rights or interests of a child, must—

(i) participate in the information and education programme contemplated in section 10(1)(a) and (b), as set out in Parts A and B of the programme; and

(ii) ensure that a child involved in the family dispute receives the information contemplated in section 10(1)(b)(vi),

before any proceedings may commence, unless—

(aa) a court determines, for reasons that may include urgency and possible hardship, that participation is not in the best interests of the parties or the child;

(bb) a party is or will be enrolled in an education programme that the court deems to be comparable;

(cc) a court determines that a party has previously completed an educational programme pursuant to this section, or a comparable programme, and the court is of the opinion that the party need not attend the programme again;

(dd) a family dispute resolution professional is of the opinion that the safety of the parties or of their children is at risk;

(ee) a party lives in an area where the programme is not available; or

(ff) the court determines that participation is unnecessary in the circumstances of the case concerned.

(2) Parties in any family law dispute that affects the rights or interests of a child may participate in the information and education programme contemplated in section 10(2), as set out in Part C of the programme, before any proceedings commence.

Certificate of attendance

14. *A programme provider appointed in terms of section 12(3) must furnish each party who attends with a—*

(a) certificate of attendance as prescribed; and

(b) list of available certified mediators.

Compliance

15*.(1) Failure of a party to comply with section 13(1)(a) has the effect that—*

(a) when both parties refuse to participate, no further proceedings may take place; and

(b) when one of the parties refuses to participate, a negative inference may be drawn regarding that party's bona fides and a punitive order as to costs, or any other appropriate order, may be made at the discretion of the court in the event of any subsequent court proceedings.

(2) Failure of a party to comply with section 13(1)(b) has the effect that—

(a) when both parties refuse to participate, no further proceedings may take place; and

(b) when one of the parties refuses to participate—

(i) a negative inference may be drawn as to that party's intentions regarding the best interests of the child concerned; and

(ii) a punitive order as to costs, or any other appropriate order, may be made at the discretion of the court in the event of any subsequent court proceedings.

(3) Failure of a dispute resolution professional to comply with section 8 will result in—

(a) a negative inference being drawn with respect to the bona fides of the family dispute resolution professional; and when the rights or interests of a child are affected, to the professional's intentions regarding the best interests of the child concerned; and

(b) a punitive order as to costs, or any other appropriate order, may be made, where applicable, at the discretion of the court in the event of any subsequent court proceedings.

PART C: FAMILY MEDIATION

Chapter 4: Introduction

4.1 Mediation as an aid to promote access to justice

4.1.1 Given the country's unjust and unequal past,[1] the concept of access to justice is valued highly and is regarded as "an inalienable constitutional right flowing from its constitutional democracy".[2]

4.1.2 The concept of "access to justice" needs to be clarified, however.

4.1.3 This term is sometimes regarded as equivalent to the right of access to a court or an independent tribunal and to a fair trial in such a court or tribunal, as enshrined in section 34 of the Bill of Rights in the Constitution.[3] See Chapter 5 below for a full discussion of section 34.

4.1.4 However, the notion of access to justice has evolved from this rather narrow concept that refers merely to the ability to gain access to legal and state services, to a wider concept that encompasses social and economic justice.[4]

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1 The fruits of colonialism and apartheid were the denial of justice. Justice was a commodity that was accessible only to the privileged, the powerful and the rich, to the detriment of the poor, the marginalised and the weak. Radebe J "Challenges facing access to justice in South Africa" Presentation at the University of Cape Town 16 October 2012 access at http://www.justice.gov.za/m_speeches/2012/20121016_minuct.html.

2 Maclons W ***Mandatory court based mediation as an alternative dispute resolution process in the South African civil justice system*** LLM thesis University of the Western Cape 26 November 2014 (hereafter referred to as "Maclons") at 14.

3 Sec 34 of the Constitution of the Republic of South Africa, 1996, provides as follows:

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

4 Vettori S "Mandatory mediation: An obstacle to access to justice?" 2015 15(2) ***African Human Rights Law Journal*** 355 at 359 with reference to Open Society Foundation of South Africa "Access to justice round-table discussion", Parkton Ian Hotel, Johannesburg, South Africa, 22 July 2003 5 (hereafter referred to as "Vettori") access at http://dx.doi.org/10.17159/19962096/2015/v15n2a6. She does not, however, subscribe to this wider context.

4.1.5 According to the United Nations Development Programme (UNDP),[5] "access to justice" should not be equated with "access to the formal justice system". The meaning of "access to justice" is interpretive and contextual. It refers to the ability of a person to seek and obtain a remedy to a grievance through any formal or informal system of justice.

4.1.6 Access to justice can therefore be described as the right to resolve a dispute under the general auspices of the state, a right which must be equally accessible to all and must lead to results that are individually and socially just.[6]

4.1.7 Based on the above, access to justice in a civil justice system may therefore be deemed to include the right of access to courts together with other affordable, procedurally simple, and expedient methods of alternative dispute resolution.[7]

4.1.8 In its comments to the Rules Board, the LSSA, for example, indicated that it viewed the move towards mediation a positive one if the aim and outcome are to make justice more accessible.[8]

4.1.9 It is also important to note that the primary aim of the Civil Justice Reform Project (CJRP), approved by Cabinet in 2010, which provided for mandatory court-based mediation, was:[9]

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5 United Nations Development Programme ***Programming for justice: Access for all – A practitioner's guide to human rights-based approach to access to justice*** 2005 at 4 and 5.

6 Cappeletti M & Garth B (eds) ***Access to Justice: A World Survey***, Vol 1 Sitjoff and Noordhoff – Alpeneaadenrijn, Milan, 1978 referred to in De Palo G "Mediation as alternative dispute resolution (the functioning of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters)" Paper read at a workshop for the European Parliament's Committee on Legal and Parliamentary Affairs "Cross-border activities in the EU – Making life easier for citizens" February 2015, published by the Policy Department of the European Parliament as PE510,003 280 at 285 access at http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510003/IPOL_STU(2015)510003_EN.pdf

7 Maclons at 13.

8 The Cape Law Society, at its annual general meeting in November 2011 hosted a workshop on the draft rules led by a panel consisting of Daryl Burman, Graham Bellairs, Teresa Erasmus, Adam Pitman and Traci Lee Bannister, who are members of the society's specialist committees. Mr Bellairs highlighted some of the areas the LSSA considered problematic and some aspects that required clarification.

9 Hawkey K "Mandatory mediation rules to shake up justice system" (2011) 515 ***De Rebus*** 21 (hereafter referred to as "Hawkey").

> the alignment of the civil justice system with the constitutional values, and the simplification and harmonisation of rules to make justice easily and equally accessible to all, particularly the vulnerable and the poor members of society. An effective and efficient justice system is indispensable for upholding the rule of law in the country.

4.1.10 it should also be noted that mere access to a dispute resolution process, be it in or outside the courts, does not necessarily result in justice. Many legal systems are plagued by high costs, delays, complexity and uncertainty. The result of these factors, many argue, is, at best, a delay in access to justice and, at worst, a denial of the right of access to justice.[10]

4.1.11 In order to ensure access to justice in a civil justice system, the system should therefore[11] –

a) be just in the outcomes it delivers;
b) be fair in the way it treats litigants;
c) offer appropriate procedures at reasonable cost;
d) deal with cases with reasonable speed;
e) be understandable to those who use it;
f) be responsive to the needs of those who use it;
g) provide as much certainty as the nature of particular cases allows; and
h) be effective, that is, adequately resourced and organised.[12]

4.1.12 In view of the above, it can be argued that optimal use of ADR (in this instance, mediation) enhances access to justice, especially in a country such as South Africa, where costs associated with litigation have spiralled.[13]

4.1.13 Recent studies have adequately established the general benefits of mediation. Parties tend to endorse mediation because of the opportunities it offers to participate in the process, to tell their side of the story and to contribute in determining the outcome of the dispute. Attorneys have found that mediation has improved communication between the parties and the attorneys.

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10 Vettori at 356.

11 Maclons at 145.

12 Private dispute resolution proceedings will always be regulated by law and by the Constitution and fairness is one of the core values of our Constitutional order. See Chapter 5 below.

13 Opening Address by Minister Of Justice And Constitutional Development In South Africa, Mr J Radebe, at the Inaugural African ADR And Arbitration Conference Cape Town 28 November 2013 (hereafter referred to as "Radebe Opening Address"): See also South African Law Reform Commission ***Investigation into legal fees*** SALRC Issue Paper 36 Project 142 16 March 2019.

Furthermore, a majority of studies show that mediated cases have a higher rate of settlement than cases that did not undergo mediation. A number of studies also show a greater compliance rate for judgments resulting from mediation than for judgments resulting from the litigation process.[14]

4.1.14 Instances where mediation would be the preferred process to resolve disputes have also been identified by respondents to SALRC Issue Paper 31:[15]

a) One respondent stated that mediation is relevant where minor children are involved.[16] Other respondents argued that mediation should not be limited to children's issues, but should also include issues relating to matrimonial property and maintenance. All issues are intrinsically linked to each other and mediation is the appropriate option.[17] Mediation would be preferable in all opposed matters, not just those involving children.[18] The majority of respondents stated that mediation should be the preferred choice in all family or relational disputes/matters.[19]

b) The fact that the children involved are no longer minors does not mean that disputes between the parents do not affect such children. By their participation in the mediation process, parties will gain greater understanding of the benefits of mediation and how to deal with their children and/or each other in the future in a sound manner. Mediation in such cases can also be educational and informative.[20]

c) It was noted that different family scenarios require different approaches to the mediation process. The following mediation options were highlighted:[21]

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14 Quek D "Mandatory mediation: An oxymoron? Examining the feasibility of implementing a court-mandated mediation program" 2010 11 ***Cardozo Journal of Conflict Resolution*** 479 (hereafter referred to as "Quek") at 482.

15 SALRC Issue Paper 31: Questions 61 and 58.

16 Office of the Family Advocate.

17 Prof. M de Jong SALRC meeting of experts on 16 February 2016.

18 Ms Jakkie Wessels Regional Court President: Limpopo Regional Division.

19 Dr Astrid Martalas; Mr Craig Schneider; Cape Law Society (Ms Zenobia du Toit); Ms Karen Botha; LSSA; Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division.

20 Dr Astrid Martalas; Mr Craig Schneider.

21 Department of Social Development ***Framework on mediation for social services professionals mediating family matters – Mediation: An alternative dispute resolution programme and/or programme to prevent family disputes*** March 2012 (hereafter referred to as "DSD Social Services Mediation Framework").

- As a preventative action, such as reaching premarital agreements or establishing a service level agreement between the biological parent and the foster parent regarding contact with the child or children involved.
- When there is a breakdown in family relationships (parents and their children, adult children and their older parents, adult siblings, blended families, divorcing or divorced parents, family members as business partners).
- When relationships need to be reconciled or restored owing to social injustices in victim and perpetrator relations.
- When family disputes are across borders due to migration (immigration and emigration) and globalisation.
- When disputes over grandchildren arise between grandparents and biological parents.
- When individual or collective trauma requires intervention.

4.1.15 Examples of cases where the courts have referred to the advantages of mediation or referred the parties to mediation are as follows:

a) ***Van den Berg v Le Roux***[22] dealt with a divorce and considered the guardianship and custody of a legitimate child. The court *inter alia* ordered the divorced parents to mediate any future dispute between them before approaching the courts. If mediation failed, a psychologist or a clinical psychologist or any other competent person would be entitled to make a decision concerning the dispute. Only after completion of the mediation process would the parties be permitted to approach the court. The court further ordered the parties to split the costs of mediation, unless the mediator in the case determined otherwise.

b) In **G v G**[23] it was indicated, with reference to a ten-year study undertaken by LF Lowenstein, that divorce mediation is seen by participants as significantly more satisfactory than the general adversarial process.

c) ***Townsend-Turner v Morrow***[24] dealt with the access of grandparents to their grandchild. The court ordered the parties to attend mediation, as directed by the

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22 ***Van den Berg v Le Roux*** 2003 (3) All SA 599 (NC) at 614.

23 ***G v G*** 2003 (5) SA 396 (Z) at 412.

24 ***Townsend-Turner v Morrow*** 2004 (2) SA 32 (C) at 55.

appointed mediators, in order to resolve the areas of conflict between them, and the manner of dealing with such conflicts appropriately, in particular so as not to affect negatively the child's welfare. Two co-mediators were to be appointed by the Office of the Family Advocate within seven days of the granting of the Order if the parties themselves were not able to agree on the mediators from the list of mediators made available to them through the Office of the Family Advocate. If after four sessions of mediation, or three months, whichever occurred first, the mediators in their sole discretion concluded that the issues of conflict were not capable of being mediated, they had to file a certificate to this effect with the Office of the Family Advocate. The costs of the mediation had to be shared equally between the applicants and the respondent.

c) In ***MB v NB***,[25] in addition to the benefits and suitability of mediation, the court emphasised that a positive duty rested on the disputants' attorneys to advise their clients to mediate their dispute before resorting to litigation. The court showed its displeasure with the attorneys' failure to do so by ordering that the fees the attorneys could recover from their own clients be capped.

d) In ***FS v JJ***,[26] which dealt with a protracted contact dispute between the unmarried father of a four-year-old daughter and the girl's maternal grandparents, Lewis JA said that she endorsed the views expressed by Brassey AJ in ***MB v NB***, namely that mediation in family matters is a useful way of avoiding protracted and expensive legal battles and that litigation should not necessarily be the first resort. Lewis JA declared that the father was the holder of full parental responsibilities and rights with respect to the child and ordered that the grandparents may have contact with the girl on a regular basis. She further ruled that, if the parties experienced difficulty in arranging contact, they should first attempt to resolve this through a mediator rather than through court proceedings.

e) In ***Port Elizabeth Municipality v Various Occupiers***[27] the Constitutional Court stated the advantages of mediation as follows:

> [42] Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By

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25 ***MB v NB*** 2010 (3) SA 220 (GSJ).

26 ***FS v JJ*** 2011 (3) SA 126 (SCA).

27 ***Port Elizabeth Municipality v Various Occupiers*** 2005(1) SA 217 (CC).

> bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways round sticking-points in a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can be better used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society.

4.2 Mediation process

4.2.1 As discussed above,[28] the regulation of the mediation process itself will be primarily addressed in a generic Mediation Act to be developed as part of the SALRC Project 94 investigation. The proposed Mediation Act will be applicable to all mediations, except where its jurisdiction is specifically excluded by other content-specific mediation legislation, such as the proposed Family Dispute Resolution Act.[29]

4.2.2 Matters that may be included in the proposed generic Mediation Act are the following:

- Definitions
- Matters suitable for mediation
- Accreditation and training of mediators
- Funding and fees
- Agreement to mediate
- Interruption of prescription
- Confidentiality of the mediation process
- Right to legal representation
- Termination of the mediation process
- Certification of participation
- Enforcement of outcome

4.2.3 A discussion paper dealing with the topics referred to above is being developed in Project 94. The Advisory Committees for Projects 94 and 100D will assist each other in finalising both projects. Stakeholder input on these topics already made to this investigation will

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[28] See Chapters 1 and 2.

[29] It may be possible that an overarching Alternative Dispute Resolution Act may eventually be enacted that will contain chapters dealing with various forms of dispute resolution processes.

be included in the present Discussion Paper, and on completion both papers will be distributed to stakeholders identified in the investigations. Where it is found to be necessary to deviate from the basic principles set out in the Mediation Act, the topics concerned will be dealt with fully in the Family Dispute Resolution Act.

a) Mandatory vs voluntary mediation

4.2.4 An important question that needs to be considered is whether family mediation should be mandatory or voluntary in nature, but since it is a context-specific matter, it will not be dealt with in the generic Mediation Act. Internationally, views differ on this question.[30]

4.2.5 Empirical data from the United States of America provide supportive evidence that mandatory mediation is much more effective than a purely voluntary process.[31] Research indicates that, despite its documented advantages, mediation is under-utilised when it is not mandatory.[32] Parties and their attorneys are still accustomed to treating litigation as the default mode of dispute resolution, and initiating mediation may be furthermore perceived as a sign of weakness.[33] Hence, the full benefits of mediation are not reaped when parties are left to participate in it voluntarily. Litigants are, in fact, more willing to talk to each other than they or their legal practitioners care to admit[34] and are, therefore, relieved when they do not have to show "weakness" by having to invite their adversaries to the mediation table.[35]

4.2.6 In South Africa, the Minister of Justice and Constitutional Development indicated during a public presentation that he was aware of the view held by some that a compulsory court-

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30 SALRC Issue Paper 31 page 188 par. 3.8.41.

31 Casals MM "Divorce mediation in Europe – An introductory outline" 2005 9(2) ***Electronic Journal of Comparative Law*** at 9 access at www.ejcl.org/92/art 92-2.pdf.

32 SALRC Issue Paper 31 at 188 par. 3.8.41 and the references it contains.

33 Quek at 483.

34 Quek at 483 refers to studies that show that parties who have entered mediation reluctantly still benefited from the process even though their participation was not voluntary.

35 Joubert J & Jacobs Y "The debate – A case for mandatory mediation in South Africa" October 2009 ***Legalbrief Today*** (hereafter referred to as "Jacobs & Joubert ***Legalbrief Today***").

based mediation is the preferred option. He expressed the wish that the SALRC should investigate the matter thoroughly and make appropriate recommendations.[36]

4.2.7 The Civil Justice Reform Project (CJRP) approved by Cabinet in 2010 provides for mandatory court-based mediation.

4.2.8 In 2011 the first draft of the court-annexed mediation rules also provided for compulsory mediation. These rules were amended, however, to provide for voluntary mediation only, since no mediation legislation existed at the time.

4.2.9 There already are a number of examples of mandatory mediation in South African statutory law. Of particular importance in this investigation is the Children's Act,[37] which makes provision for the mandatory use of mediation in certain circumstances.[38] With the assistance of the mediator, parents work together towards reaching an agreement which best serves the interests of the child.

4.2.10 In SALRC Issue Paper 31, ADR in the Children's Act was discussed by drawing a distinction between direct and indirect opportunities for ADR.[39] Direct opportunities for ADR refer to instances when the Children's Act expressly makes ADR mandatory or discretionary, at the instance of the court. By contrast, indirect opportunities for ADR refer to provisions in the Children's Act that do not contemplate ADR but might recommend it, if one has regard to the aims and objectives of those provisions.[40]

4.2.11 Instances of mandatory mediation in terms of the Children's Act are the following:

- Section 21:[41] Parental responsibilities and rights of unmarried fathers[42]

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36 Radebe Opening Address 28 November 2013.

37 Children's Act 38 of 2005.

38 See full discussion in SALRC Issue Paper 31 at 161 par. 3.7.5 – 3.7.46.

39 De Jong M "Opportunities for mediation in the new Children's Act 38 of 2005" 2008 71 ***THRHR*** 630 (hereafter "De Jong 2008 ***THRHR***") at 631. Paleker M "Mediation in South Africa's new Children's Act: A pyrrhic victory" at 4 paper read at the Asia-Pacific Mediation Forum Conference, 2008 access at http://www.asiapacificmediationforum.org/resources/2008/7. See also DSD ***Social Services Professionals Mediation Framework*** 2012 at 85.

40 DSD ***Social Services Professionals Mediation Framework*** 2012 at 86.

41 Section 21 of the Children's Act , 2005, provides as follows:

- Section 33:[43] Parenting plans between co-holders of parental responsibilities and rights.

4.2.12 Instances where a court has a discretion in terms of the Children's Act to refer a matter to ADR are the following:

- Section 49: Lay-forum mediation[44]

"**Parental responsibilities and rights of unmarried fathers**

21. (1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child—

(a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or

(b) if he, regardless of whether he has lived or is living with the mother—

(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;

(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

(iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

(2) This section does not affect the duty of a father to contribute towards the maintenance of the child.

(3)*(a)* If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1)*(a)* or *(b)*, the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.

(b) Any party to the mediation may have the outcome of the mediation reviewed by a court.

(4) This section applies regardless of whether the child was born before or after the commencement of this Act."

42 See discussion on unmarried fathers in SALRC Issue Paper 31 at 2.5.

43 Section 33 of the Children's Act, 2005, reads as follows:

"**Contents of parenting plans**

(1) The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.

(2) If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.

(3) A parenting plan may determine any matter in connection with parental responsibilities and rights, including—

(a) where and with whom the child is to live;

(b) the maintenance of the child;

(c) contact between the child and—

(i) any of the parties; and

(ii) any other person; and

(d) the schooling and religious upbringing of the child.

(4) A parenting plan must comply with the best interests of the child standard as set out in section 7.

(5) In preparing a parenting plan as contemplated in subsection *(2)* the parties must seek—

(a) the assistance of a family advocate, social worker or psychologist; or

(b) mediation through a social worker or other suitably qualified person."

44 Section 49 of the Children's Act, 2005 provides as follows:

- Section 70: Family group conference[45]
- Section 71: Mediation by lay-forum or traditional authority[46]
- Section 69(1): Pre-hearing conference[47]

"**Lay-forum hearings**
49. (1) A children's court may, before it decides a matter or an issue in a matter, order a lay forum hearing in an attempt to settle the matter or issue out of court, which may include—
(a) mediation by a family advocate, social worker, social service professional or other suitably qualified person;
(b) a family group conference contemplated in section 70*;* or
(c) mediation contemplated in section 71.
(2) Before ordering a lay forum hearing, the court must take into account all relevant factors, including—
(a) the vulnerability of the child;
(b) the ability of the child to participate in the proceedings;
(c) the power relationships within the family; and
(d) the nature of any allegations made by parties in the matter."

[45] Section 70 of the Children's Act, 2005 provides as follows:

"**Family group conferences**

70. (1) The children's court may cause a family group conference to be set up with the parties involved in a matter brought to or referred to a children's court, including any other family members of the child, in order to find solutions for any problem involving the child.
(2) The children's court must—
(a) appoint a suitably qualified person or organisation to facilitate at the family group conference;
(b) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and
(c) consider the report on the conference when the matter is heard."

[46] Section 71 of the Children's Act, 2005 provides as follows:

"**Other lay-forums**
71. (1) The children's court may, where circumstances permit, refer a matter brought or referred to a children's court to any appropriate lay-forum, including a traditional authority, in an attempt to settle the matter by way of mediation out of court.
(2) Lay-forums may not be held in the event of a matter involving the alleged abuse or sexual abuse of a child.
(3) The children's court may—
(a) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and
(b) consider a report on the proceedings before the lay-forum to the court when the matter is heard."

[47] Section 69 of the Children's Act, 2005 provides as follows:
"**Pre-hearing conferences**
69. (1) If a matter brought to or referred to a children's court is contested, the court may order that a pre-hearing conference be held with the parties involved in the matter in order to—
(a) mediate between the parties;
(b) settle disputes between the parties to the extent possible; and
(c) define the issues to be heard by the court.
(2) Pre-hearing conferences may not be held in the event of a matter involving the alleged abuse or sexual abuse of a child.
(3) The child involved in the matter may attend and may participate in the conference unless the children's court decides otherwise.
(4) The court may—

4.2.13 In SALRC Issue Paper 31 reference was also made to the view, expressed by some experts, that in certain instances mediation would not only be inappropriate, but would actually have no chance of resulting in a settlement. To compel spouses in such circumstances to mediate would be a complete waste of time and effort. Far more constructive would be to popularise the concept as being cheaper and likely to end in a more acceptable outcome, so that members of the public would, of their own volition, choose mediation.[48]

4.2.14 SALRC Issue Paper 31, therefore, posed the question whether provision for voluntary or mandatory mediation should be made in the proposed Family Dispute Resolution Act.[49]

4.2.15 Except for one stakeholder, all the parties who responded to this question agreed that mediation should be mandatory in any relational matter – any dispute relating to a family or to parties in a personal relationship should be referred to mediation.[50] It was argued that referral should be possible under all circumstances, unless there are allegations of physical or sexual abuse, in which case mediation would not be advisable.[51] Screening for domestic violence should be mandatory.[52] It was also argued that mediation should be mandatory in all defended divorce matters.[53] Some stakeholders were of the opinion that provision should be made for both voluntary and mandatory mediation.[54] It was noted, however, that mandatory mediation may prove difficult if a party who is compelled to mediate is not a willing participant and therefore obstructs the process. However, parties should at least be put under an obligation to

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(a) prescribe how and by whom the conference should be set up, conducted and by whom it should be attended;
(b) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and
(c) consider the report on the conference when the matter is heard."

48 SALRC Issue Paper 31 at 189 par. 3.8.46 and the references it contains. See also Mr Charles Mendelow's submission to SALRC Issue Paper 31.

49 SALRC Issue Paper 31 Questions 44 and 54.

50 Dr Astrid Martalas; Mr Craig Schneider; Office of the Family Advocate; Ms Karen Botha; Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division.

51 Ms Karen Botha.

52 Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division.

53 Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division.

54 Office of Family Advocate.

consider mediation and attend one meeting with a mediator. If it is clear that the mediation would not be successful, a certificate of outcome could be furnished.[55]

4.2.16 This position was confirmed at both the follow-up SALRC Family Dispute Resolution meeting in February 2016[56] and the ADR meeting of experts in October 2017.[57]

4.2.17 An interesting view to be considered is that mandatory mediation may perhaps only be needed as a temporary expedient.[58] When mediation is not compulsory, parties might not necessarily get the opportunity to experience the advantages of mediation and would therefore not really be able to make an informed choice. Compulsion may therefore not be needed in the long run should the ADR movement become mature. Mandatory mediation should, therefore, be seen as a short-term measure used in jurisdictions where mediation is relatively less well developed, and as an expedient that should be lifted as soon as the society's awareness of mediation has reached a satisfactory level.[59]

b) Mandatory mediation: A contradiction in terms?

4.2.18 Another question is whether "mandatory mediation" constitutes a contradiction in terms. There are two diverging views in this regard.

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55 Cape Law Society (Ms Zenobia du Toit).

56 For example, Dr Lynette Roux indicated that all parties should attend mediation. Whether mediation is mandatory or voluntary does not make a difference to the parties' involvement in the process. When parties enter the room, they are angry in any case and are going to stand their ground whether it is a voluntary or mandatory mediation. It is the skill of the mediator to change this mind-set that makes the difference as to whether the mediation is going to be a success or not. Dr Ronel Duchen expressed the view that both voluntary and mandatory mediation, as well as mediation that did not seem to be desirable at first, can be successful if the correct process is followed. Mediation should be child-centred; the mediator should get the child's participation and structure the process appropriately.

57 For example, Mr Craig Schneider indicated that the organisation for family mediation in Cape Town definitely believes in mandatory mediation, particularly when there are children involved, because as soon as parties are heard the matters are able to be resolved really quickly.

58 Sander FEA "Another view of mandatory mediation" Winter 2007 ***Dispute Resolution Magazine*** 16 at 16.

59 Quek at 484.

(i) Mediation is inherently a voluntary process

4.2.19 In terms of the first view, mediation should be regarded as a voluntary process. Most definitions of mediation in fact refer to mediation as a voluntary process. The Constitutional Court[60] notes the fact that mediation is notoriously difficult to define[61] and refers to the following definition of Nupen:[62]

> Mediation is a process in which parties in conflict voluntarily enlist the services of an acceptable third party to assist them in reaching agreement on issues that divide them.

4.2 20 Mediation, according to the U.S. Model Standards of Conduct for Mediators, is a process that promotes voluntary decision making by the parties to the dispute. A mediator should further conduct the mediation based on the principle of self-determination.[63]

4.2.21 It has been argued that the voluntary nature of the process is the distinct feature that distinguishes mediation from other forms of dispute resolution.[64] The alternative nature of mediation is based on the voluntary participation of the parties, so any mechanism that compels or coerces parties to make use of mediation will be in opposition to the fundamental nature of mediation. The question is, therefore, whether such an informal, social mechanism can in fact be institutionalised as part of a formal system of rules, processes, steps and fora without losing its alternative nature.[65]

4.2.22 Voluntary participation emphasises self-determination, collaboration and creative ways of resolving a dispute, as well as addressing each party's underlying concerns.[66] Coercion into

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60 ***Port Elizabeth Municipality v Various Occupiers*** 2005(1) SA 217 (CC) at fn 38.

61 See the general discussion in Boulle L & Rycroft A ***Mediation – Principles, process, practice*** Butterworths, Durban 1997 at 3 – 7.

62 Nupen 'Mediation' in Pretorius P (ed) ***Dispute Resolution*** Juta, Cape Town, 1993 at 39, as referred to by the Constitutional Court in fn 38 of the Port Elizabeth Municipality case.

63 American Bar Association *et al*. ***Model Standards of Conduct for Mediation*** September 2005 access at https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf. Model Standards adopted by the American Bar Association on 9 August 2005, by the Association for Conflict Resolution on 22 August 2005 and by the American Arbitration Association on 8 September 2005.

64 Spruyt WMA ***Kompleksiteit en Bemiddeling: 'n Model vir die Ontwerp van Gespaste Regulering*** PhD thesis University of Stellenbosch December 2017 at 72 and the references it contains.

65 Spruyt at 73.

66 Quek at 481.

the mediation process therefore seems inconsistent with, and even antithetical to, the fundamental tenets of the consensual mediation process.[67]

4.2.23 If parties are compelled to undergo mediation, the mediation process will be subject to negativity and conflict and the dispute will not be resolved.

(ii) The voluntary nature of mediation is only related to the decision-making process

4.2.24 The opposite view is based on the supposition that people who argue that mediation cannot be mandatory make the mistake of relating voluntariness in mediation to participation in the process, but this is not the feature to which the voluntariness applies. Voluntariness refers to the fact that parties who take part in the mediation process cannot be compelled to make a decision and that any decision they do make must be voluntary. This essential part of the mediation is part of the process, irrespective of whether the mediation is voluntary or mandatory.[68]

4.2.25 The apparent paradox of mandatory mediation has sparked diverse opinions on whether coercion ***into*** mediation may realistically be distinguished from coercion ***within*** mediation.[69]

4.2.26 Critics of mandatory mediation are of the opinion that there cannot possibly be a neat demarcation or even a semantic difference between coercion into and coercion within mediation.[70] From a broad perspective, the mediation process cannot exist separately from the preceding sequence of stages leading to the mediation, and “the expectation of an imposed

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67 Quek at 509.

68 Prof. M de Jong’s submission at the Family Dispute Resolution meeting of experts Cape Town 16 February 2017.

69 Quek at 485. This distinction between the decision to mediate and the decisions taken during mediation has been criticised as fictitious and arbitrary. See Merry SE "Myth and Practice in the Mediation Process" in Wright M & Galaway B (eds**)** ***Mediation and Criminal Justice: Victim, Offenders, and Community*** (1989) 239 239–250 as referred to in Spruyt at 26.

70 These terms are referred to also as front-end consent or entry-level consent, which is required for participation in the mediation process, and back-end or outcome consent, which is required for an authentic agreement.

settlement will inevitably alter the meaning of the [mediation] event for all the actors".[71] Since mediation is often closely linked to the entire court process, parties could easily associate coercion from the judge with a reduction in the level of autonomy they may exercise within the mediation process. In short, there can be a very faint distinction between coercion to enter mediation and coercion within mediation.[72]

4.2.27 In South Africa the Constitutional Court[73] seems to support the notion that such a distinction is possible (on the facts of the case) and refers to the fact that compulsory mediation is an increasingly common feature of modern systems. It comments as follows:

> [40] It should be noted, however, that the compulsion lies in participating in the process, not in reaching a settlement …

4.2.28 It seems as though the resolution of the above-mentioned issue ultimately hinges on the degree of compulsion associated with any mediation programme. A programme that has a high degree of compulsion is more likely to blur the distinction between coercion to enter into mediation and coercion within the mediation process. Mandatory mediation may take the form of either discretionary or categorical referral of cases to mediation. For both categories, there can be differing levels of compulsion imposed on the parties.[74]

4.2.29 Mandatory mediation need not, therefore, necessarily be an oxymoron when used with circumspection. There may well be a real danger that mandatory mediation could undermine the essence of mediation when accompanied by excessive coercion by the judge without exercising his or her discretion, unduly strict sanctions for non-compliance, or participation requirements that are amorphous and entail scrutiny of the parties' conduct during mediation.[75]

4.2.30 The "mandatory" aspect of this scheme needs to be sensitively dealt with so that mediation does not become enmeshed in excessive technicalities or rigid requirements that are

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71 Quek at 485 with reference to Merry S "Disputing Without Culture: Review Essay of Dispute Resolution" 1987 ***Harvard Law Review*** 2057 at 2066.

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72 Quek at 488.

73 ***Port Elizabeth Municipality v Various Occupiers*** 2005 (1) SA 217 (CC) at par. [40].

74 See discussion in Chapter 6.

75 Quek at 509.

in contradistinction to the fluid nature of mediation. If used as a temporary measure,[76] mandatory mediation ultimately has to be complemented by education and other steps to increase the general awareness of mediation in society.[77] Punitive cost orders would be contrary to the spirit of mediation, as they are essentially a form of punishment.[78]

4.2.31 On the question, posed at the Cape Town meeting of experts, whether mandatory mediation should be termed differently in order to distinguish it from voluntary mediation, the respondents were unanimous in their opinion that this should not be done.[79] Respondents indicated that they strongly supported the idea of mandatory mediation in this context and did not regard it as a contradiction in terms. Respondents stressed the fact that more confusing terminology in this area should be avoided.[80] Mandatory mediation is important and should not be termed differently.[81]

4.2.32 However, in order to determine whether mandatory mediation should be introduced in South Africa, the following issues need further attention:

a) Could mandatory mediation possibly be found to be unconstitutional?
b) How will it be funded?
c) How should the standards for mediators be determined in view of the fact that we are dealing with such diverse institutions and sections of the population?

4.2.33 These questions will be dealt with in Chapter 5 (constitutionality), Chapter 6 (funding) and Project 94 (training and accreditation). In trying to respond to these issues, the precise meaning of the term “mandatory mediation” will also have to be determined. See the discussion in Chapter 7 below.

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76 See discussion above.

77 Quek at 509.

78 Hawkey at 21.

79 Mr Craig Schneider; Prof. David Butler; Ms Zenobia du Toit; Mr CT Cloete.

80 Prof. David Butler.

81 Mr PJ Cloete, National Executive Director: Child Welfare SA.

4.3 Regulating mediation

4.3.1 Regulation has been, and continues to be, one of the most controversial topics in the development of mediation from a life skill to an industry, and finally, to a profession.[82]

4.3.2 Currently there is no umbrella mediation legislation in South Africa with respect to family law disputes, hence the present investigation of the SALRC.

4.3.3 One view[83] is that since mediation is a *voluntary* process, there is no need for any statutory amendments, and the case law and practice should develop organically. In the existing *status quo*, the Children's Act (for example its section 33) mandates mediation and/or seeking assistance with a parenting plan. In terms of recent case law a cost order can be made against a party or attorney who failed to address mediation as an option. Rule 37(6)*(d)* of High Court rules requires that it be minuted whether an issue has been referred for mediation and the relevant case law clearly requires that option to be taken seriously. Admittedly, and practically speaking, it is easy for a party to "sham" participation in mediation. Nevertheless, the existing legislative framework and case law have the distinct value of sending a message to the wider society that mediation is the norm. This alone, as well as the fact that the media advocates mediation and that consumers are seeking mediation in growing numbers, will increasingly facilitate the absorption of mediation into the family law dispute resolution culture.

4.3.4 It could therefore be argued that voluntary mediation does not need to be formally regulated, but if *mandatory* mediation is found to be a suitable procedure for South Africa's civil justice system, the question may be posed how such a system would be implemented. When the introduction of mandatory court-based mediation in South Africa was proposed in 2011 by way of court rules, it was rejected because of the absence of enabling legislation sanctioning those rules. For that reason it is suggested that mandatory court-based mediation would have to be introduced by way of legislation.[84]

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82 Alexander N "Mediation and the art of regulation" 2008 (1) ***Queensland University of Technology Law and Justice Journal*** 1 (hereafter referred to as "Alexander") at 2.

83 Charles Mendelow & Associates Inc. submission in response to Question 54 of SALRC Issue Paper 31.

84 Maclons at 158.

4.3.5 Sharon Press has identified six trends in mediation practice: [85]

a) Institutionalisation (co-option of mediation into court programmes, government agencies and business and community organisations)
b) Regulation (codes, standards, rules and legislation)
c) Legalisation (case law on aspects of mediation)
d) Innovation (experimentation with court-annexed mediation models)
e) Internationalisation (international mediator accreditation)
f) Coordination (for example among legislatures in relation to model laws and among ADR organisations)

4.3.6 It would appear that decisions need to be taken about those aspects of mediation that are most usefully standardised, and those best served by more flexible arrangements.[86] Appropriate regulation of mediation will also have to be considered in the context of culture and legal-political traditions.[87]

4.3.7 Regulation in the 21st century furthermore embraces pluralist thinking that views regulation as a system – or a web – comprising various stakeholders, democratic processes and a range of regulatory instruments and interactions. Similarly pluralistic approaches to law move beyond Western understandings of legality.[88]

4.3.8 From a global perspective, four primary approaches to regulating contemporary mediation can be identified.[89] These approaches are presented on a scale of increasing institutionalisation and top-down formalism. The four approaches to mediation regulation are not mutually exclusive.[90] They can be identified as follows:

a) Market regulation

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85 Alexander at 1 with reference to Press S "'International Trends in Dispute Resolution" (2000) 3 ***Alternative Dispute Resolution Bulletin*** 21, 21-22.

86 Alexander at 2.

87 Alexander at 3.

88 Alexander at 3. See also the discussion on African Dispute Resolution in SALRC Issue Paper 31.

89 Alexander at 3 and further.

90 Alexander at 11.

4.3.9 In terms of market-contract regulation, anyone can engage in any kind of arrangement for mediation services, subject to the laws of supply and demand and of private contract. Where consumers have access to accurate information about mediators, reputations will influence the choice of mediator and those with poor performance track records will gradually be pushed out of the market. In a Darwinian sense it is survival of the fittest.[91] Structural barriers, such as wealth and education, make choosing more illusory than real. Australian research indicates that "vulnerable consumers", that is, consumers who live in low socio-economic geographical regions or rural areas, are more likely to experience difficulty in accessing ADR schemes than those from different demographic backgrounds.[92]

4.3.10 Most family mediations in South Africa currently take place according to this approach. See discussion above about stakeholders who see mediation as a voluntary process.

b) Self-regulation

4.3.11 Self-regulatory approaches refer to collective, community- and industry-led regulatory initiatives. In their purest form, self-regulatory approaches are community-based initiatives embracing collaborative, consultative and reflective processes, as distinct from top-down policy regulation. Responsiveness refers to collaboration between government and the group or collective being regulated. Reflection means that actors have the opportunity to identify issues, reflect upon them and negotiate their own solutions.[93]

4.3.12 The Australian National Mediator Accreditation System (NMAS) (2008) is the most prominent illustration of national self-regulation on an industry basis. According to the system, mediators who wish to be accredited according to the national standard must comply with training and assessment standards and join a recognised mediator accreditation body (RMAB).[94] In so far as courts, tribunals, government departments and other users specify by

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91 Alexander at 4.

92 Alexander at 4 with reference to Sourdin T "An Alternative for Whom? Access to ADR Processes" (2008) NADRAC access at www.nadrac.gov.au.

93 Alexander at 5.

94 Alexander at 6.

way of formal regulation that mediators are required to meet the NMAS, a mixed model is beginning to emerge that embraces both reflexive and formalistic regulatory approaches.[95]

4.3.13 The perceived advantages of self-regulation are numerous. Participants in the regulatory process are experts with a close and sensitive knowledge of the needs and interests of the regulated group and its various constituents. Self-regulation promotes innovation and choice as far as the determination of the self-regulatory mix is concerned and is generally more flexible, adaptable and responsive than more formal regulatory forms. It is said to achieve a greater degree of "buy-in" from industry members as they have the opportunity to participate in decision-making about regulation issues. The legitimacy of the area under regulation and conformity with the regulation itself are also enhanced through the participatory nature of self-regulatory approaches. Self-regulation is also associated with reduced costs in relation to information collection, reduced monitoring and enforcement, and less formality compared with legislative regulation. In self-regulation models, much of the costs of regulation are absorbed by the industry itself. Finally, successful self-regulatory models may remove the need for, or at least postpone, the introduction of comprehensive legislation in a given industry.[96]

4.3.14 The primary risks associated with self-regulatory approaches relate to resource levels in terms of available expertise and funding. Effective responsive and reflexive processes require sustained "buy-in" and input by key interest groups, communities and governments. Where levels of industry and expert input wane, self-regulatory structures lose their efficacy and more government-directed input may be justified. In addition, self-regulatory schemes may be susceptible to dominance by individuals and groups that do not reflect the broader industry and consumer interests.[97]

4.3.15 In South Africa mediation bodies such as SAAM, FAMAC and KAFAM are examples of industry-based self-regulation. NABFAM is a national body that promotes national standards for accreditation and training in the family law field has also been established.

c) Formal framework

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95 Alexander at 6; see also par. 4.3.19 below.

96 Alexander at 7.

97 Alexander at 7.

4.3.16 The formal framework usually takes the form of legislative or executive instruments, such as international conventions, directives, legislation and model laws. It establishes formal and legally recognised parameters within which softer forms of regulation, such as voluntary self-regulation, can fill in the regulatory details. As such, the formal framework approach represents a meeting of top-down and bottom-up regulatory approaches. It is also referred to as co-regulation. Formal framework approaches can accommodate diverse interest groups while still pursuing a common policy.[98]

4.3.17 In South Africa an example may be the Rules Board's Court-annexed Mediation Rules, which provide for the limited regulation of voluntary mediation. The proposed generic Mediation Act will also fall into this category.

d) Formal legislative approach

4.3.18 Formal legislative regulation relies primarily on legislation supported by formal institutions, such as the judiciary.[99] Formal legislative strategies with respect to mediation represent a strong endorsement of mediation by the state and go a long way towards its formal recognition as a legitimate dispute resolution practice and as a profession.[100]

4.3.19 Formal legislative approaches also aim to clarify the status quo, set practice consistency goals, and establish certainty on legal issues and consumer protection. In Australia a formal legislative approach has been adopted with regard to family dispute resolution. The family dispute resolution practitioners' accreditation system is regulated under the Family Law Act 1975 (Cth).[101] In addition to acknowledging the professionalism of the sector, the accreditation system has a quality assurance goal. It is a comprehensive and compulsory, formal regulatory package.[102]

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98 Alexander at 8.

99 Alexander at 9.

100 Alexander at 9.

101 Family Law (Family Dispute Resolution Practitioners) Regulations 2008.

102 Alexander at 9.

4.3.20 No comprehensive family mediation legislation exists in South Africa at present. A proposed Family Dispute Resolution Act could fall into this category.

4.3.21 If a legislative approach is followed, it should also be considered where family dispute resolution is to be accommodated. The following options have been identified:

- Regulation as part of a general Mediation Bill;
- regulation in a separate Family Dispute Resolution Bill;
- a comprehensive ADR Bill, including all of the above and the recently enacted International Arbitration Act 15 of 2017, all in separate Chapters;
- regulation through various pieces of legislation dealing with the issues at hand where required, for example the Children's Act, the Maintenance Act, the Arbitration Act, the Superior Courts Act, or the Magistrates' Courts Act, always ensuring that the different pieces of legislation are aligned; or
- regulation through the Superior Courts Act and Magistrates' Courts Act only.

4.3.22 Some who submitted comments on SALRC Issue Paper 31[103] indicated that all mediation provisions should be framed in one generic Act, which should also define mediation. In addition, sector-specific family ADR legislation, which includes family mediation, parenting coordination and any other form of ADR, traditional mediation and perhaps family law arbitration, should be developed.[104]

4.3.23 Other views expressed were that the mediation provisions should be framed as subsections of existing applicable family law legislation;[105] or that they should be included in the Superior Courts Act[106] and Magistrates' Courts Act,[107] respectively, in order to ensure that they can be used in all instances where mediation may be necessary.[108]

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103 SALRC Issue Paper 31, Question 50.

104 Dr Astrid Martalas; Mr Craig Schneider; Ms Karen Botha.

105 Office of the Family Advocate.

106 Superior Courts Act 10 of 2013.

107 Magistrates' Courts Act 32 of 1944.

108 Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division.

4.3.24 It should be noted that the mandatory nature of the legislation would imply the creation of new substantive law (obligations are created and not only being effected procedurally). Rules and regulations alone will therefore not be sufficient without an enabling regulatory instrument. Where an instrument seeks to create a procedural obligation which is enforced by way of a procedural sanction, it goes beyond a mere practice directive and enters the realm of a substantive rule or law.[109]

4.3.25 The discretion of the courts to order mediation should also be examined. Each of the superior courts has the inherent power to protect and regulate its own process and to develop the common law, taking into account the interests of justice.[110] Important to remember is that all courts function in terms of national legislation, and national legislation must therefore provide for their rules and procedures.[111]

4.3.26 Once the objectives of regulating mediation has been established, its content must be considered. The following classification system has been identified:[112]

a) Triggering laws (laws that facilitate access to mediation and trigger the mediation process). The aim of regulating is to trigger the use of mediation. Here important policy questions relating to the nature of the gatekeeper role, and the extent to which parties have a discretion to participate in mediation, arise.
b) Procedural laws (laws dealing with the mediation process). Any procedural aspects of mediation are to be covered by the regulation. The elements of mediation that will be covered by the proposed legislation should be determined, and the rationale for this choice should be clear.

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109 Peter J "The supremacy of the Constitution and the role of law in theory and practice" December 2014 ***Advocate*** at 32.

110 Section 173 of the Constitution provides as follows:
"**Inherent power**
173. The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

111 Section 171 of the Constitution provides as follows:
"**Court procedures**
171. All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation."

112 Alexander at 20.

c) Standard-setting provisions (provisions that enhance and support the recognition and practice of mediators by establishing standards for mediation). Standards should be set for mediators or in relation to the conduct of the mediation process. Standards for mediators typically relate to the approval to act as a mediator, variously termed approval, accreditation, qualification and certification standards. Standards for the practice of mediation are generally referred to as practice standards or codes of conduct. Standards may also be set for service provider organisations.

d) "Beneficial" mediation laws (laws that protect and benefit mediators and consumers by setting out their various rights and obligations).[113] Matters concerning the rights and obligations of participants in the mediation process are regulated in beneficial laws. Here, tensions surrounding, inter alia, the accountability of mediators and other participants in the process, confidentiality, enforceability of agreements to mediate and mediated settlements can be addressed.

4.3.27 The exposition above should be regarded as the framework within which both the proposed Mediation Act being developed in Project 94 and the possible family dispute resolution legislation being developed in this investigation should be evaluated. For example, a national mediation regulatory policy aimed at encouraging party autonomy without jeopardising legal certainty or the quality of dispute resolution may use a mediation mix in which all of these approaches could be used in conjunction with each other.[114] See Chapter 7 below for a discussion of the proposals for triggering legislation. The procedural aspects of mediation, standard setting provisions, and the rights and obligations of mediators will be fully considered in Project 94.[115]

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113 Alexander at 14.

114 Alexander at 21.

115 See the discussion of the interaction between Project 94 and 100D in Chapter 1 above.

PART C: FAMILY MEDIATION

Chapter 5: Is mandatory family mediation unconstitutional?

5.1 Introduction

5.1.1 The Constitution of the Republic of South Africa, 1996, is the overarching institutional framework for all South Africa's policies and legislation.[1]

5.1.2 Section 2 of the Constitution states that the Constitution is the supreme law of the Republic, that any law or conduct inconsistent with it is invalid, and that the obligations imposed by it must be fulfilled.

5.1.3 Family law disputes are civil disputes, as they do not involve the State. Family law is, therefore, treated as a specialised form of civil law. The horizontal application of the Bill of Rights in the Constitution has "constitutionalised" private law. Divorce, care and contact, adoptions, and maintenance are all elements of family law that affect vulnerable members of society in particular, and need to be treated with expediency and sensitivity.[2]

5.1.4 Introducing mandatory mediation in the South African law would imply the creation of new substantive law. Such obligations will have to be created by way of legislation. Rules cannot be used to create obligations[3] and there is no general enabling legislation providing for the authority to make rules for mandatory family mediation.[4]

5.1.5 The purpose of this Chapter is to determine whether such general legislation, should it be enacted, would be contrary to the provisions of the Bill of Rights set out in the Constitution.

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1 SALRC Issue Paper 31 at par. 1.4.3 and further.

2 SALRC Issue Paper 31 at par. 1.4.4.

3 See discussion in Chapter 4 above.

4 See, however, the applicable sections of the Children's Act as discussed above in Chapter 4, although their constitutionality has not been tested yet.

5.1.6 The different competing constitutional rights relevant to this matter, as entrenched in the Bill of Rights, are the right of access to courts (section 34),[5] the rights of children (section 28),[6] the right to privacy (section 14),[7] and the right to human dignity (section 10).[8] These rights are interactive and need to be balanced.[9] The Constitution further provides for the state's duty to respect, protect, promote and fulfil the rights in the Bill of Rights.[10]

5.1.7 In this Chapter, the following matters will therefore be discussed:

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5 See par. 5.2.5 below.

6 Section 28 of the Constitution reads as follows:
"**Children**
28. (1) Every child has the right—
(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that—
(i) are inappropriate for a person of that child's age; or
(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be —
(i) kept separately from detained persons over the age of 18 years; and
(ii) treated in a manner, and kept in conditions, that take account of the child's age;
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section '**child'** means a person under the age of 18 years."

7 Section 14 of the Constitution reads as follows:
"**14. Privacy**
Everyone has the right to privacy, which includes the right not to have—
(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed."

8 Section 10 of the Constitution reads as follows:
"**10. Human dignity**
Everyone has inherent dignity and the right to have their dignity respected and protected."

9 See discussion par. 5.3(c) below.

10 Section 7(2) of the Constitution reads as follows:
"**Rights**
7. (1)….
(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
(3) …"

(a) The content and scope of the right of access to courts as set out in section 34 of the Constitution;
(b) whether the enactment of mandatory family mediation legislation would infringe on the right of access to courts; and
(c) if so, whether such infringement would be justified in accordance with the criteria contained in section 36 of the Constitution, with special reference to the rights to privacy, dignity and the best interests of children.

5.2 Content and scope of the right of access to courts (section 34)

5.2.1 The rights entrenched in the Bill of Rights are formulated in general and abstract terms. The meaning of these provisions therefore depends on the context within which the provisions are referred to. Their application in particular situations will of necessity be a matter of argument and controversy.[11]

5.2.2 Section 39 of the Constitution contains an interpretation clause which pertains to the Bill of Rights.[12] It states that when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, freedom and equality. This means that an exercise analogous to that of ascertaining the *boni mores* or legal convictions of the community in the law of delict is required.

5.2.3 In addition, the section requires reference for purposes of interpretation to international human rights legal instruments in general. This is not confined to instruments that are binding

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11 Currie I & De Waal J ***The Bill of Rights Handbook*** 6ed Juta & Co Cape Town 2015 (hereafter referred to as "Currie & De Waal 2015") at 134.

12 Section 39 of the **Constitution** reads as follows:
"**Interpretation of Bill of Rights**
39. (1) When interpreting the Bill of Rights, a court, tribunal or forum—
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.
(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

on South Africa.[13] A person may also rely on rights conferred by legislation, the common law or customary law, provided that such rights are not inconsistent with the Bill of Rights.

5.2.4 Although section 39 provides a starting-point for interpreting the Bill of Rights, it requires interpretation itself. The Constitutional Court has, therefore, laid down guidelines as to how the Constitution, in general, and the Bill of Rights, in particular, should be interpreted.[14] It should be interpreted first of all by determining the literal meaning of the text itself[15] and identifying the purpose or underlying values of the right.[16] A generous interpretation should furthermore be given to the text,[17] and the history of South Africa and the desire not to repeat it should be taken into account.[18] Finally, the context of a constitutional provision should be considered, since the Constitution is to be read as a whole and not as if it consists of a series of individual provisions to be read in isolation.[19]

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13 Dugard in Van Wyk D *et al.* (eds) ***Rights and constitutionalism: The new South African legal order*** Juta & Co Ltd 1994 at 193 as referred to in ***S v Makwanyane*** 1995 (3) SA 391 (CC) (fn 46 of the judgment). Dugard notes that a court may not only consider treaties to which South Africa is a party or customary rules that have been accepted by South African courts, but also international conventions, international custom, the general principles of law recognised by civilised nations, judicial decisions and teachings of the most highly qualified publicists of the various nations, etc.

14 Guidelines with respect to interpretation and references to court cases as per De Waal J, Currie I & Erasmus G ***The Bill of Rights Handbook*** 4ed Juta & Co Lansdown 2001 (hereafter "De Waal *et al.* 2001") at 128 and further.

15 ***S v Zuma*** 1995 (2) SA 642 (CC) par. 17. Constitutional disputes can seldom be resolved with reference to the literal meaning of the provisions alone. The literal meaning should therefore not be regarded as conclusive.

16 ***S v Makwanyane*** supra at par. 9. A value judgement therefore has to be made about which purposes are important and protected by the Constitution and which not. The scope of the right is increased by this value-based method of interpretation (Devenish at 269). While the values have to be objectively determined by reference to the aspirations, expectations and sensitivities of the people, they may not be equated with public opinion (***S v Makwanyane*** supra).

17 ***S v Mhlungu*** 1995 (3) SA 867 (CC); ***S v Makwanyane*** supra; ***S v Zuma*** supra. The use of generous interpretation may sometimes result in a strained interpretation of the text. Where a conflict arises between a purposive interpretation and a generous interpretation, the court will always choose the purposive approach.

18 ***Brink v Kitshoff NO*** 1996 (4) SA 197 (CC) par. 40. Statements made by politicians during negotiations and the drafting process are of little value in the interpretation, but this should be distinguished from the preparatory work (called *travaux preparatoires* in the case of a treaty), to which some significance is attached, for example the reports of the various technical committees.

19 ***S v Makwanyane*** supra; ***Ferreira v Levin NO*** 1996 (1) SA 984 (CC) par. 82; ***Soobramoney v Minister of Health, KwaZulu-Natal*** 1998 (1) SA 765 (CC) par. 16. Contextual interpretation should be used with caution. It cannot be used to limit rights. The Bill of Rights envisages a two-stage approach: first interpretation, then limitation. The balancing of rights against each other or against the public interest must take place in terms of the criteria laid down in section 36. In the first stage, context may only be used to establish the purpose or meaning of a provision. See ***Bernstein ao v Bester NO ao*** 1996 (2) SA 751 (CC) at 128. Contextual interpretation may also not be used to identify and focus only on the most relevant right. In terms of constitutional supremacy, a court must test a challenged law against all possibly relevant provisions of the Bill of Rights, whether the applicant relies on them or not.

5.2.5 Section 34 of the Constitution, 1996, provides as follows:[20]

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

5.2.6 Upon the straightforward reading of section 34, it provides that everyone has the right to have disputes that are susceptible to legal determination decided in a fair, public hearing by a court or by another independent or impartial tribunal.[21]

5.2.7 In ***Chief Lesapo v North West Agricultural Bank ao***,[22] Mokgoro J, on behalf of a unanimous court, reflected on section 34 as follows:

> An important purpose of section 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law.[23]

5.2.8 A similar understanding of the section was expressed by Langa CJ in ***President of the Republic of South Africa ao v Modderklip Boerdery (Pty) Ltd***.[24] He reasoned:

> The first aspect that flows from the rule of law is the obligation of the state to provide the necessary mechanisms for citizens to resolve disputes that arise between them. This obligation has its corollary in the right or entitlement of every person to have access to courts or other independent forums provided by the state for the settlement of such disputes. Thus section 34 of the Constitution provides as follows: …[25]

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20 Section 34 is the equivalent of section 22 of the Interim Constitution.

21 ***Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews ao*** 2009 (4) SA 529 (CC) (hereafter referred to as "Lufuno") par. 201.

22 ***Chief Lesapo v North West Agricultural Bank ao*** 2000 (1) SA 409 (CC).

23 Par. 13.

24 ***President of the Republic of South Africa ao v Modderklip Boerdery (Pty) Ltd (Agri SA ao, Amici Curiae)*** 2005 (5) SA 3 (CC).

25 Idem at par. 39. See also the remarks of Ngcobo J in ***Zondi v MEC for Traditional and Local Government Affairs ao*** 2005 (3) SA 589 (CC) at [60]-[63].

5.2.9 The language in section 34 appears to be derived from paragraph 1 of Article 6 of the European Convention on Human Rights.[26] The European Convention has been held to contain two inter-related rights:

a) A right of access to court; and

b) a right to a fair hearing once a person is before court.[27]

5.2.10 It is a right that is also protected in terms of international instruments,[28] for example, Article 10 of the United Nations Declaration of Human Rights[29] provides that an individual has the right to a fair and public hearing by an "independent and impartial tribunal". The African Charter on Human and Peoples' Rights[30] in Article 7 provides for the right to an "impartial tribunal". This guarantee also appears in the International Covenant on Civil and Political Rights,[31] and the American Convention on Human Rights.[32]

5.2.11 According to Currie and De Waal,[33] section 34 guarantees three rights for a person who is involved in a dispute that may be resolved by law:

a) It creates a right of access to a court or another tribunal;

b) it requires such tribunals to be impartial and independent; and

c) it requires the dispute to be resolved in a fair and public hearing.

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26 European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms), which entered into force on 3 September 1953.

27 Brand J & Todd C "Mandatory mediation in South Africa: Are there Constitutional Implications?" Chapter 3.1 ***The Dispute Resolution Digest*** TOKISO 2015 47 (hereafter referred to as "Brand & Todd") at 48 with reference to Budlender "Access to courts" (2004) ***SALJ*** 339. See also ***P, C and S v United Kingdom*** (2002) 35 EHRR 31 at [89] and [91], referred to in Budlender (note 4) at 339.

28 Vettori at fn 2.

29 Universal Declaration of Human Rights proclaimed by the United Nations General Assembly on 10 December 1948.

30 African Charter on Human and Peoples' Rights (also known as the "Banjul Charter") approved by the OAU on Assembly in June 1981.

31 International Covenant on Civil and Political Rights adopted by the United Nations General Assembly on 16 December 1966 and in force from 23 March 1976.

32 American Convention on Human Rights (also known as the "Pact of San Jose") came into force on 18 July 1978. Adopted by the United Nations General Assembly on 19 December 1966 and in force from 23 March 1976.

33 Currie & De Waal 2015 at 711.

5.2.12 in the case of ***Bernstein ao v Bester NO ao***,[34] the procedures under sections 417 and 418 of the Companies Act, 1973, amongst other things, were challenged on the basis that they breached the provisions of section 22 of the Interim Constitution (current section 34). In this case, the court per Ackermann J, as regards the purpose of section 22 of the Interim Constitution, had the following to say:[35]

> When section 22 is read with section 96(2), which provides that "the judiciary shall be independent, impartial and subject only to the Constitution and the law", the purpose of section 22 seems to be clear. It is to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the judiciary from the other arms of the state. Section 22 achieves this by ensuring that the courts and other fora which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional state the "regstaatidee", for it prevents legislatures, at whatever level, from turning themselves by acts of legerdemain into "courts". … By constitutionalising the requirements of independence and impartiality the section places the nature of the courts or other adjudicating fora beyond debate and avoids the dangers alluded to by Van den Heever JA in the *Harris* case.[36]

5.2.13 Currie and De Waal further state that the purpose of section 34 is to protect individuals against actions by the state and other persons that deny such individuals access to courts and other forums. The prime example of such denial of access is the use of so-called "ouster clauses".[37]

5.2.14 The Constitutional Court[38] interpreted section 34 of the Constitution with reference to private arbitration. O'Regan ADCJ, in a majority judgment, held that section 34 of the Constiution regarded private arbitration as a process distinct from the processes referred to in section 34. It was, however, stated that the resolution of disputes by other tribunals established by law, such as the CCMA, would be covered by this right.[39] Such tribunals must also conduct "fair public hearings" as provided in section 34.[40]

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34 ***Bernstein ao v Bester NO ao*** supra.

35 At paragraph 105.

36 ***Minister of the Interior ao v Harris ao*** 1952(4)SA 769(A).

37 Currie & De Waal 2015 at 714.

38 ***Lufuno*** supra.

39 This is because the process is neither consensual nor private: Compare Vettori at par. 6.4: "Given the fact that the mediation or conciliation of labour disputes in terms of the LRA dispensation is only mandatory in theory and not in practice, it is not surprising that there have been very few challenges to the constitutionality

5.2.15 The criteria applied in the case of arbitration can also be used to determine the position of family mediation with respect to section 34. Mediation will also not fall under the alternative "other forms" provided for in section 34. Mediation does not take place in public, the dispute is not always resolved by the application of the law (mediators are not necessarily legal practitioners), the State does not provide the forum (the parties choose their own mediators and pay them) and the parties may decide to choose a mediator if they trust him or her, even though he or she may not be completely independent or impartial. Resolving a dispute through mediation will therefore not meet the requirements of section 34.

5.2.16 In the ***Lufuno*** case, O Regan ADCJ states as follows:[41]

> … Quite clearly, when parties decide to refer a dispute to be determined by an arbitrator, they are not seeking to have the dispute determined by a court. They are seeking to have it determined by an arbitrator of their own choice.

5.2.17 The aim of the various forms of ADR is to create a dispute resolution mechanism outside the court system to resolve matters outside the formal adjudication process of that court system. Such a process is therefore not part of the court process. ADR mechanisms appear to fall outside the conventional litigation procedures, rules and time limits in respect of which the powers of the Rules Board, for example, seem to extend.[42] The mediation process is extra-curial in nature. The object of the mediation process is to avoid the formal court process.[43]

5.2.18 In ***Lufuno***, it was further stated that persons who choose arbitration do not waive their constitutional rights in terms of section 34, but choose rather not to exercise such rights; they instead choose to participate in a private process that must be fairly conducted (the arbitration process replaces the court process). The issue of choice is important, therefore.[44]However, the

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of the mandatory mediation as provided for in terms of the LRA, on the basis that the mandatory mediation breeches the constitutional right of access to courts."

40 ***Lufuno*** at [201].

41 ***Lufuno*** at [201].

42 See discussion on court-annexed rules in SALRC Issue Paper 31 at 221.

43 Office of the Chief State Law Adviser DOJCD Comments on Draft Mediation Rules 31 October 2011.

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

distinction between arbitration (which is an adjudicative process) and mediation (which is a collaborative process) should be considered.[45]

5.2.19 It is important to remember that even though a dispute will in these circumstances be resolved by private dispute resolution proceedings rather than the court, these proceedings will still be regulated by law and by the Constitution. Fairness is one of the core values of our constitutional order.[46] This reasoning will be true for any private dispute mechanism conducted with or without the consent of the parties.

5.3 Limitation of the right of access to courts

5.3.1 The right of access to court, as the other fundamental rights and freedoms entrenched in the Bill of Rights, is not absolute.[47] Boundaries are set by the rights of others and by the legitimate needs of society. Section 36 of the South African Constitution is a general limitation clause[48] and sets out specific criteria for the limitation of the fundamental rights entrenched in the Bill of Rights.[49]

5.3.2 The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. There is, however, no absolute standard that can be laid down for

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45 See discussion below in par. 5.3.

46 ***Lufuno*** at [221].

47 Woolman S & Bishop M ***Constitutional law of South Africa*** 2ed Juta & Co Ltd Cape Town 2013 (hereafter referred to as "Woolman & Bishop") at 59-100.

48 Section 36 of the **Constitution** provides:
"**Limitation of rights**
36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

49 Currie & De Waal 2015 at 150.

determining reasonableness and necessity. Whether the purpose of the limitation is reasonable or necessary will depend on the circumstances in each particular case.[50]

5.3.3 Constitutional analysis in terms of section 36 involves a two-stage approach:[51] First it must be determined whether the proposed law will in fact infringe on the fundamental right in question. If the right will be infringed, the state or the person relying on the validity of the proposed legislation, will have to demonstrate that the infringement of the right is nevertheless permissible in terms of the criteria for a legitimate limitation of rights laid down in section 36.[52] The policy indulging the infringement must be reasonable and justifiable in a free and open democracy.[53]

5.3.4 Rights cannot be overridden simply because the public good will be served by the restriction. The reasons for limiting a right need to be exceptionally strong, as opposed to the trivial.[54] The limitation should also be in line with the intrinsic values set out in the Constitution.[55]

5.3.5 In ***S v Makwanyane***,[56] the Constitutional Court set out its approach as follows: In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

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50 ***S v Makwanyane*** supra at 708.

51 S v Zuma supra; Chaskalson et al. 12-3; Woolman S "Coetzee: The limitations of Justice Sach's concurrence. Coetzee v Republic of South Africa; Matiso v Commanding Officer of Port Elizabeth Prison" 1996 12(1) SAJHR 99; Chaskalson et al. at 20-1; S v Makwanyane supra at [100].

52 ***S v Makwanyane*** supra at [102].

53 Devenish GE "The limitation clause revisited – The limitation of rights in the 1996 Constitution" 1998 ***Obiter*** 256 (hereafter referred to as "Devenish") at 261.

54 ***Edmonton Journal v Alberta (Attorney General)*** (1989) 64 DLR 4th 577 (SCC) 612.

55 Devenish at 263.

56 Supra. This approach has been largely codified in section 36 of the Constitution. See also ***Qozeleni v Minister of Law and Order*** 1994 (3) SA 625 (E) at 640; ***S v Manamela*** 2000 (5) BCLR 491 (CC) at 519G-520A; ***National Coalition for Gay and Lesbian Equality v Minister of Justice*** 1999 (1) SA 6 (CC); ***Director of Public Prosecutions: Cape of Good Hope v Bathgate*** 2000(2) SA 535(C); 2000 (2) BCLR 151 (C) as discussed in Devenish supra.

5.3.6 In the present investigation, it is the delicate balance between the right of access to courts and the rights of children, privacy and dignity that has to be determined. In determining the current modes of thought and values of the community, the *boni mores* or convictions of the community regarding right and wrong are of particular importance. This is a test analogous to that of the unlawfulness inquiry in terms of the common-law *actio iniuriarum*.[57]

a) Would mandatory mediation legislation infringe on the right of access to courts?

5.3.7 The concern has been raised that mandatory mediation could constitute an infringement of section 34. It could be argued that making mediation a mandatory process for civil disputants may diminish the freedom of parties to resolve their dispute in a way they deem appropriate.[58]

5.3.8 First, in interpreting this concern, the notion that mandatory mediation, like arbitration, may be construed as replacing the right of access to a court should be considered. Various arguments should be noted in this regard:

a) Since mediation is not conducted in a public forum or tribunal, it is in fact a private and confidential process. Therefore, by compelling disputants to pass through another) forum, which, moreover, is private and for which section 34 does not provide, may possibly be construed as unconstitutional.[59]

b) Furthermore, a mediator, by the very nature of his or her role, cannot make a decision by applying the law nor arrive at a judgment or final decision as the court may do. Thus, compelling disputants to have their disputes mediated may be seen as an infringement of their constitutional right to have their matter determined by the court, which would make a final decision in law and arrive at a judgment legally producing a winning party and a losing party.[60]

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57 Burchell J ***Personality rights and freedom of expression: The modern actio injuriarum*** Juta & Co Ltd Kenwyn 1998 at 416.

58 Maclons at 138 with reference to Oosthuizen S & Blom P "Mandatory mediation as integrated into the process of dispute resolution in South Africa" (Autumn 2012) ***Dispute resolution matters*** (DLA Cliffe Dekker Hofmeyr) 4; Maclons 141.

59 Maclons at 138.

60 Maclons at 150.

c) In addition, mediation may not be suitable for every type of dispute arising out of civil matters. For example, if a party wishes to note a legal precedent or if it is a public-interest matter, judicial determination may be more appropriate than mandatory court-referred mediation. Furthermore, by proceeding by way of the process of mediation, parties give up most of the protection they would enjoy in a court, including the right to a decision by a judge based on admissible evidence, and the right of appeal as well as the right to require reasons for the judicial decision. Moreover, there is, generally, less opportunity to establish the other side's case in mediation proceedings than in litigation. Mediation may not be effective if it takes place before the parties have sufficient information about the strengths and weaknesses of their respective cases.[61]

5.3.9 The above-mentioned interpretation has been criticised, however,[62] by arguing that a mandatory-mediation order would not contain any "waiver" of a right of access to court. In the absence of agreement, there would be no barrier to a party's seeking resolution of the dispute before a court, and access to court is therefore not limited nor excluded.[63] Mandatory mediation therefore simply suspends access to the courts as disputants cannot be forced into an agreement.[64]

5.3.10 In terms of this argument, the constitutional concerns appear to be based on each of the two separate, but related, components of the section 34 right:[65]

a) First, if mediation is introduced in rules of court as a compulsory step that must be taken before a litigant is allowed access to court, it may be construed as a limitation of the right; and

b) second, if a court orders mediation in the course of pending proceedings, something which cannot reasonably be construed as a barrier that limits or

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61 Maclons at 114 with reference to Victorian Law Reform Commission ***Civil justice review report*** (2008) 215.

62 Brand & Todd at 52.

63 Brand & Todd at 49.

64 Vettori at par. 3. See also the discussion above regarding the question whether mandatory mediation should be regarded as an oxymoron.

65 Brand & Todd at 49.

precludes *access* to court (the litigants are already before court), it may affect the fairness of the hearing.

When these two suppositions are considered, they are, however, in terms of this argument, found to be untenable, and the view is held that the courts will not find that a requirement of mediation before proceedings are initiated *by itself* violates the right of access to courts, because rules that regulate court proceedings are commonplace.[66]

5.3.11 It should, however, be noted that the premise on which this argument is based, namely, that mediation is introduced in rules of court[67] as a necessary step taken before a litigant would be allowed access to court, is contestable.[68] The idea behind the proposed mandatory-mediation legislation, as well as all the arguments supporting legislation of this nature, is the notion that mediation is a better alternative for resolving family disputes than the adversarial system used in the courts.[69] It would, therefore, be quite cynical, or even disingenuous, to suggest that mediation is merely a precondition for participating in the court process;[70] a box that needs to be ticked before proceeding with a claim or defence.[71] Furthermore, choosing litigation as the process to defend your rights implies that one accepts the rules in terms of

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66 Brand & Todd at 55. In ***Mukaddam v Pioneer Foods (Pty) Ltd ao*** Case CCT 131/12 [2013] ZACC 23 at [31], the Constitutional Court stated: "However, a litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute." In ***Giddey NO v JC Barnard and Partners*** 2007 (5) SA 525 (CC) Mr Justice O Reagan stated as follows at [16]:

> [16] But for courts to function fairly, they must have rules that regulate their proceedings. Those rules will often require parties to take certain steps on pain of being prevented from proceeding with a claim or defence. …

67 See discussion on the authority to mandate mediation above.

68 See for example the position in Italy, where the Constitutional Court found that the mandatory mediation provisions of the Legislative Degree 28/2010 were unconstitutional since it had exceeded both the scope of the EU Mediation Directive (2008/52/EC) and Law 69/2009. The Directive defines "mediation" as the "extrajudicial resolution of disputes", whereas the Italian government had conceived mediation as being a compulsory preliminary step of judicial litigation. See also De Vos & Broodryk Part 1 at 701, where they state that alternative dispute resolution in Australia is no longer regarded as a process to supplement courtroom adjudication. The shift from trial adjudication to alternative dispute resolution processes has transformed the latter into the main focus in the litigation system.

69 See discussions in Chapters above. See also Vettori at par. 2:" Mediation is a form of alternative dispute resolution (ADR). The reason it is termed "alternate" is that it is a dispute resolution method that is perceived to be an alternative to the traditional system of court procedures".

70 In ***National Union of Metal Workers of South Africa v Intervalve (Pty) Ltd ao*** [2014] ZACC 35, the Constitutional Court stated as follows at [155]:

> It is true that conciliation, under the auspices of the CCMA or a bargaining council, is not intended as just another perfunctory step on the way to securing a licence for action. The mechanism is a process required by the LRA for the adjustment of competing interests and industrial peace. …

71 The court held this position even though non-compliance with the conciliation provision had the effect of non-suiting the employees.

which this process is regulated. Having a process imposed on a person could, however, indicate a lack of any choice.

5.3.12 If no settlement is reached, this argument furthermore seems rather strained, given the fact that those advocating mediation as an alternative to traditional adjudication see it as resolving the problems of high costs and delays associated with the judicial system and the consequent denial of access to justice. When the mediation process does not achieve settlement, mediation is nothing more than an additional step, exacerbating the other traditional obstacles in the way of access to justice associated with a judicial system.[72]

5.3.13 It is, however, accepted that there are a large number of procedural rules that do limit access to a court. These include rules setting time limits on claims, the requirement of written pleadings, time limits within the rules, discovery, and the requirement that a pre-trial conference be held and a minute filed.[73]

5.3.14 It is important to note that even though the use of such procedural rules is accepted practice, the Constitutional Court acknowledged that, in certain circumstances, such rules may impose limitations on access to courts. The Court therefore stated that all such rules must comply with the Constitution and that, to the extent that they do constitute a limitation on a right of access to courts, the limitation must be justifiable in terms of section 36 of the Constitution.[74]

5.3.15 This position applies to both categories identified in par. 5.3.10 above.

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72 Vettori at par. 3.

73 Brand & Todd at 49 fn 7. See also Brand & Todd at 54: "Procedural rules that impose limitations on access to courts are commonplace."

74 ***Giddey*** at [16]. Mr Justice O'Regan stated as follows:
"[16] … Of course, all these rules must be compliant with the Constitution. To the extent that they do constitute a limitation on a right of access to court, that limitation must be justifiable in terms of section 36 of the Constitution. If the limitation caused by the rule is justifiable, then as long as the rules are properly applied, there can be no cause for constitutional complaint."

5.3.16 It would seem, therefore, that mandatory mediation cannot be regarded as merely a precondition for access to courts, but even if it were, such a precondition could in certain circumstances be regarded as a limitation on the right of access to courts.[75]

5.3.17 It has further been stated that even if mediation does not necessarily replace access to courts, it could have this effect if a party is indigent. The question arises as to how this would affect access to justice, how additional costs, such as that of interpreters, would be covered, how legal aid would fit into the proposed regime change and how the proposed rules would be reconciled with existing court rules.[76] Mediation rules that compel a party to pay half the costs of the mediation – the dispute resolution manager and the mediator's fees – may be challenged by cash-strapped clients.[77] This system may prejudice a litigant who has limited financial resources from achieving a preferred legal outcome at the lowest possible cost in a dispute where the opposing party is not prepared to negotiate on the matter and particularly if the opposing party has a weak case.[78] Parties may also be at a disadvantage if they are compelled to pay the cost of mediation, while they would not have had to pay the judge. If parties fail to resolve the dispute and are thus compelled to return to court, the resulting duplication of costs should be considered, especially when litigants may have had sufficient funds for one method of dispute resolution only.[79] Such a party may be forced to accept an unfavourable settlement.[80] The question may be posed whether it is, in principle, fair to compel parties to use ADR processes and also pay for these processes.[81]

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75 Woolman & Bishop at 59-107. The theme that underlies most of the procedural rules that potentially limit access to courts is that the aim is to enhance access to courts by freeing the courts to adjudicate deserving cases.

76 The Cape Law Society, at its annual general meeting in November 2011 hosted a workshop on the draft rules, which was led by a panel consisting of Daryl Burman, Graham Bellairs, Teresa Erasmus, Adam Pitman and Traci Lee Bannister, who are members of the society's specialist committees. Mr Bellairs highlighted some of the areas that the LSSA considered problematic and some of those matters that required clarification.

77 Joubert J "Mediation Rules finally signed by Minister of Justice but require judicial activism to get the system going" ***Legalbrief Today*** 28 January 2014; De Vos & Broodryk Part 2 at 22.

78 Maclons at 138 with reference to Oosthuizen S & Blom P supra.

79 De Vos & Broodryk Part 2 at 22.

80 De Vos & Broodryk Part 2 at 24.

81 Quek at 498.

5.3.18 Mandatory mediation could also lead to unacceptable delays. Referring the matter to mediation is likely to result in a delay in the proceedings.[82] The dispute resolution process may be delayed, especially in matters that may be "destined to fail" at mediation.

5.3.19 Also, the value of mediators may be questioned if they are not adequately prepared and have inadequate legal experience or confidence to provide the parties with meaningful reality checking.[83]

5.3.20 Finally, there may be a power imbalance if a party is not represented. Effective mediation proceedings therefore require that parties have the capacity effectively to take care of their own needs and interests. Unequal, weak, unrepresented or indigent/poor parties may be bullied into accepting unfavourable terms.[84]

5.3.21 Taking into account all the arguments set out above, it would appear that mandatory mediation legislation could, depending on the merits of each case, be regarded as a limitation of the right of access to the courts. If this is the case, the determining factor will be whether it is a justifiable limitation.

b) Can the limitation be justified in accordance with the criteria set out in section 36 of the Constitution?

5.3.22 A law may legitimately limit a right in the Bill of Rights if it is—

(a) a law of general application;

(b) that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

5.3.23 There must be sufficient and appropriate evidence to justify a limitation of a right in accordance with the criteria laid down in section 36.[85]

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82 Hawkey at 21.

83 Joubert J "Mandatory mediation will soon arrive in South Africa, and should be warmly welcomed by the legal profession" ***Legalbrief Today*** 9 November 2011.

84 Maclons at 114 with reference to Victorian Law Reform Commission supra.

85 Currie & De Waal 2015 at 154 state that a court cannot determine in the abstract whether a limitation is reasonable or justifiable. Such determination often requires evidence, such as sociological or statistical data, of the impact of the legislative restriction on society.

(i) Is the proposed legislation a "law of general application"?

5.3.24 This requirement is the expression of the basic principle of the rule of law. It seems that all forms of legislation (delegated as well as original) would qualify as law, as would the common law and customary law.[86] Mandatory mediation legislation would be law of general application**(ii) Is the limitation of section 34 a reasonable and justifiable limitation in an open and democratic society based on human dignity, equality and freedom?**

5.3.25 To satisfy the limitation test, it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the infringement of the right and the benefits it is designed to achieve. As stated above, the standard reference used when the Constitutional Court considers the legitimacy of a limitation was set out in ***S v Makwanyane***[87] and subsequently included in section 36 of the final Constitution. The following five factors identified as making up the proportionality requirement in this case will be discussed:[88]

(aa) Nature of the right

(bb) The importance of the purpose of the limitation

(cc) The nature and extent of the limitation

(dd) The relation between the limitation and its purpose

(ee) Less restrictive means to achieve the purpose

(aa) Nature of the right (section 36(1)(a))

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86 Currie & De Waal 2015 at 156.

87 ***S v Makwanyane*** supra at [104].

88 The factors mentioned are not exhaustive. They are key considerations, to be used in conjunction with any other relevant factors, in the overall determination of whether a limitation is justifiable. ***S v Manamela*** supra at 508E and section 36(1) of the Constitution. Once each of the factors has been examined, it must be determined what the factors have revealed about the purpose, effects and importance of the infringing legislation, on the one hand, and, on the other, what the nature and effect of the infringement caused by the legislation (a proportionality test) is to ascertain its constitutionality. The court must engage in a balancing exercise and arrive at a global judgment on proportionality, and not adhere mechanically to a sequential check-list. **S v *Makwanyane*** supra at [104]; ***S v Manamela*** supra at 508B.

5.3.26 Some rights may weigh more than others. It will therefore be more difficult to justify an infringement of such rights than the infringement of other, less weighty rights. A court must assess what the importance of a particular right is in the overall constitutional scheme.[89]

5.3.27 There is no doubt that the right of access to the courts is of crucial importance in any society, and this reality has been acknowledged not only in the South African Constitution**[90]** but also, for many years, by the South African courts.[91]

5.3.28 As Mokgoro J stated in ***Chief Lesapo v North West Agricultural Bank ao***[92]***-***

> The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.

5.3.29 This aspect of the Lesapo case was referred to and confirmed by O'Regan J in ***Giddey NO v Barnard and Partners***[93] as follows:

> [15] Section 34 of the Constitution provides that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing. This important right finds its normative base in the rule of law …

5.3.30 In the ***Lufuno*** case, Madam Justice O'Regan states, with reference to ***Mohamed ao v President of the RSA ao (Society for the Abolition of the Death Penalty in South Africa ao Intervening)***,***[94]*** as follows:

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89 Currie & De Waal 2015 at 164.

90 Section 34 of the Constitution.

91 ***Chief Lesapo v North West Agricultural Bank ao*** supra; see also ***Giddey*** and ***Lufuno*** supra

92 ***Chief Lesapo v North West Agricultural Bank ao*** supra at [22].

93 O'Regan J in ***Giddey NO v Barnard and Partners*** supra at [15].

94 ***Mohamed ao v President of the RSA ao (Society for the Abolition of the Death Penalty in South Africa ao Intervening)*** 2001 (3) SA 893 (CC) at [61], n 55, with reference to ***South African Co-operative Citrus Exchange Ltd v Director-General: Trade and Industry ao*** 1997 (3) SA 236 (SCA) at 242G-H and 244D-E; ***Ritch and Bhyat v Union Government (Minister of Justice)*** 1912 AD 719 at 734-5; ***Reckitt and Colman (New Zealand) Ltd v Taxation Board of Review ao*** [1966] NZLR 1032 (CA) at 1042–3; and ***S v Shaba ao*** 1998 (2) BCLR 220 (T) at 221H–I.

[16] If we understand section 34 not to be directly applicable to private arbitration, the effect of a person choosing private arbitration for the resolution of a dispute is not that they have waived their rights under section 34. They have instead chosen not to exercise their right under section 34.

5.3.31 The difference between a "waiver" and a "choice not to exercise a constitutional right" is that some constitutional rights inhere in the individual and do not fall to be exercised and may, arguably, therefore never be waived.[95] They are inalienable fundamental rights.

5.3.32 Having been identified as an inalienable fundamental right, it is clear that the right of access to the courts is worthy of fierce protection.[96]

(bb) Importance of the purpose of the limitation (section 36(1)(b))

5.3.33 To be reasonable, the limitation of a right must serve an important purpose. The purpose should be one that is worthwhile and one that all reasonable citizens would agree to be compellingly important in a constitutional democracy.[97]

5.3.34 It should be remembered that the aim of mandatory mediation legislation will be the more expedient and less costly settlement of disputes and a lightening of the burden of the court system.[98] These are *per se* legitimate objectives in the general public interest.[99] Of particular interest when resolving family disputes are the following advantages that should also be considered:

a) Resolution of disputes by mediation is in the best interest of the child (section 28 of the Constitution);

b) mediation is a dignified process (section 9 of the Constitution);

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95 In the ***Mohamed*** case at fn 55 reference is made to ***S v Shaba ao*** 1998 (2) BCLR 220 (T) at 221H-I, in which the Court held that the private-law doctrine of waiver is not applicable to inalienable fundamental rights. An individual may choose not to exercise a constitutionally protected right, but is always free to change his or her mind without penalty. De Waal *et al.* 2001 at 42-3, while suggesting that many "freedom rights" may be waived, are of the view that rights to human dignity, life, and the right not to be discriminated against cannot be waived.

96 Vettori at par. 1.

97 Currie & De Waal 2015 at 145.

98 Both these factors will increase access to justice.

99 ***Rosalba Alassini v Telecom Italia SpA*** (C-317/08) Judgment of the Court (Fourth Chamber) of 18 March 2010 European Court of Justice.

c) the privacy of the parties is protected (section 14 of the Constitution);

d) parties are given the opportunity to speak their minds (section 16 of the Constitution); and

e) the process is built on reconciliation and compromise.

5.3.35 The fundamental principle consistently applied by South African courts in family disputes, as indeed in all matters concerning children, now entrenched in section 28(2) of the Constitution, is that a child's best interests are of paramount importance in every matter concerning the child.[100]

5.3.36 Section 28(2) creates a self-standing right. The best-interests criterion is relevant at the limitation stage of the application analysis of any other constitutional right.[101] It is, however, important to note that the use of the word "paramount"[102] in the section does not mean that this right can never be trumped by the rights of others. The Constitutional Court in the ***De Reuck*** case[103] stated as follows:

> The approach adopted by this Court [is] that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that section 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with section 36.

5.3.37 In ***S v M***,[104] the Constitutional Court stated the following:

> The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned.

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100 ***P v P*** 2007(5)SA 94 (SCA) and the references in it to ***Jackson v Jackson*** 2002 (2) SA 303 (SCA) at 307I-308A, ***F v F*** 2006 (3) SA 42 (SCA) at [8] and ***Lubbe v Du Plessis*** 2001 (4) SA 57 (C) at 66B-67G. Madam Justice Belinda van Heerden, at the SALRC meeting of experts in Cape Town on 16 February 2017, stated that even if mandatory mediation were regarded as unconstitutional (which she doubted) when the limitation test was applied, the provision remains that the best interest of children is of paramount importance. She indicated that one does not have to go much further than this to conclude that mandatory mediation can be justified.

101 Woolman & Bishop at 47-40.

102 Note that the text of section 28(2) does not read that a child's rights "are paramount", but that they "are of paramount importance".

103 ***De Reuck v Director of Public Prosecutions, Witwatersrand Local Division ao*** 2004(1)SA 406 (CC) at [55].

104 ***S v M*** 2008 (3) SA 232 (CC) at [42].

5.3.38 The following question, therefore, needs to be answered: Is mediation, rather than litigation, the better way to resolve family disputes when children are involved? See in this regard the discussion of the challenges of the adversarial system and the importance of the principle of wider access to justice in Chapter 4 above.

5.3.39 In essence, the mediator's role is to provide sensitive and unobtrusive assistance. The aim of mediation is the commitment to reach an agreement through co-operative means, rather than by way of a confrontation. It is believed that this much-needed intervention carries advantages for the divorcing parties, the children affected by the divorce, and also for the judicial system.[105]

5.3.40 Mediation minimises the hurt to children and families going through a divorce, by giving parents a chance to settle their differences with the assistance of a third party[106] who remains neutral. Research has shown[107] that mediated settlement agreements in instances of divorce include far more advantageous provisions regarding the interests of children compared to agreements or orders made in terms of the adversarial system.[108]

5.3.41 Mediation improves communication between divorcing parties. Constructive communication in turn improves the level of cooperation between the parties during the divorce process and the period following the divorce. Unlike litigation, mediation is not restricted solely to legal issues, and allows the parties to deal with many facets of divorce.[109]

5.3.42 Assessments conducted to determine the contact arrangements between non-resident parents and their children approximately 12 years after the families had reached a settlement

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105 SALRC Issue paper 31 at 3.8.23 and references it contains.

106 Dr Ronel Duchen, at the SALRC meeting of experts held in Cape Town on 16 February 2016, stated that children should have the benefit that the parents or adults are forced to do the right thing for them. This will increase the positive outcomes for children.

107 Dr Astrid Martalas, at the SALRC meeting of experts held in Cape Town on 16 February 2016, stated that empirical research has shown that the biggest risk factor for children post-divorce is ongoing acrimony between the parents and, secondly, that self-determined decisions such as in mediation lasts longer. If one puts these two facts together, it is clear that mediation is the better option and in the best interest of children.

108 SALRC Issue Paper 31 at 3.8.24 with references it contains.

109 SALRC Issue Paper 31 with references it contains.

after separation, brought noteworthy results. A distinction was drawn between settlements reached after mediation, on the one hand, and, on the other, through adversary procedures. It was found that 30% of non-residential parents who participated in mediation saw their children every week or more, were more involved in many areas of their children's lives, maintained better contact with their children, and had greater participation in co-parenting, whereas the same could be said about only 9% of parents who litigated.[110]

5.3.43 The rights contained in section 28 as a whole impose obligations on both the State and families to provide for the well-being of children. For example, the primary obligation to provide shelter lies with the family, and only alternatively with the State if parents cannot provide for their children. However, the State also needs to fulfil its additional obligations towards children by passing laws and creating mechanisms for enforcement in connection with the maintenance of children; their protection from maltreatment, abuse, neglect or degradation; and the prevention of all other forms of abuse.[111]

5.3.44 There is also an obligation on the State to create the necessary environment for parents to care for their children.[112]

5.3.45 Even where there are no children involved in the family dispute, mediation should still be the preferred option, since the mediation process enables the disputants to resolve a dispute in a dignified manner and at the same time to have their dignity respected and protected. In addition, the forum of a mediation process is of a private nature, so maintaining the disputants' right to privacy.[113] In promoting the right to privacy, any disclosures made during the mediation process are made entirely without prejudice to the parties' rights, remain confidential and may not to be disclosed outside of the mediation session.[114]

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110 Emery RE, Laumann-Billings L, Waldron MC, Sbarra DA & Dillon P "Child custody mediation and litigation: custody, contact and co-parenting 12 years after initial dispute resolution" 2001 69 ***Journal of Consulting and Clinical Psychology*** 323.

111 ***Government of the Republic of South Africa v Grootboom*** 2001 (1) SA 46 (CC).

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

113 See also the position regarding the status of section 12 of the Divorce Act, which regulates the publication of divorce (court) proceedings.

114 Maclons at 144.

5.3.46 The right to dignity is also one of the core constitutional rights. The Constitutional Court describes the right to dignity and the right to life as the most important human rights.[115] The Court further points out that the right to dignity is intricately linked with other human rights and is therefore the foundation[116] and the source[117] of many of the other rights that are expressly entrenched in the Bill of Rights.[118] The right to dignity could perhaps be seen as a naturally all-embracing notion and as an important underpinning of any human-rights ideology.[119]

5.3.47 The right to privacy is a valuable and advanced aspect of personality. Sociologists and psychologists agree that a person has a fundamental need for privacy.[120] An individual therefore has an interest in the protection of his or her privacy.[121]

5.3.48 A person's sexual relationship with another is probably the most intimate of all human relationships, particularly when such relationship is consecrated by marriage.[122] Marriage has been described as the most intimate of human relationships. Even in English law, where invasion of privacy is not recognised as a common-law tort, the courts have recognised that any disclosures concerning what passed between a husband and wife during the marriage may be

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115 ***S v Makwanyane*** supra at [144].

116 In ***S v Makwanyane*** supra at [328], O'Regan J holds that the recognition of a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right is therefore the foundation of many of the other rights that are specifically entrenched in the Bill of Rights.

117 In ***S v Makwanyane*** supra at [144], Chaskalson P states that the rights to life and dignity are the most important rights, and the source of all other personal rights in the Bill of Rights. "By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others." See also Devenish at 369.

118 The then Appellate Division of the Supreme Court of South Africa and the Constitutional Court have regarded privacy as a part of the individual's right to dignity or dignitas. See Jansen van Vuuren NNO v Kruger 1993 (4) SA 842 (A). Neethling J, Potgieter JM & Visser PJ Neethling's law of personality Butterworths Durban 1997 (hereafter referred to as "Neethling, Potgieter & Visser") at 37 holds a dissenting view that in the case of an infringement of privacy, the question whether someone's good name has been infringed is irrelevant.

119 Burchell at 367.

120 Neethling, Potgieter & Visser at 33.

121 Neethling, Potgieter & Visser at 35.

122 McKerron RG **The law of delict 7**ed Juta & Co Ltd Cape Town 1971 at 55, as referred to by McQuoid-Mason DJ The ***law of privacy in South Africa*** Juta & Co Ltd Johannesburg 1978 (hereafter referred to as "McQuoid- Mason") at 183.

construed as an actionable breach of confidence.[123] The same is true for parties in a domestic partnership.

5.3.49 If evidence has to be given in open court, it may be difficult for the parties and witnesses to speak fully and frankly on sensitive matters or when answers are potentially self-incriminatory.

5.3.50 Even though mandatory family mediation legislation may constitute a limitation of the right of access to court, it should be noted that such legislation could, at the same time, be a confirmation of the right to dignity and the right to privacy, which are also enshrined in the Constitution (sections 10 and 14, respectively), and, especially, of the rights contemplated in section 28(2) of the Constitution dealing with the child's best interests.

5.3.51 From the above it appears that the purpose of mandatory mediation, namely, to protect children as well as the privacy and dignity of all the parties concerned, is a legitimate and important government objective. The limitation imposed by the proposed legislation on the constitutional right of access to the courts, therefore, serves an important purpose.

(cc) The nature and extent of the limitation (section 36(1)(c))

5.3.52 One has to assess the way in which the limitation affects the right concerned. In general, the more serious the impact of the measure on the right, the more persuasive the justification must be. This assessment is a necessary part of the proportionality enquiry, because proportionality means that the infringement of rights should not be more extensive than is reasonably warranted by the result that the limitation seeks to achieve. Determining whether the limitation does more damage to rights than is reasonable for achieving its purpose, first requires an assessment of how extensive the particular infringement is.[124]

5.3.53 In general, some critical questions that focus on the proper role of the court in the context of dispute resolution have been raised. If the common law is developed through court

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123 ***Argyle v Argyle*** [1965] 1 All ER 611, 620 at 623 as referred to by McQuoid-Mason at 183. See, however, the ***Younger Report*** (Cmnd 5012), July 1972 par. 113: "Privacy can be used as a cloak to conceal undesirable activities: it may be easier to hide physical and sexual abuse which takes place out of sight in the home, than crimes of violence in public".

124 Currie & De Waal 2015 at 168; ***S v Manamela*** supra at 508B.

decisions, will reducing the opportunity for adjudication not affect the evolution of the common law? Every time a court interprets a statutory provision or court rule in a certain way, it constitutes a precedent to be followed in future. The court therefore performs an important "social governance role" in society. The same cannot be said of mediation.[125]

5.3.54 The following specific arguments are also pertinent: [126]

(a) The precise nature of the proposed legislation should be considered. A blanket imperative preventing the parties from accessing the courts would significantly reduce the parties' access to the courts. However, if a judicial discretion or an opt-out option is included, the effect of the infringement could be lessened.

(b) When matters unsuitable for mediation, such as legal precedent, public interest or allegations of sexual offences, are excluded from the imperative, it could also have a positive effect on the justification for the infringement.

(c) The fact that a party would still be allowed to access the courts if the mediation is unsuccessful is important. However, disproportionate sanction for failure to participate in the mediation in good faith could imply excessive scrutiny of parties' participation in the mediation.

5.3.55 In evaluating the arguments set out above, it seems that the restriction, depending on the specific option chosen, would not result in a substantial infringement of the right of access to court.

(dd) The relation between the limitation and its purpose (section 36(1)(d))

5.3.56 There should be proportionality between the harm done by the infringement and the beneficial purpose that the law is meant to achieve. Section 36 does not permit a sledgehammer to be used to crack a nut.[127] There must therefore be a causal connection between the law and its purpose.

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125 De Vos & Broodryk Part 1 at 702 and further.

126 Quek at 491.

127 ***S v Manamela*** supra at 508G; De Waal *et al.* ***The Bill of Rights Handbook*** 2001 at 160.

5.3.57 The first question to be answered is whether the law serves the purpose it is designed to serve at all. If not, it cannot be a reasonable limitation of the right. If the law contributes only marginally to achieving its purpose, it cannot be an adequate justification for an infringement of fundamental rights.[128]

5.3.58 One should, furthermore, determine whether the legislature has overreached itself in responding, as it must, to matters of great social concern.[129]

5.3.59 The proposed legislation addresses a concern about the inadequacy of the adversarial court system to resolve family disputes, especially in so far as the protection of children and the dignity of the parties are concerned. As was stated in the chapters above, mediation does seem to be effective in addressing these problems.

5.3.60 It furthermore is clear that the aim of the proposed legislation is to provide parties with another option to resolve their disputes. It needs to be established whether the mechanism chosen to further this objective is proportional to that objective.[130] Is the infringement of the right therefore greater than is reasonably necessary to achieve its object? Although the proposed legislation may be rationally connected to its purpose, it may suffer from a constitutional defect of over-breadth.[131]

5.3.61 It is envisaged that mandatory mediation will only apply to family disputes (not to all civil disputes). The next question to be considered is whether the fact that using mandatory mediation may, on occasion, prevent emotional and psychological trauma for children or public humiliation for the family, warrants using the process in all family matters, presumably on the assumption that such matters are inevitably attended by such consequences.[132] Discretionary referral might be a more customised and fair form of mandatory mediation, in comparison with

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128 De Waal *et al.* ***The Bill of Rights Handbook*** 3ed Juta & Co Kenwyn (2000) (hereafter referred to as "De Waal *et al.* 2000") at 148.

129 ***S v Manamela*** supra at 508G.

130 See the comparable **Edmonton Journal** case supra at fn 53 at 593.

131 For a discussion of this principle, see ***Case ao v Minister of Safety and Security ao****; **Curtis v Minister of Safety and Security ao*** 1993 (3) SA 617 (CC). See also ***Coetzee v Government of the Republic of South Africa***; ***Matiso v Commanding Officer, Port Elizabeth Prison*** 1995 (4) SA 631 (CC) at 643C.

132 Maclons at 138.

an unqualified referral of entire classes of cases. While simple to administer, such a system is synonymous with arbitrariness.[133]

5.3.62 Furthermore, the possibility of imposing compulsory collaboration on the parties may cause hostility between them to escalate, which could possibly have the opposite effect to what was intended with mandatory court-based mediation.[134] Unqualified referral is, therefore, frequently accompanied by provisions allowing parties to opt out of the mandatory programme.[135]

5.3.63 One should rather weigh up the possible infringement of the freedom of choice against the considerable benefits this system generally affords disputants. In this regard, the benefits of mandatory mediation may carry more weight, which would make the possible infringement less severe. Furthermore, as previously mentioned, should the mediation process become established in South Africa and all the beneficial effects recognised, the necessity for mandatory mediation may perhaps become obsolete.[136]

5.3.64 Maclons[137] refers to the fact that the mediation process gives parties an opportunity to speak their minds and to express their emotions; it also allows the parties their "day in court", but without requiring them to give up control over the outcome and it presents the opportunity, if settlement is reached, to secure a final and certain outcome of the dispute.

(ee) Less restrictive means to achieve the purpose (section 36(1)(e))

5.3.65 A limitation must achieve benefits that are in proportion to its cost. The question whether there may be less restrictive means to achieve the government's purpose is an important part of

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133 Quek at 491.

134 Maclons at 138 with reference to Oosthuizen S & Blom supra.

135 Quek at 491.

136 Maclons at 141.

137 Brand J, Steadman F & Todd C ***Commercial mediation: A user's guide to court-referred and voluntary mediation in South Africa*** 2ed Juta & Co Ltd Cape Town 2016 at 27; Maclons at 145.

the analysis of the limitation, but one should remember that this is only one of the considerations. It cannot be the sole consideration.[138]

5.3.66 The limitation would not be proportionate if other means could be employed to achieve the same end. If a less restrictive (but equally effective) alternative method exists to achieve the purpose of the limitation, then that less restrictive method must be employed.[139]

5.3.67 It may be argued that the object of providing mediation services may be achieved in terms of existing legislation. The court-annexed mediation service rules already permit voluntary mediation and therefore include a provision that allows exercising a choice. Attempts at settlement may also be made in terms of the ordinary court procedure.[140] It has also been argued that if the underlying issue is that litigation is too expensive and too slow, civil-justice reforms should make litigation more affordable, faster and more efficient.[141]

5.3.68 A judicial discretion exercised in appropriate circumstances may provide an appropriate mechanism to further the objective of mediation without unnecessarily limiting the citizen's right of access to the courts.

5.3.69 However, in a case in Italy, it has been held[142] that it cannot be argued that a less restrictive alterative exists when considering both out-of-court settlements and voluntary mediation, since both processes are merely optional and not as effective as mandatory mediation.

c) Conclusion

5.3.70 It is clear that the right of access to court is firmly rooted in both our common law and statutes. Set against this right are the notion of a wider concept of access to justice, the

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138 ***S v Manamela*** supra at 528H; De Waal *et al*. 2000 at 149.

139 In ***S v Manamela*** supra at 529 it was noted that in assessing the effectiveness of alternative methods a margin of discretion is given to the state. The role of the court is not to second-guess the wisdom of policy choices made by legislators. It should take care not to dictate to the legislature unless it is satisfied that the mechanism chosen by the legislature is incompatible with the **Constitution**.

140 Rule 37 of the High Court Rules.

141 De Vos & Broodryk Part 1 at 703.

142 ***Rosalba Alassini v Telecom Italia SpA*** supra.

protection of the rights of children, the right to privacy, and the right to dignity, all of which are important rights entrenched in the Bill of Rights. These rights are all based on basic principles regarded as fundamental to a free society. It would be difficult in principle to prefer one right to the other.

5.3.71 Although the proposed legislation may be regarded as an infringement of the right of access to court, there will be some leeway in that the proposed legislation will not be applicable to all civil cases. Provision may also be made for exceptions to the general rule. The infringement will, in addition, not have the effect that the right of access to court is extinguished. Parties will have access to the courts after having taken part in the mediation process. The format of the mandatory settlement procedure should therefore not make it impossible or particularly difficult for parties to exercise their rights in terms of section 34 of the Constitution.[143]

5.3.72 To the extent that a new procedural requirement does limit the right of access to the courts, the limitation may be found to be justifiable, if it does not cause significant delay in the resolution of disputes and, secondly, if it does not involve costs that might preclude litigation by indigent parties.[144]

5.3.73 The ***Alassini*** bright-line framework[145] for mandatory mediation should be considered:

a) Mediation must not result in a binding decision by the mediator. It therefore does not prejudice the party's right to bring legal proceedings.
b) Mediation must not cause substantial delay if a party wants to institute legal proceedings.
c) Mediation must suspend the period for time-barring of claims.
d) Mediation must not give rise to extra cost, or the cost must be low.

5.3.74 Mandatory mediation could therefore be regarded as unconstitutional in certain instances, for example if a mediator takes a binding decision, or if it leads to an unreasonable delay or extra cost. It could also be unconstitutional when cases are arbitrarily referred to mediation without any provision for exemption, without any opportunity to opt out, without any

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143 See Chapter 7 for a discussion of the various forms of mandatory mediation.

144 ***Rosalba Alassini v Telecom Italia SpA*** supra.

145 ***Rosalba Alassini v Telecom Italia SpA*** supra.

discretion being exercised and when it is accompanied by sanctions for non-compliance.[146] A mandatory mediation programme will, therefore, have to be developed with the utmost care and sensitivity to address all the possible objections levelled against mandatory mediation.[147]

146 See also Quek at 490.

147 Quek at 500.

PART C: FAMILY MEDIATION

Chapter 6: Mandatory mediation – Costs, funding and fees

6.1 Introduction

6.1.1 Should the introduction of mandatory mediation in South Africa be contemplated, one would have to consider it from a cost perspective.

6.1.2 The population in South Africa is diverse in terms of race, culture and class. While a section of the population may be completely reliant on the State for assistance, another sector may feel more comfortable seeking the services of a non-governmental organisation; some may wish to go to a traditional leader, and yet another group might prefer to consult a mediator in private practice.[1] It is true, however, that most South Africans would not be able to afford the services of private mediators and would require assistance from the State, if mediation were made mandatory.[2]

6.1.3 In its comments to the Rules Board,[3] the LSSA said it viewed the move towards mediation as a "positive one if the consequences and aim thereof are to make justice more accessible". Despite this, the LSSA considered some aspects to be problematic and requested clarification. The issues raised were the following:[4]

a) Parties may not be willing to take the mediation route, especially if they had to pay costs within a shorter period of time.

b) The LSSA was "gravely concerned" that parties would be responsible for the mediator's fees, which would add substantially to the costs of the general

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1 SALRC Issue Paper 31 at par. 3.8.68.

2 SALRC Issue Paper 31 at par. 3.8.73.

3 2011 Rules Board initiative.

4 The Cape Law Society, at its annual general meeting in November 2011, hosted a workshop on the 2011 draft rules. The workshop was led by a panel consisting of Daryl Burman, Graham Bellairs, Teresa Erasmus, Adam Pitman and Traci Lee Bannister, who are members of the society's specialist committees as referred to in Hawkey K "Mandatory mediation rules to shake up justice system" 2011 515 ***De Rebus*** 21.

litigation process.[5] The costs of court-based mediation should therefore be covered by the state.

c) Further information about mediators' fees was required. The LSSA stated that mediators should be paid a reasonable fee to ensure a satisfactory level of competence and suggested that fees be payable on a tariff basis.

d) How the indigent would pay for mediation and how this would affect access to justice should be clarified, as should payment of additional costs, such as interpreters' fees. The position of legal aid in the proposed change and the reconciliation of the proposed rules with existing rules of court should be resolved.

e) It would be wrong, in principle, to compel parties to pay the costs of mediation, as parties are not required to pay the costs of the judge when a matter is heard in court. This would impose a cost obligation on the parties which they would not previously have had. Mediators should therefore be part of the court structure and should be funded in the same way as judges are funded.

6.1.4 Globally, states are confronted with having to make policy trade-offs because of limited financial and human resources – a scenario that requires contributions from private, community and non-governmental sectors. Buy-in from all these sectors may have to be obtained in South Africa, as budgetary constraints may hamper a fully state-funded mediation service.[6]

6.1.5 It should be noted that the funding of, and fees pertaining to, mediation will be fully canvassed in the Project 94 investigation. However, the fact that the present paper is proposing the implementation of *mandatory* mediation adds a unique perspective to the issue that necessitates a preliminary discussion.

6.2 Implementation vs engagement costs

6.2.1 The investigation into costs and funding may be divided into two enquiries, namely, the costs of –

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[5] See also Maclons at 114 in this regard with reference to Victorian Law Reform Commission ***Civil justice review report*** 2008 214.

[6] SALRC Issue Paper 31 at 196-197; See also SALRC Issue Paper 142 ***Investigation into Legal Fees*** Project 142 16 March 2019 at 24, 39,47, 100 and 168.

- *implementing* a mandatory mediation system in South Africa's civil justice system; and
- *engaging* in the actual mediation process.[7]

a) The cost of implementing a mandatory mediation system in South Africa's civil justice system

6.2.2 In South Africa, mediation services are currently primarily offered through court-connected mediation services, private persons and professionals, non-governmental organisations, and community-based organisations. It needs to be established whether the costs and fees related to a system of mandatory mediation in all family law matters (including the extent of funding for increased human resources required, increased office space, and the establishment of offices in outlying areas)[8] should be regulated and whether they should be managed publicly, privately, or by means of a public-private partnership.[9]

(i) Public funding

6.2.3 The resolution of family law disputes has broader social and public benefits. First, individual conflict comes to an end and its potentially destructive consequences are contained. At the same time, resolution of the individual conflict serves the greater good not only by demonstrating to society at large that such conflicts can be managed (enhancing public confidence in the justice system), but also by indicating how they can be resolved. In this way, public values are affirmed and may have an ordering influence on other families and on other conflicts. It should follow that the state has a major interest in responding effectively to the

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7 Maclons at 126.

8 SALRC Issue Paper 31 at par. 3.8.75.

9 SALRC Issue Paper 31 at par. 3.8.58.

problem of unmet family legal needs.[10] As has been argued in Chapter 4 above, the optimal use of the ADR (mediation) enhances access to justice.[11]

6.2.4 Certain sections of the Constitution impose a duty on, and mandate, the branches of the state in South Africa to perform in a certain way. These sections include section 7(2) of the Bill of Rights in the Constitution,[12] which provides that the state must respect, protect, promote and fulfil the rights contained in the Bill of Rights. Furthermore, section 8[13] provides that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all other organs of state. This ensures that the South African state strives towards transforming the country's justice system (in this regard, the civil-justice system), in order to keep it in line with the Constitution, 1996.[14]

6.2.5 There seems to be a strong constitutional argument in favour of the provision of civil legal aid services in order to achieve equal access to legal services and promoting justice.[15] It

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10 Action Committee at 18 (text): "The individual and social costs associated with failing to resolve family law issues, while not yet empirically quantified, are presumably high. For the individual, the cost can be measured not only in dollars but in stress, ill health, employment problems, lost opportunities and so on. The broader social costs for business, the health care system and policing are likely considerable. Another potential cost is the damage to public confidence in the justice system and the harm to civil society when legal issues are left unresolved on this scale."

11 Chapter 4 above.

12 Section 7(2) of the Constitution provides as follows:
"**Rights**
7. (1) …
(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
(3) …"

13 Section 8 of the Constitution provides as follows:
"**Application**
8.(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

14 Maclons at 148.

15 Holness D "The constitutional justification for free legal services in civil matters in South Africa" 2013 27 (2) ***Speculum Juris*** 1 (hereafter referred to as "Holness") at 1.

has been noted above that the use of mediation to resolve disputes is mandated by sections 10, 14 and 28 of the Bill of Rights in the Constitution with respect to all parties, but especially in so far as the welfare of all children is concerned. It stands to reason, therefore, that the state should promote and protect these rights.

6.2.6 One should also consider the difference between the costs of settling a litigated dispute ahead of the trial and the costs of settling the dispute on the steps of the court.[16] Anecdotal evidence shows that Equillore (a private mediation service provider) recently proposed that accredited and experienced mediators be appointed to assist the Road Accident Fund to settle claims well ahead of trial. This proposal would have cost the Road Accident Fund R2 150 per claim for four hours of mediation. It had the potential to save the Road Accident Fund millions in legal fees. The Road Accident Fund rejected the proposal.[17]

6.2.7 Two observations should be noted in this regard. The legislature has, in the Children's Act, already expressly made provision for specific instances of mandatory mediation. It is argued, therefore, that the state has a responsibility, as a matter of principle, to make the process affordable. Furthermore, experience has shown that international donor funding is frequently available to support projects that foster access to justice and dispute resolution in developing countries (such as South Africa). While it is often difficult for private individuals to tap into such funds, governments generally experience fewer obstacles in this regard. It is a question of initiating new funding sources.[18]

6.2.8 It has been suggested[19] that one option would be for government to make funding available to the various Divisions of the High Court to enable the Judges President to engage the services of accredited mediation service providers. Such service providers could then

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16 See also European Parliament Directorate-General for Internal Policies ***Quantifying the cost of not using mediation – a data analysis*** Note April 2011; ADR Center **The cost of non-ADR – Surveying and showing the actual costs of intra-community commercial litigation** Survey Data Report Rome 9 June 2010.

17 Joubert and Jacobs ***Legalbrief Today.***

18 SALRC Issue Paper 31 at par. 3.8.78; Paleker at 25.

19 Ibid.

provide court-based mediation in their Divisions and pay mediators for their services.[20] It will be taxpayers' money well spent. The government could, of course, also develop its own mediation component.

6.2.9 At the SALRC meeting of experts in Pretoria, it was noted that the DOJCD is actually embarking on a project that is intended to train the State Attorneys to use mediation in litigation, and to function independently as a mediator. If the second purpose is taken forward, then to some extent the problem in question might be lessened when a member of the public is involved in a dispute with the State. If one wants to push ahead to make state litigation subject to mediation, it would be worthwhile to train people in the Office of the State Attorney as well as other people such as Legal Administration Officers (not necessarily people that are legal practitioners, but people in the Department that could be employed for this purpose).[21]

6.2.10 It has been further noted that the DSD is responsible for prevention and early intervention programmes and that mediation has been identified as one of the early-intervention programmes that is funded. Therefore, there should be interaction with Treasury to ensure that there is a designated budget for early intervention and prevention.[22]

6.2.11 In the Netherlands the government funded the mediation project for the first five years. During the first two and a half years the mediation was funded for everyone, rich and poor. It was a free service that parties could use. Legal Aid also provided for mediation. As mediation became a better-known process, it was incorporated in every court, except the Appeal Court, and people became obliged to pay for the service. Since mediation had proven itself, parties have been willing to pay for the service.[23]

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20 See for example par. 107.530 of Chapter 107 of the **Revised Statutes of the State of Oregon**, which reads as follows:
"**107.530 Source of conciliation services; county to pay expenses**
(1) A circuit court or the circuit courts of a judicial district exercising conciliation jurisdiction may obtain conciliation services, with the prior approval of the governing body of each county involved, by:
a) employing or contracting for counselors and other personnel; or
b) contracting or entering into agreements with public or private agencies to provide conciliation services to the court or courts.
(2) Subject to the provisions of the Local Budget Law, the compensation and expenses of personnel performing conciliation services for the circuit court or courts and other expenses of providing conciliation services may be paid by the county or as may be agreed upon between the counties involved …"

21 Mr Jay Balkisun, Rules Board.

22 Ms Nelsiwa Cekiso, DSD, at SALRC meeting of experts on 16 February 2017 in Cape Town.

23 Dr Astrid Martalas at SALRC meeting of experts on 16 February 2017 in Cape Town.

6.2.12 At the SALRC meeting of experts it was also argued that the specific mandatory mediation option chosen in Chapter 7 below will affect the cost and funding of mediation, since it will become a statutory mandate when applying to Treasury for funds. As an example, reference was made to the phraseology in the Children's Act in terms of which the Minister is obliged by law to provide certain services. This obligation enables him or her to approach Treasury for funds in order to fulfil the legislative mandate. However, if a voluntary mediation option is implemented, no such obligation would exist and there would consequently never be funding for mediation and there would not be a regulatory framework. The status quo would remain: a fragmented, discretionary and unfunded process.[24]

6.2.13 Support for the contention that the costs of including a mandatory court-based mediation system in South Africa's civil-justice system should be covered by the DOJCD, can be found in the then Minister's speech at the Access to Justice Conference in 2011,[25] where he stated that it was inexplicable that South Africa had taken such a long time to commit to reforming its civil-justice system by implementing mandatory court-based mediation. The Minister explained that the DOJCD had provided additional capacity in its budget and human resources in support of the CJRP and the implementation of mandatory court-based mediation.

6.2.14 One needs to evaluate the discussion in this chapter in the context of the entire document. In accordance with the proposal set out in paragraph 2.7.5 above, all dispute resolution services will be available at all entry points at any stage of a dispute.[26] As stated there, entry points such as LASA, the courts, the traditional courts, the Office of the Family Advocate, the DSD social workers and Thusong MPC are all state-funded. It is clear that the government will be primarily responsible for the basic implementation of a mandatory mediation system in each of these entities once the legislation has been enacted. Van As makes the point that extending legal aid requires both funding and the political will.[27]

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24 Prof. Julia Sloth-Nielsen at SALRC meeting of experts on 16 February 2017 in Cape Town.

25 Supra.

26 See discussion in Chapter 2 above.

27 Holness with reference to Van As "Taking legal aid to the people: Unleashing local potential in South Africa" ***Obiter*** 2005 188.

6.2.15 It is important to note, however, that in some instances mediation services are, or have been, offered and therefore are, or have been, funded already:[28]

aa) ADR has for centuries been practised *de facto* in rural communities in South Africa. It is part of the culture of the rural population to seek the services of a traditional leader, a chief, or an elder in the community to "mediate" in personal and business disputes.[29]

bb) It was submitted that social workers would be able to provide mediation services to the public. It is evident in the Children's Act that social workers are considered to have adequate training to deal with family matters. The Act presumes that social workers do mediation as part of their functions. Examples of this are found in, amongst other sections, sections 21(3), 33(5), 34(3), and 49(1) of the Act. Many aspects of the statutory functions of designated social workers and other social workers include mediation, for example, the mediation of parenting agreements between foster and natural parents or liaison with natural parents whose children are resident in child and youth care centres. Such mediated settlements are frequently incorporated in orders of courts and, in particular, the civil regional courts and children's courts.[30]

cc) Another public institution that currently "mediates" in contact and care disputes is the Office of the Family Advocate.[31] At the Focus Group Forum, it was intimated that the Office of the Family Advocate is inundated with enquiries held in terms of the Mediation in Certain Divorce Matters Act, and that the Office is experiencing immense difficulty in conducting mediation in terms of sections 21, 33 and 34 of the Children's Act as well. The Cape Town Office of

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28 A significant increase in the number of mediations is however expected if the mandatory system is implemented.

29 SALRC Issue Paper 31 at par. 3.8.66; SALRC Focus Group Forum Pretoria 2008 and Focus Group Forum with Family Advocates February 2008. See also the discussions on traditional courts in Chapter 4 of the Issue Paper and lay forums appointed in terms of the Children's Act.

30 Ministry for Social Development, Western Cape.

31 SALRC Issue Paper 31 at par. 3.8.59. There is a debate about the nature of the "assistance" that the Office of the Family Advocate is providing. See discussion in Chapter 4.

the Family Advocate outsources matters to a private association of mediators to conclude matters expeditiously and effectively.[32] It has been argued that if South Africa were to focus on a publicly regulated family mediation service, it would be essential that the capacity, powers, functions, competencies, and character of the Office of the Family Advocate be sufficiently increased, expanded and transformed, or, alternatively that a family justice centre be established. This may require an injection of funds by the State.[33]

dd) Maintenance officers in maintenance courts regularly assist the parties by employing a form of mediation.

ee) Legal Aid South Africa,[34] established by section 2 of the Legal Aid South Africa Act,[35] aims to make legal aid available to indigent persons.[36] The following are examples:

(A) Non-litigious assistance through justice centres, including arbitration and mediation, may only be rendered if the main service provider is –

a) a salaried legal practitioner employed by a justice centre or cooperation partner;

b) a person working under the control and supervision of a salaried legal practitioner employed by a justice centre or cooperation partner; or

c) an accredited judicare practitioner who is instructed to provide mediation services on behalf of Legal Aid SA clients.[37]

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32 SALRC Focus Group Forum April 2008 Cape Town. Paleker at 25 suggests that unless there is a fundamental change to the Office of the Family Advocate, mediation under the Children's Act, should be left to "other suitably qualified persons" as contemplated in the Act.

33 SALRC Issue Paper 31 at par. 3.8.61.

34 See full discussion in SALRC Issue Paper 31.

35 Legal Aid South Africa Act 39 of 2014. See full discussion on LASA in SALRC Issue Paper 31 at par. 4.8.

36 Section 3 of the Legal Aid South Africa Act reads as follows:

"Objects of Legal Aid South Africa
3. The objects of Legal Aid South Africa are to—
(a) render or make available legal aid and legal advice;
(b) provide legal representation to persons at state expense; and
(c) provide education and information concerning legal rights and obligations,
as envisaged in the Constitution and this Act.

(B) The Legal Aid Board (as it then was) also initiated a national internship project supported by the French Government's Priority Solidarity Fund.[38] The project had its roots in a call made in 1998 by Arthur Chaskalson, the then President of the Constitutional Court. Internships for all law graduates were also proposed at the National Legal Aid Forum in January 1998 and were supported by the DOJCD. The project aimed to pilot the placement of law graduates in LASA justice centres, initially for one year. In brief, the internship project had the following features:

- The interns were paid a stipend for their services.
- They were under the direct supervision of the principal in the justice centre.
- They were not registered for articles and they were not to have any expectation of serving articles at the Legal Aid Board on completion of their internships.
- They were to do work performed by candidate attorneys, except that they could not appear in court on behalf of clients.
- Although the project experienced many difficulties, both the Legal Aid Board and the interns involved benefited greatly from it. A sizeable body of knowledge was acquired in the process, which can stimulate the debate about the creation of a compulsory national legal internship programme.
- The programme has shown that it is possible to provide services to poor people through an internship programme that is relatively inexpensive, yet effective. The programme further showed that the Board has a critical role to play in creating a channel for black law graduates

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37 However, in appropriate circumstances, the justice centre employee can get advice or an opinion from a specialist or expert if necessary to properly advise a client.

38 LASA ***Evaluation Report Internship Programme*** 2004.

to enter the legal profession. The fact that the project had an almost 100% placement rate is a notable achievement.

- The Legal Internship Project benefited the Legal Aid Board, the interns involved and the clients who would otherwise have been waiting in never-ending queues for basic legal services.

Even though this programme was not aimed at mediation services, its success could pave the way for a similar programme to assist with the mandatory mediation process.

6.2.16 Indications are, however, that contributions to the legal aid systems from governments are decreasing worldwide. In the United Kingdom, private family law was removed from the scope of legal aid, while legal aid for mediation was continued. The thinking was that couples should be encouraged to resolve disagreements as early as possible without recourse to court proceedings and without incurring unnecessary legal expense. Removing family law from the scope of legal aid would lead to additional mediation.[39] However, there was a sharp fall in mediation. The reasons advanced included the following:[40]

a) The end of compulsory mediation assessment during trials;
b) removal of solicitors from the process; and
c) inadequate provision of clear, reliable and easy to access advice on mediation and the continued availability of legal aid in this regard.

Criticism has focused on the "unfortunate lack of 'joined up' thinking" in the preparation of the new legal regime.[41]

6.2.17 At the Cape Town meeting of experts, a representative from LASA stated that they do not have a financial mandate to pay for mediation. They use FAMAC or other attorneys on a *pro bono* basis, or refer people to the Family Advocate, but can do only that much. The

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39 House of Commons Justice Committee ***Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*** Eighth Report of Session 2014-2015 4 March 2015 (hereafter referred to as "***Eighth Report***") at par. 139.

40 ***Eighth Report*** at par. 149.

41 ***Eighth Report*** at par. 150.

representative indicated that most of their clients want mediation, but since there is a lack of funds, the system is not working.[42]

6.2.18 At the Pretoria meeting of experts, a representative from LASA explained that there currently is a conflict of interest when LASA has to become involved both as legal representatives and as mediators. Even the paralegals are part of this "legal firm".[43]

6.2.19 In their responses to the question in SALRC Issue Paper 31 as to the role LASA should fulfil, the following arguments were raised:

a) Cognisance should be taken of the fact that staff members of Legal Aid South Africa nationwide are trained as mediators (the present author, as an appointed mediation trainer for LEAD, frequently finds legal practitioners from the Legal Aid South Africa and legal-costs insurance companies participating in the five-day divorce mediation course).[44]

b) Legal Aid South Africa provides legal assistance in the same manner as a firm of attorneys. Its role should not be extended beyond that.[45]

c) The role of Legal Aid South Africa should be to –

   (i) act on behalf of the child when legal representation is needed in order to ensure that the best interests of the child are served; and

   (ii) to provide legal services for the indigent.[46]

6.2.20 Finally, it is interesting to note that the Short Process Courts and Mediation in Certain Civil Cases Act, 1991,[47] which commenced on 17 July 1992,[48] makes provision for short

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42 Mr Renate Bougard, LASA

43 Ms Hanonoshea Hendricks, LASA.

44 Mr Charles Cohen.

45 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

46 Child Welfare South Africa (Ms Julie Todd).

47 Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991. The developments that led up to this Act are set out in the DOJCD Annual Report 1 July 1991-30 June 1992 RP 40/1993 in par. 1.66-1.69 at 17, as follows: "During 1987 the Minister of Justice convened a conference at Jan Smuts Airport [as it was known at the time] to examine an alternative method of dispute resolution. The conference was attended by various prominent legal practitioners and many inputs were made on the subject. A draft Bill, which was drafted by the Department, served as a working document for the conference. After the conference liaison was maintained on a continuous basis with the organised legal professions in order to promote the aims of the project. The joint effort eventually resulted in the promulgation of the Act."

process courts and mediation proceedings.[49] This Act has not been repealed. Apart from the conciliatory function the mediator will perform, the parties will also be provided with advice as to the steps to be followed to expedite the ensuing trial if a settlement cannot be reached. The DOJCD indicated at the time that adjudicators would be appointed from the ranks of retired magistrates, attorneys and advocates to preside in the short process court.[50] Mediators would be appointed on the same basis as adjudicators, and a person would be able to hold both positions.[51] Remuneration was to be paid to mediators and adjudicators from the Treasury in terms of the rules. However, half of this payment, or at least R50, may be recovered from a party or parties. The proceedings may take place after normal business hours.[52]

(ii) Private funding

6.2.21 The alternative approach suggests that divorce and separation are essentially private matters. It is argued that the introduction of no-fault divorce has allowed parties the right to decide whether or not to remain married; logically, therefore, this right should be extended to decide post-marital issues arising from their divorce. Inherent in this approach is the view that the parties should be entitled to turn for assistance to an independent third party of their choice rather than one provided by the State. A further indirect advantage of this approach would be that it is, from the State's point of view, a relatively inexpensive process as it does not require the manpower or facilities needed for mediation provided by the State.[53]

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48 Short process courts were established at Pretoria and Pretoria North with effect from 1 September 1992. The provisions relating to mediation proceedings came into effect at the same time. DOJCD ***Annual Report*** 1 July 1991 – 30 June 1992 RP 40/1993 in par. 1.69 at 17. In 1994, the DOJCD reported that the institution of further pilot projects would receive attention after the promotion of further legislative amendments aimed at increasing the utilisation of these courts – DOJCD ***Annual Report*** 1 July 1992-30 June 1993 RP 137/1994 in par. 1.108 at 31. Chapter 4 of SALRC Issue Paper 31 presents a discussion of the Magistrates' Courts Amendment Act, 1993, which makes provision for, inter alia, the expansion of the court structures of lower courts through the establishment of family and civil courts, to create a division that would improve the accessibility of justice at reduced costs. This Act has not yet been implemented.

49 Rules for Short Process Courts and Mediation Proceedings, 1992, R. 2196 published in *Gazette* No. 14188 on 31 July 1992 in terms of the Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991.

50 DOJCD ***Annual Report*** 1 July 1990–30 June 1991 RP 42/1992 par. 1.20 at 5.

51 Section 2 of the Act.

52 Rules 22 to 25.

53 SALRC Issue Paper 31 at 3.8.63; Mowatt 1987 ***De Rebus*** at 198.

6.2.22 There are currently some trained practising mediators in the private sector, especially in affluent urban areas. South Africa has various voluntary associations to which mediators are affiliated, namely Family Association of Mediators of the Cape (FAMAC), South African Association of Mediators (SAAM) in Gauteng, and KAFAM in Kwa-Zulu Natal. Accreditation requirements are being set by the Dispute Settlement Accreditation Council (DiSAC) under the auspices of the African Centre for Dispute Resolution at the University of Stellenbosch and the National Accreditation Board for Family Mediators (NABFAM). Private mediation services based in urban areas are mainly utilised by affluent members of society, though.[54]

6.2.23 Cognisance should be taken of Rule 86(1) of the 2014 Voluntary Mediation Rules,[55] which provides for the establishment of accreditation practices in respect of court-annexed mediation. Although court-annexed mediation is a government initiative, parties would still have to use private mediators.[56]

6.2.24 Mediation services are also offered by non-governmental organisations like Family Life and FAMSA. Although these organisations offer mediation services free of charge or at a minimal cost, they also experience problems, the main one being budgetary constraints. This fact is also evident from the vast number of people who line up at university clinics, which would benefit from mediation, if they had a budget to offer mediation.[57] While they do render a valuable service, they require more funding and trained family mediators.[58]

6.2.25 At the Pretoria meeting of experts Prof. Chicktay[59] invited the members of the audience to make use of the University's student capacity. He explained that the University often teaches students mediation skills with the assistance of qualified mediators. Such students could be very

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54 SALRC Issue Paper 31 at par. 3.8.67.

55 Department of Justice and Constitutional Development ***Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa*** *Gazette* 37448 18 March 2014 (hereafter referred to as "***2014 Voluntary Mediation Rules***").

56 SALRC Issue Paper 31 at 3.8.64.

57 Prof. Julia Sloth-Nielsen at the SALRC meeting of experts in Cape Town.

58 The position of mediators in rural areas is uncertain and should be investigated.

59 Prof. Alli Chicktay, WITS.

useful, especially in far-flung rural areas where expert senior mediators could supervise their work.

6.2.26 The position of paralegals (especially at LASA and at advice offices) will also have to be considered.[60]

b) The cost of engaging in the mandatory mediation process

(i) Private vs state funding

6.2.27 In South Africa's current adversarial civil-justice system, litigation, as the primary method of dispute resolution, is usually funded by the litigating parties themselves. Similarly, it should be understood that the costs of mediation, as a primary method of dispute resolution, would be covered by the parties involved.[61]

6.2.28 In the 2011 Draft Set of Court-Annexed Mandatory Mediation Rules,[62] similar provision is made for a privately funded mandatory mediation process. These provisions stipulate that the parties participating in the mediation process are to pay for the mediator's fees and that such fees are to be split proportionate to the number of parties to the mediation process.[63] It should be noted that voluntary mediation[64] is also privately[65] funded[66] in terms of the 2014 Voluntary Mediation Rules.

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60 See Chapter 2. Retired volunteers from the ranks of retired legal professionals, psychologists, social workers and even teachers are also a rich potential source.

61 Maclons at 126.

62 Department of Justice and Constitutional Development ***Draft Mandatory Mediation Rules of the High Courts or the Magistrates' Courts*** 11 October 2011 (hereafter referred to as "2011 ***Draft Mandatory Mediation Rules"***).

63 Maclons at 126.

64 Maclons at 124.

65 Parties have the choice whether they want to make use of the service.

66 These Rules Board rules of 2014 further provide that the parties to the mediation are liable for the fees of the mediator, except where the services of a mediator are provided for free (Rule 84(1)). The tariffs of such fees chargeable by mediators are determined by the Minister and published in the *Gazette* (Rule 84(3)).

6.2.29 It is argued, however, that mandatory court-based mediation is more cost effective than the conventional litigation process. Even though parties have to pay for using this ADR tool, it would still lessen the high costs of litigation and the uncertainty about the final legal costs. The legal fees involved in litigation are excessive and often exceed the monetary value of the claim in dispute. Furthermore, the unpredictable time frames of the litigation process often lead to unpredictable costs for the parties. Therefore, the costs related to litigation remain high and unpredictable, but the legal costs of court-based mediation can be standardised and controlled. Disputing parties will be able to pay a fee prescribed by the Minister of Justice and Correctional Services and to split the costs of the mediation process. Furthermore, court-based mediation, if successful, is speedy in nature, thereby curbing the costs that would have been expended on lengthy litigation processes. The costs of mandatory court-based mediation, would, therefore, be considerably less than the costs of litigation.[67]

6.2.30 In terms of section 28(a) and (b) of the New South Wales Civil Procedure Act 28 of 2005[68] (applicable to all courts) the costs of the mediators and the mandatory mediation process are borne by the disputing parties in the proportion agreed to between them. Alternatively, the court may make an order specifying the payment, by one or more of the disputing parties, of these costs.

6.2.31 The first point of entry would therefore be private mediation, unless the parties are unable to afford it.[69] Cash-strapped clients may challenge mediation rules that compel a party to pay half the costs of the mediation (the dispute resolution manager and the mediator's fees).[70]

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67 Maclons at 126.

68 Section 28 of the Civil Procedure Act 28 of 2005 reads as follows:

"28 Costs of mediation

The costs of mediation, including the costs payable to the mediator, are payable:
(a) if the court makes an order as to the payment of those costs, by one or more of the parties in such manner as the order may specify, or

(b) in any other case, by the parties in such proportions as they may agree among themselves."

69 De Jong 2005 ***TSAR*** at 44.

70 Jacques Joubert ***Legalbrief Today.***

6.2.32 It has been argued[71] that persons who can afford to pay for mediation services will have to do so. Persons who cannot do so must have public, community-based, or non-governmental organisation (NGO) mediation services available to them. If such services are not available, private mediation services should, at the expense of the State, be utilised for persons who cannot afford to pay for mediation themselves. It ought to be fully funded by the State as a service to its people. A public/private/joint venture should also be established to meet the middle group who are unable to qualify for State-funded mediation but who also cannot afford private mediation.[72] Commentators agreed with this proposal.[73]

6.2.33 Respondents emphasised, however, that the State cannot afford to foot the bill for mediation in all circumstances.[74] It was noted that it would be unreasonable to assume that the State, in its current financial situation, would be able solely to fund mediation. There ought to be a sliding scale according to which there is private mediation (privately funded), a joint venture between State and private enterprise, and, finally, a state-funded mediation section for the indigent group, perhaps similar to the requirements of LASA.[75] Parties should be given the option of engaging the services of a private mediator. If they are able to pay for the services of such a private mediator, they have to do so themselves; if not, the mediation ought to be funded either by the State or by a State-private enterprise partnership.[76]

6.2.34 A means test should determine whether parties qualify for state-funded mediation in whole or in part, or whether the parties should fund the mediation themselves.[77] The means test, and therefore payment, would be based on a sliding scale according to parties' income, the indigent getting a free *pro bono* service.

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71 Dr Astrid Martalas; Mr Craig Schneider.

72 Dr Astrid Martalas; Mr Craig Schneider; SALRC Issue Paper 31 at 3.8.79.

73 Office of the Family Advocate; LSSA; Cape Law Society (Ms Zenobia du Toit).

74 Cape Law Society (Ms Zenobia du Toit); Ms Karen Botha; Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD; Mr Charles Mendelow & Associates Inc.; LSSA; Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division.

75 Dr Astrid Martalas; Mr Craig Schneider;

76 Dr Astrid Martalas; Mr Craig Schneider;

77 SALRC Issue Paper 31 at par. 3.8.76.

6.2.35 Some delegates at the meeting of experts in Pretoria stated that they are engaged in a project at the Benoni Court involving a means test. If the parties have a joint income that falls into the low-income category, they receive *pro bono* assistance, but if they fall into the high-income category, a fee is charged. Since there are no formal guidelines, that way is the best they can do.[78]

6.2.36 A representative from FAMAC in Cape Town confirmed a similar project at the Wynberg Court on a purely *pro bono* basis. There are no charges and they use the court to assist their newly trained mediators to become accredited. A proposal was further made that when a mediator is allocated two or three cases, that mediator has to do at least one of the three on a *pro bono* basis. The idea is that if the mediators are provided with work, they need to give back to the system.[79]

6.2.37 One delegate referred to the fact that one of the laws dealing with access to justice is the Legal Practice Act.[80] Section 29 deals with community service. There is a lot of uncertainty as to what is meant by community service, however. The Law Society has had provincial consultative workshops some time ago, and one of the issues that came up for discussion was the issue of mediation and, more specifically, what role legal practitioners can play in terms of the Act. The interesting issue is that the term *pro bono* does not appear in the Legal Practice Act, and this creates confusion. However, there is a lot of opportunity under the Legal Practice Act to explore the provision of *pro bono* mediation services by memebrs of the legal profession.[81]

6.2.38 The Office of the Family Advocate advanced the view that all mandatory mediation should be funded by the State, and such mediation should be conducted as part of the mediation stream of the Office of the Family Advocate.[82] Another opinion was that when a court orders mediation, the State should be responsible; otherwise it should be funded privately.[83] If

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78 ProBono.org input at the SALRC meeting of experts held on 30 October 2017 in Pretoria.

79 Mr Craig Schneider.

80 Legal Practice Act 28 of 2014.

81 Mr Ricardo Wyngaard, LSSA, at the SALRC meeting of experts on 30 October 2017 in Pretoria.

82 Focus Group Forum.

83 See also the discussion on funding in Chapter 4 par. 4.4(c)(ii), which deals with the People's Family Centre.

parties do not want to wait for the service offered by the Office of the Family Advocate, they should have the choice to attend a mediation session with a private accredited mediator. If the workload becomes too much for the Office of the Family Advocate, the Office should also have the discretion to outsource matters to private mediators.[84]

6.2.39 It may perhaps be concluded, therefore, that there was a fair amount of agreement that both government (including social workers) and the private sector (including ADR organisations) should be responsible for providing mediation services to the public, provided that the mediators are properly trained.[85]

(ii) Effect of the time of the referral on costs

6.2.40 An additional matter raised was the question as to when it would be most appropriate for cases to be referred to ADR, since the timing of the decision may also have an important effect on the determination of the costs. The obvious answer may be that the appropriate time would depend on the nature and complexity of the case. However, if the referral to mediation is ordered too late, there is the risk that the parties would have already expended significant sums in preparation for court proceedings, only to have their trial delayed pending the outcome of the mediation procedure. If the matter is not settled, the mediation can lead to additional costs in the proceedings, but if the matter is settled, the parties might be equally frustrated because substantial costs were incurred before the successful mediation process was attempted, particularly when there are many documents or expert report requirements.[86]

(iii) Fees and funding

6.2.41 In so far as fees and funding are concerned, the Amended Magistrates' Court Rules give an indication of how court based mediation fees would be charged by mediators. These rules provide that tariffs of the fees chargeable by mediators must be published by the Minister together with a schedule of accredited mediators. Furthermore, mediators are prohibited from

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84 SALRC Issue Paper 31 at par. 3.8.74.

85 Dr Astrid Martalas, Mr Craig Schneider, Office of the Family Advocate, LSSA.

86 Maclons at 113 with reference to Bathurst TF "The role of the courts in the changing dispute resolution landscape" (2012) 35(3) ***University of New South Wales Law Journal*** 879.

soliciting or negotiating any private arrangement relating to fees and must abide by such fee structure determined by the Minister.[87]

6.2.42 In response to SALRC Issue Paper 31, commentators provided the following guidelines: It is important to note that there should be a regulated fee structure for mediators in order to make mediation accessible to the public,[88] taking into account mediator experience and the participants' ability to pay according to a sliding scale.[89] The fees can be structured and standardised as in the case of debt collectors. However, it should be borne in mind that if there is a very formal structure in place, some persons might be excluded, such as traditional leaders, pastors and teachers.[90] The current rules provide for a regulated fee structure.[91] Court-annexed mediation should be subject to the tariffs published in the *Gazette*.[92] Private mediations performed by Family Life are charged according to a means test. Other private mediations need to be subject to tariffs.[93]

6.2.43 There was some difference of opinion as to whether the fees of mediators should be pegged: Some respondents indicated that fees should be pegged, because fees should accommodate people in terms of their socio-economic circumstances.[94] Others disagreed.[95] It was proposed that fees charged by mediators in the private sector should be pegged in family matters in a way similar to the pegging of adoption fees under the Children's Act.[96]

6.2.44 When the services of private mediators are used, there should be a specified range with regard to the fees mediators are allowed to charge. Such regulation would prevent mediators

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87 Maclons at 126.

88 Office of the Family Advocate.

89 Dr Astrid Martalas; Mr Craig Schneider.

90 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

91 Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division.

92 2014 Voluntary Mediation Rules.

93 Charles Mendelow & Associates.

94 Office of the Family Advocate.

95 Cape Law Society (Ms Zenobia du Toit); Ms Karen Botha.

96 Child Welfare South Africa (Ms Julie Todd).

from taking advantage of parties because of their need for a certificate indicating that they have attended a mediation session.[97]

6.2.45 An interesting initiative that should be noted is that of "unbundling". It refers to a situation where a legal practitioner provides limited-scope services to a client, rather than providing full-scope legal services. Limited-scope legal services refer to a situation in which a legal practitioner performs discrete tasks for a client, and the client deals with other matters that, in a full-service retainer, would form part of the services the legal practitioner would provide.[98] Many people can afford to pay something for legal services, but they often cannot afford the cost of the full representation model.

6.2.46 In 2008, the Law Society of British Columbia Unbundling of Legal Services Task Force found that unbundling could be a valuable tool for enhancing access to justice by allowing people to retain lawyers for discrete services, and in accordance with their financial means. The project is aimed at encouraging more family lawyers to offer unbundled legal services to support families that want to use mediation. They are particularly interested in exploring various business models, as this approach must be both affordable for families and financially sustainable for the lawyers involved.[99]

6.3 Conclusion: Proposed draft legislation

6.3.1 As far as the implementation of a mandatory mediation system for South Africa is concerned, it would seem that the State will be the primary source of funding. This obligation will, however, be ameliorated by the fact that no new entities need to be established to allow this development. There are exciting possibilities with regard to the possible incorporation of legal interns, paralegals and students into the system. Furthermore, considerable assistance will also be forthcoming from existing private mediation service providers. Finally, the question will be whether some of these costs could be borne by the parties themselves.

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97 Office of the Family Advocate, Focus Group Forum.

98 The Law Society of British Columbia ***Report of the Unbundling of Legal Services Task Force*** April 2008.

99 Limited-scope litigation services can take many forms, including assistance in drafting a document or appearing in court to assist an otherwise self-represented litigant in arguing a particularly nuanced part of a case.

6.3.2 There seems to be consensus that parties who can afford to pay for mediation services will have to do so. Providing a first mediation meeting free of charge should be considered to allow parties to decide whether they want to opt out. However, in all cases the fees should be prescribed and reasonable, except where parties decide to use alternative private mediators, in which case the fee could be agreed between the parties.[100]

6.3.3 If parties are indigent according to the means test used by LASA, the mediation services should be provided free of charge by the State.

6.3.4 The SALRC's preliminary proposal for the regulation of mediation costs, funding and fees in draft legislation is set out below at the end of Chapter 7.

[100] See, however, the view of the Office of the Family Advocate as set out above in par. 6.2.44.

PART C: FAMILY MEDIATION

Chapter 7: Mandatory family mediation

7.1 Triggering legislation (how should the mediation process be initiated?)

7.1.1 Several countries have a mandatory pre-trial mechanism aimed at facilitating early settlement between the parties.[1] The past decade has seen the introduction of many different mandatory mediation initiatives, a trend that has grown at different paces worldwide.[2] In South Africa, sixty-five statutes, in different areas of the law, require or promote the mediation or conciliation of disputes.[3]

7.1.2 Three factors have been identified[4] that have influenced domestic attitude to mandatory mediation and the various mediation models developed, namely structural, external and domestic factors.

7.1.3 Structural factors include the legal tradition of a country, where the difference between civil-law and common-law systems may affect a state's approach to mediation.[5] External factors, such as membership of regional or international organisations also have an effect on a state's legal framework. These factors are particularly relevant in the European context, the continent focusing on facilitating free trade within the European Economic Area and applying the European Convention on Human Rights (ECHR).[6] Finally, domestic factors are a significant driver in the trend towards mandatory mediation. These factors include the time it takes for

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1 Zuckerman AAS ed ***Civil justice in crisis: Comparative perspectives of civil procedure*** Oxford University Press United Kingdom 1999 at vi & 48.

2 Hanks M "Perspectives on mandatory mediation" ***UNSW Law Journal*** *Vol 35(3) 2012 929* (hereafter referred to as Hanks) at 929.

3 See Brand, Steadman & Todd at 97 (Appendix A) for a list of statutes that make provision for mediation. Of particular importance for this investigation are the opportunities for mediation provided for in the Children's Act. See the discussion in Chapter 4 above.

4 Hanks at 929.

5 Hanks at 929.

6 Supra.

cases to reach trial, the cost of litigation, the prevailing legal culture and political climate, and the attitude of the legal profession, judiciary and general public.[7]

7.1.4 In so far as the form of the mediation to be implemented is concerned, it would seem as though it can be defined by the way the mediation is initiated, the so-called legislative trigger. Should mandatory mediation be statutorily regulated in South African, the way in which the legislation will trigger the commencement of the mediation will have to be considered. In order to have a constructive discussion, this document will therefore set out to identify the different kinds of triggers. Four categories of mandatory mediation can be identified:

a) First, some mandatory mediation models provide for the automatic and compulsory referral of certain matters to mediation. Such models are, generally, of a legislative nature and often require parties to undergo mediation as a prerequisite to commencing proceedings. This approach is sometimes referred to as being "**categorical**". [8]

b) A second kind of mandatory mediation is often referred to as court-referred mediation and described as "**discretionary**". It gives judges the power to refer parties to mediation, with or without the parties' consent, on a case-by-case basis.[9]

c) Thirdly, some mandatory mediation models can be described as "**quasi-compulsory**". In these models, although alternative dispute resolution (ADR) is not mandated, it effectively becomes compelled by the threat of a potential punitive cost order if proof of participation is not submitted prior to the commencement of proceedings.[10]

d) Finally, "**consensual**" mediation refers to mandatory mediation in terms of an agreement between the parties.[11]

7.1.5 It is interesting to note that most respondents to SALRC Issue Paper 31 were in favour of mandatory family mediation. The same sentiment was expressed during the meetings of

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7 Hanks at 929.

8 Hanks at 931 with reference to Frank EA Sander "Another view of mandatory mediation" 2007 13(2) ***Dispute Resolution Magazine*** 16 at 16.

9 Ibid.

10 Ibid.

11 Spruyt at 99.

experts.[12] In considering the submissions, the SALRC realised, however, that each commentator had his or her own idea of what mandatory mediation embodies. Determining the precise meaning of the term "mandatory mediation" is therefore important. The categories identified above may assist this process.

7.1.6 During the discussion of the various models at the SALRC meeting of experts in Cape Town, it was noted that even though a distinction can be made between categorically mandated mediation and discretionary mandated mediation, these approaches could be incorporated in any combination when developing a specific model.

a) Categorical approach

7.1.7 In terms of the categorical approach, the parties are statutorily compelled to attempt mediation.

7.1.8 Different forms of categorically mandated mediation can be identified and distinguished:

- Parties are compelled to attempt mediation (there is a duty to participate in all instances);
- parties are compelled to submit to mediation, subject to specific statutory exemptions/exceptions;
- parties are compelled to attend a mediation meeting, but may opt out without having participated in the mediation process itself (opt-out method); and
- mediation is mandatory in certain specific categories of cases.

7.1.9 The various forms are discussed below:

(i) Parties compelled to attempt to mediate (duty to participate)

7.1.10 In this category, mediation is mandatory and there is a duty on the parties to participate in the mediation in good faith. Should the mediation be unsuccessful, they may revert to mainstream litigation. The parties are, therefore, compelled to attempt settlement through mediation, but not to settle.

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[12] February 2016 in Cape Town and October 2017 in Pretoria.

7.1.11 The mandatory mediation model introduced in Italy in 2010 is an example of this category. In April 2010, Italy passed a statutory instrument, Legislative Decree No. 28 (2010),[13] with the aim of implementing the EU Mediation Directive. This decree, however, went far beyond the Directive's terms, introducing a categorical mandatory mediation system for disputes, inter alia, in family law. It also introduced a non-mandatory mediation procedure for all other civil or commercial claims. The scheme came into effect on 20 March 2011,[14] but was

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13 Legislative Decree on Mediation Aimed at Conciliation of Civil and Commercial Disputes (28/2010).

14 Legislative Decree No 28 of 4 March 2010 implementing Article 60 of Law No 69 of 18 June 2009 on mediation for the purposes of conciliation in civil and commercial litigation (GURI No 53 of 5 March 2010;

Article 5(1) of Legislative Decree No 28/2010 provides:
"Any person who intends to bring legal proceedings concerning a dispute over joint ownership, property rights, division, inheritance rights, family contracts, leases, loans-for-use, leases of businesses, compensation for damage resulting from vehicle and boat traffic, medical liability and defamation through the press and other media, or insurance, banking and financial contracts, shall be required, as a preliminary step, to use mediation within the meaning of the present decree … The carrying out of mediation shall be a precondition for bringing legal proceedings. Any objection of inadmissibility on this ground must be raised by the defendant, failing which it shall be barred, or may be raised by the court of its own motion, before the conclusion of the first hearing. Where a court finds that mediation has been initiated but not concluded, it shall fix a further hearing after the period referred to in Article 6 has expired. It shall do likewise where mediation has not been initiated, granting the parties, at the same time, a period of 15 days within which to submit the request for mediation."

Article 6 of Legislative Decree No 28/2010 reads as follows:
"1. A mediation procedure shall last no longer than four months."

Article 8 of Legislative Decree No 28/2010, as amended by Law No 148 of 14 September 2011 (GURI No 216 of 16 September 2011, p. 1), governs the carrying out of the mediation procedure. That article provides as follows:

"1. On submission of a request for mediation, the person responsible within the relevant body shall designate a mediator and shall arrange a first meeting between the parties within 15 days of the submission of the request. …"

Article 11 of Legislative Decree No 28/2010 states:

"1. Where an amicable settlement has been reached, the mediator shall draw up a record to which the text of the agreement shall be annexed. Where no agreement is reached, the mediator may draw up a proposal for conciliation. In any event, the mediator shall draw up a proposal for conciliation where the parties make a joint request for him to do so at any point during the mediation process. Before drawing up the proposal, the mediator shall inform the parties of the possible consequences referred to in Article 13.

"...

"4. Where the attempt at conciliation is unsuccessful, the mediator shall draw up a report setting out the proposal, which shall be signed by the parties and by the mediator, who shall certify the signatures of the parties so signing, or their inability to sign. The mediator shall also mention in his report the failure of any party to participate in the mediation."

Article 13 of Legislative Decree No 28/2010**,** concerning the costs of the procedure, provides:

"1. Where the order made in the judgment concluding the proceedings corresponds entirely to the content of the proposal, the court shall disallow recovery of the costs incurred by the successful party who has rejected the proposal, in respect of the period following the drawing up of the proposal, and order that party to reimburse the costs incurred by the unsuccessful party in respect of that period and also to pay to the State treasury a further sum equal to the single payment due. Articles 92 and 96 of the Code of Civil Procedure [Codice di procedura civile] continue to apply. The provisions of this paragraph shall also apply to the remuneration paid to the mediator and to the fees of any expert as referred to in Article 8(4).

declared unconstitutional in 2012 and replaced with an alternative mandatory mediation system in 2013.

(ii) Parties compelled to mediate, subject to statutory or court exemptions or exceptions

7.1.12 In terms of this option, legislation compels mediation in family law proceedings except where there are certain factors rendering mediation unsuitable, in which case parties are not required to submit to a mediation process.[15]

7.1.13 An example of statutory exemptions can be found in in the Australian Family Law Legislation Amendment Act, 2005,[16] which amended the Family Law Act, 1975. In terms of

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"2. Where the order made in the judgment concluding the proceedings does not correspond entirely to the content of the proposal, the court may, if there are serious and exceptional reasons for doing so, none the less disallow recovery of the costs incurred by the successful party in respect of the remuneration paid to the mediator and the fees of any expert as referred to in Article 8(4)."

15 Hanks at 945.

16 "**60I Attending family dispute resolution before applying for Part VII order**

Object of this section

(1) The object of this section is to ensure that all persons who have a dispute about matters that may be dealt with by an order under this Part (a ***Part VII order***) make a genuine effort to resolve that dispute by family dispute resolution before the Part VII order is applied for.

(2) The dispute resolution provisions of the *Family Law Rules 2004* impose the requirements for dispute resolution that must be complied with before an application is made to the Family Court of Australia for a parenting order.
(3)-(6)…..

(7) Subject to subsection (9), a court exercising jurisdiction under this Act must not hear an application for a Part VII order in relation to a child unless the applicant files in the court a certificate given to the applicant by a family dispute resolution practitioner under subsection (8). The certificate must be filed with the application for the Part VII order.

…

Exception

(9) Subsection (7) does not apply to an application for a Part VII order in relation to a child if:
  (a) the applicant is applying for the order:
    (i) to be made with the consent of all the parties to the proceedings; or
    (ii) in response to an application that another party to the proceedings has made for a Part VII order; or
  (b) the court is satisfied that there are reasonable grounds to believe that:
    (i) there has been abuse of the child by one of the parties to the proceedings; or

section 60I of the Family Law Act all children's matters must, subject to certain exceptions, first be mediated before these matters may be taken to court. A court is prevented from hearing an application relating to children unless a certificate from a mediator is also filed.

7.1.14 Different kinds of certificates may be issued to parties in terms of the Australian 2005 Family Law Act.[17]

(ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or
(iii) there has been family violence by one of the parties to the proceedings; or
(iv) there is a risk of family violence by one of the parties to the proceedings; or

(c) all the following conditions are satisfied:
(i) the application is made in relation to a particular issue;
(ii) a Part VII order has been made in relation to that issue within the period of 12 months before the application is made;
(iii) the application is made in relation to a contravention of the order by a person;
(iv) the court is satisfied that there are reasonable grounds to believe that the person has behaved in a way that shows a serious disregard for his or her obligations under the order; or

(d) the application is made in circumstances of urgency; or

(e) one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason); or

(f) other circumstances specified in the regulations are satisfied.

"60J Family dispute resolution not attended because of child abuse or family violence

(1) If:
(a) subsections 60I(7) to (12) apply to an application for a Part VII order (see subsections 60I(5)and (6)); and
(b) subsection 60I(7) does not apply to the application because the court is satisfied that there are reasonable grounds to believe that:
(i) there has been abuse of the child by one of the parties to the proceedings; or
(ii) there has been family violence by one of the parties to the proceedings;
a court must not hear the application unless the applicant has indicated in writing that the applicant has received information from a family counsellor or family dispute resolution practitioner about the services and options (including alternatives to court action) available in circumstances of abuse or violence.

(2) Subsection (1) does not apply if the court is satisfied that there are reasonable grounds to believe that:
(a) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or
(b) there is a risk of family violence by one of the parties to the proceedings.

(3) The validity of:
(a) proceedings on an application for a Part VII order; or
(b) any order made in those proceedings;
is not affected by a failure to comply with subsection (1) in relation to those proceedings.

(4) If:
(a) the applicant indicates in writing that the applicant has not received information about the services and options (including alternatives to court action) available in circumstances of abuse or violence; and
(b) subsection (2) does not apply;
the principal executive officer of the court concerned must ensure that the applicant is referred to a family counsellor or family dispute resolution practitioner in order to obtain information about those matters."

17 "[60I] (8) A family dispute resolution practitioner may give one of these kinds of certificates to a person:

7.1.15 Reference has also been made to the fact that in South Africa it is not possible in the labour law process to obtain a date either for trial in the Labour Court or for an arbitration hearing unless and until such time as the parties have attempted conciliation[18] through the Commission for Conciliation, Mediation and Arbitration (CCMA).[19] Only once a party has attempted conciliation proceedings and a Certificate of Outcome has been issued (which either sets out the agreement reached between the parties or states that an agreement could not be reached) is a party allowed to apply to the CCMA for a date for arbitration or for referral to the Labour Court. It is important to note that even though the applicant is compelled to attempt conciliation, there is a statutory exemption available to the defendant. If the defendant does not appear, the case automatically proceeds to arbitration or the court.[20]

7.1.16 An overwhelmingly positive response[21] was received from respondents to the question[22] whether a process similar to the CCMA process should be instituted. In terms of

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(a) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but the person's failure to do so was due to the refusal, or the failure, of the other party or parties to the proceedings to attend;

(aa) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, because the practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to conduct the proposed family dispute resolution;

(b) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, and that all attendees made a genuine effort to resolve the issue or issues;

(c) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the person, the other party or another of the parties did not make a genuine effort to resolve the issue or issues;

(d) a certificate to the effect that the person began attending amily dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to continue the family dispute resolution.

"Note: When an applicant files one of these certificates under subsection (7), the court may take the kind of certificate into account in considering whether to make an order referring to parties to family dispute resolution (see section 13C) and in determining whether to award costs against a party (see section 117)."

18 In labour law "conciliation" is used when reference is made to what in this paper is referred to as "mediation".

19 Schneider C "Mediation in Children's Act, 2005" Paper read at Miller Du Toit Cloete Family Law Conference Cape Town 2008 (hereafter referred to as "Schneider presentation") at 4.

20 See Vettori supra, who argues that conciliation is only mandatory in theory, but not in practice.

21 Dr Astrid Martalas; Mr Craig Schneider; Office of the Family Advocate; Ms Karen Botha.

such a process a trial date may be allocated in family law procedures only if the registrar or judge is in possession of a certificate which states that the parties have participated in mediation but failed, or which sets out the issues as determined by the mediator.

7.1.17 There was one dissenting voice,[23] who argued that this would not be advisable since mediation should be voluntary and a positive outcome could therefore not be guaranteed.

7.1.18 Respondents who were in favour of this option did, however, state that since family disputes are different from labour disputes and mediation would help to bring a quicker resolution to the dispute, it cannot be dealt with in the same way as labour matters.[24] The fact that the context of family law is unlike that of labour law has to be taken into consideration.[25]

7.1.19 Mandatory mediation provisions are often limited by an exemption in cases where there is suspected domestic violence.[26] The question was also posed in SALRC Issue Paper 31 whether such cases should be mediated.[27] A similar question was posed at the Cape Town meeting of experts.[28] There was no consensus on this issue.

7.1.20 Some respondents to the SALRC Issue Paper 31 were of the opinion that the fact that domestic violence is suspected does not mean that a matter cannot be mediated. In such a case, the mediator should be more mindful of a power imbalance and the possibility of violence. When there has been domestic violence involving a child, a mediator can follow a more direct approach and a mental health professional must be present at such mediation sessions.[29] The

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22 Questions 51 and 52, SALRC Issue Paper 31.

23 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

24 Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division; Dr Astrid Martalas; Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD; Ms Karen Botha; Office of the Family Advocate; Mr Craig Schneider.

25 Question 52, SALRC Issue Paper 31.

26 See also par. 7.1.13 above for the Australian position.

27 SALRC Issue Paper 31, Question 73.

28 Prof. Wesahl Domingo.

29 Mr Craig Schneider.

safety and best interests of the child must be ensured at all times.[30] Individual and separate mediation sessions with the disputing parties should be available when there are power imbalances involved.[31]

7.1.21 At the meeting of experts[32]the following comments were recorded:

a) One respondent was of the opinion that one can mediate domestic-violence cases, but not the issue of domestic violence itself: not the question of whether the alleged assault had taken place or whether there was emotional abuse, but the issues around the alleged violence. It is all about affording people the right to be heard. By taking away the forum one is denying parties the opportunity to be heard. The domestic violence may be between the husband and wife, but the children's issues are still capable of being mediated. It affects the position of the children. If there are allegations of domestic violence, the parties must be kept in separate rooms and the mediator has to work around it.[33]

b) Another respondent related that she was engaged, together with the Office of the Family Advocate, in a pilot project dealing with a hundred cases (100 files) in order to test a specific mediation model. Almost nine out of every ten contained an allegation of either domestic violence or alcohol and drug abuse. So if a blanket exclusion of that kind of case is instituted, very few mediations would take place.[34] This opinion was supported by the Chief Family Advocate, who indicated that such cases were successfully mediated if proper screening had taken place.[35]

c) Apart from the screening process, appropriate measures should be taken during the mediation process to ensure that all the safeguards are in place.[36]

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30 Dr Astrid Martalas.

31 Office of the Family Advocate.

32 Cape Town, February 2016.

33 Mr Craig Schneider.

34 Dr Ronel Duchen; see also the wide definition of "domestic violence" in the Domestic Violence Act.

35 Adv. Petunia Seabi, Office of the Family Advocate.

36 Prof. Madeleen de Jong.

d) One respondent cautioned that family violence protection orders are sometimes abused. It is very often used to get the father out of the house.[37] Obtaining protection orders is, therefore, often merely used as a tactical step in the litigation process.[38]

7.1.22 Some respondents felt that matters of family violence should ideally not be mediated. Confidentiality would, of course, be an issue together with whatever practical and legal measures could be taken.[39]

7.1.23 A third group of respondents[40] argued that domestic violence and sexual abuse should never be the subject of mediation. They constitute criminal behaviour and should be prosecuted, not mediated. Besides, from the outset of the proceedings, there would be a power imbalance between the abuser and the victim, and that cannot be tolerated.

7.1.24 There was, however, agreement between experts on the need for a proper screening methodology and risk assessment for domestic violence.[41] Screening for family violence should be conducted as follows:[42]

a) The Department of Social Development Risk Assessment Tool is recognised and accepted in the child protection field. It can and should be used to screen for domestic violence, and if abuse or domestic violence is suspected, referral should be made to a registered and accredited child protection organisation such as CWSA, whose affiliates are accredited in this field.[43]

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37 Dr Elzabe Durr-Fitschen, social worker.

38 Prof. Madeleen de Jong.

39 Cape Law Society (Ms Zenobia du Toit).

40 Ms Karen Botha; Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

41 Dr Ronel Duchen.

42 SALRC Issue Paper 31, Question 72.

43 Child Welfare South Africa (Ms Julie Todd).

b) The mediators can pose specific questions prior to the mediation in order to establish whether domestic violence or sexual abuse had taken place.[44] The replies should be treated as confidential.[45]

c) There may be protection orders, medical certificates and the like that could be made available prior to the commencement of the mediation process.[46]

d) The mediator should also be granted permission to obtain collateral information prior to the commencement of the mediation.[47]

7.1.25 It was also argued, however, that there is no guaranteed method of screening for domestic violence. Skilled mediators may pick up the signs, but apart from visible injuries or a party's admitting to family violence, it would be very difficult to prove.[48]

7.1.26 The measures identified to be put in place during the mediation to ensure the safety of spouses and children in cases of suspected domestic violence, are the following:[49]

a) The children must be interviewed separately;[50]

b) the parties may be interviewed separately;[51]

c) a mental-health professional must be present;[52]

d) such cases should only be mediated by more experienced mediators;[53]

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44 Dr Astrid Martalas; Mr Craig Schneider; Office of the Family Advocate.

45 Cape Law Society (Ms Zenobia du Toit); LSSA.

46 Dr Astrid Martalas.

47 Dr Astrid Martalas.

48 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

49 SALRC Issue Paper 31, Question 74.

50 Dr Astrid Martalas; Mr Craig Schneider.

51 Dr Astrid Martalas; Mr Craig Schneider.

52 Dr Astrid Martalas; Mr Craig Schneider.

53 Dr Astrid Martalas; Mr Craig Schneider.

e) all relevant documentation related to domestic violence must be submitted to the mediator prior to the session;[54] and

f) telephone numbers, employment details, email addresses and home addresses should not be disclosed to the other party.[55]

7.1.27 It should be noted that domestic violence has been identified as a separate topic, the details of which will be considered under the policy section of this investigation.

(iii) Opt-out method

7.1.28 In terms of this option parties are compelled[56] to attend a mediation meeting, but may opt out without having participated in the mediation process itself – they may "opt out" at the time of the meeting. The parties will have the opportunity to participate, but would not be forced to do so. Each party may be required to pay the mediator a token fee for his or her time.

7.1.29 Opt-out provisions that allow parties to argue a case for exemption are a variant of the categorical approach but allow parties to opt out, either because certain criteria are not met, or because one or more of the parties do not consent to mediation. An example is the Florida Rules of Civil Procedure.[57]

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54 Dr Astrid Martalas; Mr Craig Schneider.

55 Office of the Family Advocate.

56 By legislation or court order.

57 The Florida Rules of Civil Procedure adopted in March 1954, as amended, read as follows:

"**RULE 1.700 RULES COMMON TO MEDIATION AND ARBITRATION**

(a) **Referral by Presiding Mr Justice or by Stipulation**.
Except as hereinafter provided or as otherwise prohibited by law, the presiding judge may enter an order referring all or any part of a contested civil matter to mediation or arbitration. The parties to any contested civil matter may file a written stipulation to mediate or arbitrate any issue between them at any time. Such stipulation shall be incorporated into the order of referral.
(1) Conference or Hearing Date.
Unless otherwise ordered by the court, the first mediation conference or arbitration hearing shall be held within 60 days of the order of referral.
(2) Notice.
Within 15 days after the designation of the mediator or the arbitrator, the court or its designee, who may be the mediator or the chief arbitrator, shall notify the parties in writing of the date, time, and place of the conference or hearing unless the order of referral specifies the date, time, and place.

(b) **Motion to Dispense with Mediation and Arbitration.**
A party may move, within 15 days after the order of referral, to dispense with mediation or arbitration if:

7.1.30 It is crucial that any mandatory mediation scheme should set out clear criteria concerning the opt-out provisions, and should ensure a sufficiently high threshold for the parties to obtain an exemption from mediation in appropriate circumstances.[58] Under the Florida Rules of Civil Procedure[59] similar criteria exist:

a) The issue to be considered has been previously mediated between the same parties pursuant to Florida law;
b) the issue presents a question of law only; or
c) any other good cause is shown.

7.1.31 In Colorado,[60] for example, it is required that compelling reasons be shown in the motion, which has to be filed five days after the court's referral to mediation. The relevant statute also elaborates and indicates that these reasons include "that the costs of mediation would be higher than the requested relief and previous attempts to resolve the issues were not successful".

7.1.32 Failure to impose clear limits on parties' rights to opt out could effectively render the programme a voluntary scheme.[61]

7.1.33 Florida has also introduced relatively clear criteria for establishing when the obligation to participate in mediation is fulfilled. The main requirement is for parties to appear at the mediation session, and that requirement is fulfilled when the following persons are physically present:

a) The party or his or her representative having full authority to settle without further consultation;

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(1) the issue to be considered has been previously mediated or arbitrated between the same parties pursuant to Florida law;
(2) the issue presents a question of law only;
(3) the order violates rule 1.710(b) or rule 1.800; or
(4) other good cause is shown. "

58 Quek at 502.

59 Florida Rules of Civil Procedure 1.710(b).

60 Colorado Revised Statutes Ann § 13-22-311 (2016).

61 Quek at 502.

b) the party's counsel of record, if any; or

c) a representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle.[62]

7.1.34 Unlike the amorphous "good faith" standard, these concrete requirements result in greater certainty for the parties, and could also in some way attenuate the mandatory nature of the discretionary referral of cases.[63]

7.1.35 The 2013 Italian model was also proposed as an example of this option. In Italy the opt-out system was the preferred option after various other options had been unsuccessfully implemented. The constitutionality challenges could be countered by the opt-out nature of the system. A person would automatically opt in to the mediation, and then have the opportunity to opt out voluntarily after one mediation session. According to statistical data, this was the most successful option.[64] It has been explained that, psychologically, a person who may opt out often does not do so. People are not inclined to sign themselves out, but would rather just accept that they have to take part.[65]

7.1.36 In South Africa, rule 5(3)[66] of the 2011 Draft Mandatory Mediation Rules[67] of the magistrates' courts could also be considered, since it provides an example of a mediation conference before the commencement of the mediation process, where parties have to indicate their willingness to participate in mediation.

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62 Quek at 507.

63 Ibid.

64 Mr Ebrahim Patelia, ADR Committee LLSA, Cape Town Conference.

65 See par. 7.1.38 (b) below.

66 "**5 Procedure for referral to mediation prior to commencement of litigation**
(1) –(2)..
(3) The dispute resolution officer must inform all other parties to the dispute that mediation of the dispute is being sought and must call upon the party seeking mediation and all other parties to the dispute to attend a conference within ten (10) days, for the purposes of determining whether all or some of the parties agree to submit the dispute to mediation.
(4)-(6)."

67 Version 11 October 2011.

7.1.37 There was considerable support for the opt-out option (in some instance with the punitive-cost option included) at the Cape Town Conference.[68] It was argued that it may go some way towards addressing the constitutional objections.[69]

7.1.38 On the question posed at the Cape Town Conference as to why the opt-out option would be the preferred choice, the following responses were received:

a) In Italy people preferred this model after various other options proved unsuccessful. Similarly, in the United Kingdom, in their labour system the voluntary mediation system failed and they subsequently adopted a compulsory mediation system. It was argued that there should be compulsion, but it should be applied with great circumspection. Where there is a measure of voluntariness more balance was achieved.[70]

b) The SALRC was also referred to the "psychology" of decision-making.[71] In order to make any decision, a person has to convince him- or herself to do so. If one deals with the opt-out option, people have to convince themselves why they shouldn't make use of mediation. Generally speaking, people will choose what would be the least troublesome for them. Consequently, there is a much greater chance that they will go with mediation as an option. Once the convention has been established, they would need strong reasons not to follow it. The opt-out method is, therefore, a good one.

c) Another psychologist[72] added that there is a specific part of the brain that gives us a bias to act. What triggers that part of the brain is decision-making. A person has to make a decision before being able to act on it. It therefore makes much more sense to tell people they have to act rather than to put them through a whole process in which they have to make a decision in order to trigger their bias to act. The underlying premise is that mediation will be to the benefit of children. Adults should not have the benefit of a multiplicity of options. Children should have the

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68 Ms Zenobia du Toit; Prof. Madeleen de Jong; Mr Ebrahim Patelia; Prof. David Butler.

69 Ms Zenobia du Toit, Cape Town Conference.

70 Mr Ebrahim Patelia.

71 Dr Lynette le Roux.

72 Dr Ronel Duchen.

benefit that the best possible decisions and processes would be used that would yield the best outcome for them.

(iv) Mediation mandatory in certain categories of cases

7.1.39 This approach applies where statutes provide that certain classes of dispute must undergo ADR.[73]

7.1.40 Section 21 of the South African Children's Act,[74] which deals with the parental responsibilities and rights of unmarried fathers,[75] is an example of this approach.

7.1.41 Section 21(3)(a) of the Children's Act provides that if there is a dispute between the biological father and mother of a child as to whether the father fulfils the conditions of section 21(1), the matter must be referred for mediation to a family advocate, social worker, social service professional, or other suitably qualified person. The word "must" is peremptory and the parties are obliged to have their dispute mediated first.[76] The parties may, however, approach a

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[73] Quek at 481.

[74] Section 21 of the Children's Act, 2005 provides as follows:

"**Parental responsibilities and rights of unmarried fathers**

21. (1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-

(a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or

(b) if he, regardless of whether he has lived or is living with the mother-

(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;

(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

(iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

(2) This section does not affect the duty of a father to contribute towards the maintenance of the child.

(3)*(a* If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (l)(a) or (b), the matter must be referred for mediation **to** a family advocate, social worker, social service professional or other suitably qualified person.

(b) Any party to the mediation may have the outcome of the mediation reviewed by a court.

(4) This section applies regardless of whether the child was born before or after the commencement of this Act."

[75] See discussion on unmarried fathers in Chapter 2 at par. 2.5.

[76] Paleker M "Mediation in South Africa's new Children's Act: A pyrrhic victory" Paper read at the Asia-Pacific Mediation Forum Conference 2008 access at http://www.asiapacificmediationforum.org/resources/2008/7- (hereafter referred to as "Paleker") at 8. See also Davel & Skelton (eds) at 3-12. See discussion on the possible unconstitutionality of these sections as discussed above in Chapter 2.

court for immediate and urgent interim relief pending the finalisation of mediation. Furthermore, the Act does not require the lodging of an application to court as a precursor to mediation. This means that such mediation is not only a court-sanctioned process but can also stand independently.[77]

7.1.42 Section 33 of the Children's Act,[78] which deals with parenting plans, is another example of this approach.[79]

7.1.43 Although not specifically defined in the Act, a "parenting plan" refers to an agreement in which co-holders of parental responsibilities and rights make arrangements about how they intend to exercise and fulfil their respective parental rights and duties.[80]

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[77] DSD ***Social Services Professionals Mediation Framework*** 2012 at 89: Mediation agreement may be reviewed by court. The agreement can be registered with the Office of the Family Advocate without court intervention. Thus, mediation could be court sanctioned or not.

[78] Section 33 of the Children's Act, 2005, reads as follows:

"**Contents of parenting plans**
(1) The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.
(2) If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.
(3) A parenting plan may determine any matter in connection with parental responsibilities and rights, including-
(a) where and with whom the child is to live;
(b) the maintenance of the child;
(c) contact between the child and-
(i) any of the parties; and
(ii) any other person; and
(d) the schooling and religious upbringing of the child.
(4) A parenting plan must comply with the best interests of the child standard as set out in section 7.
(5) In preparing a parenting plan as contemplated in subsection *(2)* the parties must seek-
(a) the assistance of a family advocate, social worker or psychologist; or
(b) mediation through a social worker or other suitably qualified person."

[79] Other examples outside the family law sphere are the Health Professions Act 56 of 1974, which provides that minor transgressions must be referred to professional boards established by the Act for mediation; the National Land Transport Act 5 of 2009 states that when parties to existing contracting arrangements cannot agree on amendments to or inclusions in the contract the matter must be referred to mediation; and the Rules of the Post Office Pension Fund, made in terms of the Post Office Act 44 of 1958, state that if any dispute arises relating inter alia to the Rules or the Post Office Retirement Fund, the matter shall be referred to mediation for a recommendation.

[80] De Jong 2008 ***THRHR*** at 632; Paleker at 10. See also DSD ***Social Services Professionals Mediation Framework*** 2012 at 90.

7.1.44 In section 33(2) the Act provides that in the event of a dispute about the exercising of parental responsibilities and rights, probably owing to divorce proceedings or the parental rights of the unmarried father, the co-holders of parental responsibilities and rights must first try to reach agreement on a parenting plan before they request the assistance of the court.[81]

7.1.45 Section 33(5) provides that the parenting plan referred to in subsection (2) can either be negotiated with the assistance of a family advocate, social worker or psychologist, or be mediated through a social worker or other suitably qualified person.[82]

7.1.46 Should mediation be made mandatory for all family disputes where there are children involved, these two sections would have to be considered for consequential amendments.

b) Discretionary (court-mandated) approach[83]

7.1.47 The discretionary or court-mandated approach gives judges the power to refer parties to mediation, with or without the parties' consent, on a case-by-case basis.

7.1.48 The Constitutional Court in ***Port Elizabeth Municipality v Various Occupiers***[84] stated as follows:

> [39] In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents.

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81 DSD ***Social Services Professionals Mediation Framework*** 2012 at 90.

82 Section 34(3)(b)(ii) provides that an application submitted in terms of section 33(2) for registration of a parenting plan must be accompanied by the statement contemplated in section 33(5)(a) to the effect that the plan was prepared after consultation with a family advocate, social worker or psychologist, or after mediation in terms of section 33(5)(b) by a social worker or other appropriate person.

83 Discretionary (court-mandated) mediation will also be discussed as one of the of case management options in the courts.

84 ***Port Elizabeth Municipality v Various Occupiers*** 2005(1) SA 217 (CC).

[45] In appropriate circumstances, the courts should themselves order that mediation be tried.

7.1.49 There are different forms of court-mandated mediation, namely –

- courts may stay a hearing to allow a party to participate in mediation;
- courts may encourage parties to participate in mediation; and
- courts may order parties to participate in mediation (with or without the parties' consent).

7.1.50 The discretionary approach is widely available to courts in Australia.[85]

(i) Courts may stay hearing to allow a party to participate in mediation.

7.1.51 This option refers to the existing position in South African law and also confirms the inherent jurisdiction of the High Court.

7.1.52 Of particular interest are rules 3(1)(a),[86] 6(2)[87] and 7[88] of the 2011 Draft Mandatory Mediation Rules,[89] which make provision for the parties to a dispute to apply to court to refer the dispute to mediation.

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85 See for example the Civil Procedure Act 2005 (NSW) pt 4; Supreme Court (General Civil Procedure) Rules 2005 (Vic) r 50.07; Uniform Civil Procedure Rules 1999 (Qld) r 319.

86 "**3 Referral to mediation**

(1) A dispute may be referred to mediation-

(a) …

(b) by any party after commencement of litigation but prior to judgment: Provided that where the trial has commenced the parties must obtain the authorisation of the court;

(c) …"

87 "**6 Referral to mediation by litigants**
(1) …
(2) After the commencement of trial but prior to judgment any party may apply to court to refer the dispute to mediation.
(3)-(4) …"

88 "**7 Referral to mediation by the court**

(1) …

(2) If during the trial the parties consent to the dispute being mediated, the parties must request the court to refer the dispute to the dispute resolution officer.

(3) …"

(ii) Courts may encourage parties to participate in mediation

7.1.53 In the United States, mediation is more firmly embedded in the litigation process, with courts applying various degrees of coercion to encourage parties to submit to mediation.[90]

7.1.54 In South Africa, a division of the High Court may, in terms of Rule 37(8)(c) of the Uniform Rules,[91] give a direction to the parties, with their consent, in order to promote the effective conclusion of the matter. Such direction may include mediation. A High Court judge may, with the consent of the parties and without a formal application, at a pre-trial conference or thereafter, give any direction which might assist in the conclusion of the matter.

(iii) Courts may order parties to participate in mediation (with or without the parties' consent)

7.1.55 Formal court-mandated mediation occurs when the court makes an order referring the matter to mediation. In this instance, parties are compelled to attempt to resolve the matter through mediation. The order can set a date on which the first mediation session should take place, how many mediation sessions should be held, what issues should be mediated, how a mediator should be elected, and so forth.[92]

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89 Version dated 11 October 2011.

90 Joubert 2014.

91 The Rule reads as follows:

"**37 Pre-trial conference**

(8)*(a)* …
(b) …
(c) The judge may, with the consent of the parties and without any formal application, at such conference or thereafter give any direction which might promote the effective conclusion of the matter, including the granting of condonation in respect of this or any other rule.
(d) …"

92 ***Townsend-Turner v Morrow*** 2004 (2) SA 32 (CPD); ***Van den Berg v Le Roux*** *[*2003] 3 All SA 599 (NC); ***FS v JJ*** 2011 (3) SA 126 (SCA) at 55.

7.1.56 The inherent processes and procedures of the children's court are largely adversarial. There is no general, judicial discretion to compel parties to submit to mediation,[93] but the Children's Act provides that a special measure in terms of section 49[94] may be taken to protect the child from the intimidating nature of adversarial litigation.[95]

7.1.57 In terms of section 49, the presiding officer has the discretion, within the framework of the general powers of children's courts, to refer matters to mediation if the matter concerned is specifically mentioned in the Act, and in matters where mediation is envisaged. Should mediation fail, court intervention will be necessary.[96]

7.1.58 Section 49(1) makes provision for the presiding officer to order a lay forum hearing before making a decision. The attempt to settle the matter may include the following:

- Mediation by a family advocate, social worker, social service professional or other suitably qualified person;
- a family group conference in terms of section 70; [97] or
- mediation as contemplated in section 71. [98]

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93 Spruyt at 103.

94 Section 49(1) of the Children's Act, 2005, provides as follows:
"**Lay-forum hearings**
49.(1) A children's court may, before it decides a matter or an issue in a matter, order a lay forum hearing in an attempt to settle the matter or issue out of court, which may include—
(a) mediation by a family advocate, social worker, social service professional or other suitably qualified person;
(b) a family group conference contemplated in section 70*;* or
(c) mediation contemplated in section 71."

95 De Jong 2008 ***THRHR*** at 633; Paleker at 14; see also DSD ***Social Services Professionals Mediation Framework*** 2012 at 92.

96 De Jong 2008 ***THRHR*** at 634; Paleker at 14; see also DSD ***Social Services Professionals Mediation Framework*** 2012 at 92.

97 Section 70 of the Children's Act, 2005, provides as follows:

"**Family group conferences**

70.(1) The children's court may cause a family group conference to be set up with the parties involved in a matter brought to or referred to a children's court, including any other family members of the child, in order to find solutions for any problem involving the child.

(2) The children's court must—
(a) appoint a suitably qualified person or organisation to facilitate at the family group conference;
(b) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and
(c) consider the report on the conference when the matter is heard."

7.1.59 Section 70 grants the court the discretion to set up a family group conference involving the parties to the matter, including any other family members of the child. The aim of the family group conference is to find solutions to any problem involving the child. The agreement needs to be captured in the prescribed manner in a report to be considered when the matter is heard. The family group conference should not be held on a "without prejudice" basis.[99] Should the family group conference be set up, the court is obliged to appoint a suitably qualified person to act as facilitator, determine the process to be followed, and consider the report emanating from the conference.[100]

7.1.60 Section 71 stipulates that the children's court may, as part of its case management options, refer a matter brought or referred to a children's court to any appropriate lay-forum, including a traditional authority. The intention here is to attempt to settle the matter by way of mediation, out of court. However, in matters involving the alleged abuse or sexual abuse of a child, a lay-forum may not be held. The court needs to consider a report on the proceedings before the lay-forum when the matter is heard.[101]

7.1.61 Other examples from the Children's Act are as follows:

- Section 69(1): Pre-hearing conference
- Section 46(1)(h): Child protection orders

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98 Section 71 of the Children's Act, 2005, provides as follows:
"**Other lay-forums**
71. (1) The children's court may, where circumstances permit, refer a matter brought or referred to a children's court to any appropriate lay-forum, including a traditional authority, in an attempt to settle the matter by way of mediation out of court.
(2) Lay-forums may not be held in the event of a matter involving the alleged abuse or sexual abuse of a child.
(3) The children's court may—
(a) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and
(b) consider a report on the proceedings before the lay-forum to the court when the matter is heard."

99 Schneider presentation at 7.

100 Section 70 refers to "facilitation" and not to "mediation". Since no definition has been provided, it is not clear what form of ADR is envisaged.

101 DSD ***Social Services Professionals Mediation Framework*** 2012 at 93.

7.1.62 Section 69(1)[102] provides that when a matter in the children's court is contested, the court may order that a pre-hearing conference be held with the parties. The aims would be –

- to mediate between the parties;
- to settle disputes between them as far as possible; and
- to define the issues to be heard by the court.

The intention of the legislature regarding these pre-hearing conferences was clearly the mediation of all outstanding disputes.[103]

7.1.63 Similarly, section 46(1)(h)(iii)[104] allows the children's court to make a child protection order. Such an order can include "instructing a parent or care-giver of a child to undergo professional counselling, or to participate in mediation, a family group conference, or other appropriate problem solving forum".

7.1.64 The legislature clearly envisaged that mediation should play an important role both in court applications, and in children's courts in particular, to ensure that the best interests of

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102 Section 69 of the Children's Act, 2005, reads as follows:
"**Pre-hearing conferences**
69.(1) If a matter brought to or referred to a children's court is contested, the court may order that a pre-hearing conference be held with the parties involved in the matter in order to-
(a) mediate between the parties;
(b) settle disputes between the parties to the extent possible; and
(c) define the issues to be heard by the court.
(2) Pre-hearing conferences may not be held in the event of a matter involving the alleged abuse or sexual abuse of a child;
(3) The child involved in the matter may attend and may participate in the conference unless the children's court decides otherwise.
(4) The court may-
(a) prescribe how and by whom the conference should be set up, conducted and by whom it should be attended;
(b) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and
(c) consider the report on the conference when the matter is heard."

103 De Jong 2008 ***THRHR*** at 634.

104 Section 46(1)(h)(iii) of the Children's Act, 2005, provides:
"**46. Orders children's court may make**
"(1) A children's court may make the following orders:
(a)-(g) …
(h) a child protection order, which includes an order –
(i)-(ii)…
(iii) instructing a parent or care-giver of a child to undergo professional counselling, or to participate in mediation, a family group conference, or appropriate problem-solving forum;
(iv)- (xi) …
(i)-(j)"

children remain of paramount importance, to avoid unnecessary delays, and to move the process away from an adversarial process towards a resolution-focused one.[105]

7.1.65 An important question which has not been conclusively addressed in the Children's Act is whether a court has the authority to order parties to submit to mediation against their will.

7.1.66 In the United Kingdom, this issue was addressed in various court cases:

a) In ***Cable & Wireless v IBM United Kingdom***[106] it was held that the court has the power to enforce an agreement to mediate (even against the wishes of one party) if the relevant provision imposes a sufficiently defined mutual obligation upon the parties to mediate so that a court is able to determine if a party has complied with its obligations.

b) The decision in ***Halsey* v *Milton Keynes General NHS Trust***[107] created an impediment to the progression of discretionary mandatory mediation in England. The Court of Appeal in ***Halsey*** held *obiter*[108] that courts do not have the power to order parties to submit to mediation against their will as this would constitute a breach of article 6 of the ECHR. Dyson LJ said in the judgment of the Court:

> [i]t seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court.

The Court quoted the 2003 edition of the *White Book*,[109] which stresses the voluntary nature of ADR procedures. Their Lordships concluded that even if the Court had jurisdiction to order non-consenting parties to mediate, "[they] find it difficult to conceive of circumstances in which it would be appropriate to exercise it". The judge has however since conceded in a published paper[110] (with reference

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105 Ibid.

106 ***Cable & Wireless v IBM United Kingdom*** [2002] EWHC (Comm) 2059 (Eng).

107 ***Halsey v Milton Keynes General NHS Trust*** [2004] 4 All ER 920, 924.

108 The case was concerned with the question when a court would be justified in making a special costs order for sanctioning a party who had refused to participate in ADR. The court held that this was only justified if the refusal was unreasonable, and set out a non-exhaustive list of factors which a court should take into account when exercising its discretion.

109 **Civil Procedure (The White Book),** 2003, Sweet & Maxwell.

110 Lord Dyson "A word on Halsey v Milton Keynes" (2011) 77 ***Arbitration*** 337.

to the Rosalba Alassini case)[111] that compulsory mediation, in and of itself, as a pre-condition for a dispute going to trial would not amount to a breach of the parties' rights to access a court in accordance with article 6 of the ECHR.[112]

7.1.67 Courts in Australia have wide discretionary powers to order mediation without the parties' consent:[113]

a) Legislative provisions empowering the Supreme Court of NSW to order mandatory mediation first appeared in 2000. Section 110K of the Supreme Court Act 52 of 1970[114] initially authorised the Supreme Court to refer civil matters to mediation upon the consent of disputing parties. The Supreme Court Amendment (Referral of Proceedings) Act 36 of 2000 amended section 110K of the Supreme Court Act 52 of 1970. The amended section 110K provided that the power of the court to refer cases to mediation can be exercised with or without the consent of the disputing parties in question. This provision has since been repealed and replaced with a near identical provision in the Civil Procedure Act 2005 (NSW), section 26(1) and (2).[115]

b) In Australia, section 27 of the Civil Procedure Act[116] (formally section 110L of the Supreme Court Act, 1970) provides that disputants have a duty to participate in the mediation process in good faith. With regard to the mediators conducting the

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111 See discussion of the Alassini case in par 5.3.73 below.

112 Lord Dyson, however, still held by his view that a court can strongly encourage reluctant parties to mediate but should stop short of compelling them to do so.

113 Maclons at 151.

114 Supreme Court Act 52 of 1970 (NSW), s 110K.

115 "Referral by court
(cf Act No 52 1970, section 110K; Act No 9 1973, section 164A; Act No 11 1970, section 21L)

26.(1) If it considers the circumstances appropriate, the court may, by order, refer any proceedings before it, or part of any such proceedings, for mediation by a mediator, and may do so either with or without the consent of the parties to the proceedings concerned.
(2) The mediation is to be undertaken by a mediator agreed to by the parties or appointed by the court, who may (but need not be) a listed mediator.
(2A) Without limiting subsections (1) and (2), the court may refer proceedings or part of proceedings for mediation under the *Community Justice Centres Act 1983*.
(3) In this section,
'listed mediator' means a mediator appointed in accordance with a practice note with respect to the nomination and appointment of persons to be mediators for the purposes of this Part."

116 Civil Procedure Act 2005 (NSW).

mediation process through the Supreme Court, a list of these mediators is kept by the court. This list provides details about the mediators' fees, areas of expertise and occupations.

c) Supreme Court Practice Notes have reinforced these powers of judges to order unwilling parties to mediate.[117] There has been open judicial support for this initiative, often in the form of court-annexed mediation where the process is carried out by a court officer and in some cases a judge.[118]

d) The Supreme Court further has the authority to order parties to mediate their dispute, with or without their consent, as it appears from the Practice Notes of the Supreme Court of NSW. For instance, Practice Note No. SC Gen. 6591 (commenced 17 August 2005) sets out the Court's mediation procedures and its expectations of the parties in proceedings after they have been referred to mediation.

e) This Practice Note further specifically mentions the Civil Procedure Act of 2005 (CPA), which permits the Court to refer any matter to mediation by order, where it is in the opinion of the Court appropriate to do so, without the consent of the disputing parties in question.

f) In terms of the CPA, the cost of the mediators and the mediation process is borne by the disputing parties in proportions agreed to between them. Alternatively, the court may make an order regarding the payment of these costs, by one or more of the disputing parties, in the manner the order specifies.

g) In 2010, former Chief Justice James Spigelman of the Supreme Court of NSW acknowledged that –

> [p]eople are reluctant to admit that they might have some weakness in their case and therefore don't offer to settle or mediate … Whereas if they are forced into it, experience is that reluctant starters often become active participants.[119]

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117 See, for example, Supreme Court of NSW, *Practice Note SC Gen 6 – Mediation*, 10 March 2010, [5]. This Practice Note applies to the NSW Court of Appeal, the Common Law Division (civil cases only) and the Equity Division. See also Supreme Court of Victoria, Commercial Court, *Practice Note 10 of 2011 – General* (1 January 2010) pt 10; Supreme Court of Victoria, *Practice Note 3 of 2012 – Professional Liability List* (1 October 2012) [5.3], which provides that "all proceedings will be referred to mediation unless there is a good reason to the contrary".

118 In 1999, the Chief Justices Council adopted the *Declaration of Principles on Court-Annexed Mediation.*

119 Hanks at 946 with reference to Chris Merritt "Mediation in NSW Supreme Court works: Spigelman", *The Australian* (online) 1 October 2010 access at http://www.theaustralian.com.au/business/legal-affairs/mediation-in-nsw-supremecourt-works-spigelman/story-e6frg97x-1225932539482.

h) These remarks echo Justice Einstein's judgment in ***Idoport Pty Ltd v National Australia Bank Ltd (No 21)***[120] and Justice Hamilton's comments in ***Remuneration Planning Corporation Pty Ltd v Fitton*.**[121] Similarly, Justice Bryson in ***Browning v Crowley***[122] listed a number of reasons why the judiciary should favour mediation, including its comparatively low cost, the importance of the relationship between the parties and the "public interest in relatively peaceable resolution of conflicts".

i) There has also been support for discretionary compulsory referral to ADR by the National Alternative Dispute Resolution Advisory Council (NADRAC). In its report *The Resolve to Resolve*,[123] NADRAC states that it supports "a mandatory pre-action requirement to attempt ADR" in appropriate cases. It encourages courts to acquire powers to order mandatory ADR both at the pre-filing and post-filing stages, but warns against a categorical approach, stressing that the court should retain its discretion in referring a case to ADR. This is because courts are "well placed to identify those types of matters where a pre-action requirement to use a specific ADR process or processes may be desirable".[124]

7.1.68 Other examples can be found in the Trinidad and Tobago: Mediation Bill, 2003,[125] the Family Proceedings (No 2) Bill, 2003,[126] and Ghana's Alternative Dispute Resolution Act, 2010.[127]

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120 ***Idoport Pty Ltd v National Australia Bank Ltd (No 21)*** [2001] NSWSC 427 [29]–[30].

121 ***Remuneration Planning Corporation Pty Ltd v Fitton*** [2001] NSWSC 1208 [3]. Other NSW cases in which the desirability of compelling parties to mediate is discussed include ***Singh v Singh*** [2002] NSWSC 852 [4] and ***Higgins v Higgins*** [2002] NSWSC [5]–[12].

122 ***Browning v Crowley*** [2004] NSWSC 128 [5].

123 NADRAC ***The resolve to resolve: Embracing ADR to improve access to justice in the federal jurisdiction*** A Report to the Attorney-General Commonwealth of Australia September 2009 24 [2.16] access at http://www.nadrac.gov.au/publications/PublicationsA-Z/Pages/default.aspx.

124 Ibid 24 [2.18]; 38 [Recommendation 2.8].

125 "**COURT ANNEXED MEDIATION**
Court may refer matter to mediation
13. (1**)** Where in any matter the court considers it appropriate to refer parties to mediation, the court may refer parties to a certified mediator who is–
(a) a public officer; or
(b) in the employ of the judiciary; or
(c) on the judiciary's roster of mediators.
(2) The parties to any matter before the Court, may with the approval of the court, agree to retain the services of a mediator who is not included under subsection (1).

7.1.69 A general discretion exists in the United States.[128]

7.1.70 Responding to the question posed[129] at the Cape Town Conference whether the courts are currently referring cases for mediation and the extent to which this is happening, the following responses were received:

a) A social worker in private practice stated that in November and December 2016 her practice was fully occupied in dealing with court orders. She was unable to take in any private matters. The majority of them involved families with children. The judges or magistrates required the social worker to mediate the matter or, when the mediation had not been fully mediated with a parenting plan in place in the correct format, the judges or magistrates would request a section 10 report or recommendation from the social worker on what should be done. Cases referred to social workers for mediation when parties had been in dispute for two years were resolved in four to six weeks, with the resulting parenting plan submitted to court for an order. Children benefited from that situation. It was in the interest of the children if the matter was resolved in a short period of time.[130]

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(3) Any expenses incurred under subsection (2) shall be borne by the parties or either of them as the court may direct or as the parties may agree."

126 "**Court may refer matter to mediation, etc.**

5. (1) Where in the opinion of the court the interest of the parties to any family proceedings may be better served if the matter or any aspect thereof is referred to mediation or to the unit responsible for social services in the court or to some other professional, the court may make the appropriate referral.
(2) Parties to any family proceedings may with the approval of the court, agree to retain the services of a private mediator, counsellor or other professional.
(3) Any expenses incurred under subsection (2) shall be borne by the parties or either of them as the court may direct."

127 Section 64(1) provides that the court, before which an action is pending, may refer a matter to mediation if it is of the view that mediation will facilitate the resolution of the matter or part of the matter in dispute.

128 Spruyt at 104 fn 434 with reference to Galanter M "'A settlement judge, not a trial judge': Judicial mediation in the United States" (1985) 12 ***J Law & Soc*** 1; Galanter M & Cahill M "Most cases settle: Judicial promotion and regulation of settlements" 1994 46 ***Stanford LR*** 1339; Ingleby R "Court sponsored mediation: The case against mandatory participation" 1993 56 ***Mod LR*** 441.

129 Ms Neliswa Cekiso.

130 Ms Irma Schutte: social worker in private practice.

b) An attorney from Cape Town stated that the Cape Town High Court definitely referred matters for mediation (divorce and children matters), particularly when there was an opposed application and the date of the opposed hearing was a few months away. The court would ask whether there was a facilitator or mediator and request that they manage the matter in the interim. It is a combined court/ facilitation/ mediation process.[131]

c) An attorney from KwaZulu-Natal, however, stated that the High Courts in KwaZulu-Natal did not refer matters to mediation by way of court order.[132]

c) Quasi-mandatory approach

7.1.71 In these models, although ADR is not mandated, it is effectively compelled through the threat of potential punitive cost orders if the parties did not submit to mediation prior to commencing proceedings.[133] Mediation may also be encouraged by legislation *per se* or by provisions compelling legal representatives to explain the various ADR options to their clients.

(i) Voluntary approach, but legal representatives are compelled to explain the possible ADR options to clients

7.1.72 In terms of this approach, there is a statutory requirement that a legal representative discuss and explain various ADR options to a party who is consulting the representative about a family dispute and make appropriate recommendations as to the option to be chosen.[134]

7.1.73 The extent of legal representatives' duty to inform parties of mediation as an alternative to litigation may be determined by the existence, or not, of specific sanctions for not doing so.

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131 Ms Zenobia du Toit.

132 Ms Susan Abro: LSSA Chair of the Family Law Division.

133 Hanks at 931.

134 See also the discussion on information and education programmes in Chapter 3 above.

7.1.74 In Canada, lawyers are required to certify that they have fulfilled their duty to discuss dispute resolution options with their clients prior to commencing proceedings in court.[135] This policy promotes the informed use of out-of-court processes to resolve family law disputes.[136]

7.1.75 In 2009, Italy's 2009 Decree also placed a duty on lawyers to inform clients in writing about the availability of mediation.[137]

7.1.76 A similar provision[138] is found in the Irish Act[139] and Australia's Family Law Act.[140]

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135 British Columbia Family Law Act [SBC 2011] Chapter 25 assented to November 24, 2011.

136 "Duties of family dispute resolution professionals

8 (1) A family dispute resolution professional consulted by a party to a family law dispute must assess, in accordance with the regulations, whether family violence may be present, and if it appears to the family dispute resolution professional that family violence is present, the extent to which the family violence may adversely affect –

(a) the safety of the party or a family member of that party, and
(b) the ability of the party to negotiate a fair agreement.

(2) Having regard to the assessment made under subsection (1), a family dispute resolution professional consulted by a party to a family law dispute must –
(a) discuss with the party the advisability of using various types of family dispute resolution to resolve the matter, and
(b) inform the party of the facilities and other resources, known to the family dispute resolution professional, that may be available to assist in resolving the dispute.

(3) A family dispute resolution professional consulted by a party to a family law dispute must advise the party that agreements and orders respecting the following matters must be made in the best interests of the child only:
(a) guardianship;
(b) parenting arrangements;
(c) contact with a child."

137 Law No 69 of 19 June 2009 access at http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2009;69; Legislative Decree No 5 of 17 January 2003 access at http://www.camera.it/parlam/leggi/deleghe/testi/03005dl.htm.

138 "**Practising solicitor and mediation**
14. (1) A practising solicitor shall, prior to issuing proceedings on behalf of a client—
(a) advise the client to consider mediation as a means of attempting to resolve the dispute the subject of the proposed proceedings,
(b) provide the client with information in respect of mediation services, including the names and addresses of persons who provide mediation services,
(c) provide the client with information about—
(i) the advantages of resolving the dispute otherwise than by way of the proposed proceedings, and
(ii) the benefits of mediation, and
(d) inform the client of the matters referred to in subsections (2) and (3) and sections 10 and 11.

(2) If a practising solicitor is acting on behalf of a client who intends to institute proceedings, the originating document by which proceedings are instituted shall be accompanied by a statutory declaration made by the solicitor evidencing (if such be the case) that the solicitor has performed the obligations imposed on him or her under subsection (1) in relation to the client and the proceedings to which the declaration relates.

7.1.77 On the question posed in SALRC Issue Paper 31 whether parties should be given information on the availability of mediation as "Annexure A" which accompanies the divorce summons,[141] the response was positive.[142] It was suggested that a leaflet should be attached explaining the mediation process, which the parties must sign. If they rejected the option, they should be required to give reasons.[143] The necessary information so provided would be of great assistance to parties.[144] Whether this option should be viewed as an alternative to mandatory mediation was not clear. One respondent indicated her opposition to this option.[145]

(ii) Voluntary, but with encouragement

7.1.78 In 2003, Italy issued a decree that created an opt-in mediation procedure for corporate matters, exempting settlements of those matters from stamp duty and, in certain cases, requiring a stay of proceedings while the mediation takes place.[146] Although this model did not represent a categorical approach applying to all corporate matters, the stamp duty exemptions brought the model into the quasi-compulsory category.

7.1.79 The examples referred to in category b)(ii) above (courts encourage the parties to participate in mediation) will also fall under this category.

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(3) If the originating document referred to in subsection (2) is not accompanied by a statutory declaration made in accordance with that subsection, the court concerned shall adjourn the proceedings for such period as it considers reasonable in the circumstances to enable the practising solicitor concerned to comply with subsection (1) and provide the court with such declaration or, if the solicitor has already complied with subsection (1), provide the court with such declaration."

139 Irish Mediation Act 2017.

140 Section 12E imposes an obligation on legal practitioners to inform parties about the services provided by family dispute resolution (mediation) practitioners. Section 12F imposes a similar obligation on court officers. See section 128(2)(b).

141 SALRC Issue Paper 31, Question 49.

142 Office of the Family Advocate; Dr Astrid Martalas; Mr Craig Schneider; Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

143 Dr Astrid Martalas; Mr Craig Schneider.

144 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

145 Ms Karen Botha.

146 Legislative Decree No. 5 of 17 January 2003.

(iii) Voluntary, but court may impose a cost sanction

7.1.80 It is fair to say that the settlement process takes place in a legal context where public policy not only promotes mediation as a step towards settlement, but may perhaps penalise those who refuse it and, as a consequence, waste public resources to resolve the dispute.[147]

7.1.81 The general point of departure with respect to cost orders in the South African law is that the costs of a lawsuit are awarded at the discretion of the court, except where otherwise regulated in legislation. In general, the costs are carried by the unsuccessful party, except where there are special circumstances to deviate from this rule. The discretion of the court is not absolute, however, and may not be exercised arbitrarily.[148]

7.1.82 In England, the Civil Procedure Rules (CPR), which came into force in 1999, strongly emphasise pre-action procedures and, in particular, place an onus on courts to encourage settlement where appropriate.[149] It is notable that courts in the UK impose cost sanctions on parties who unreasonably refuse or fail to submit to mediation.

7.1.83 Part 36 of the CPR provides that a court may order costs against a claimant who has turned down a higher settlement offer.

7.1.84 Similarly, rule 44.3(5) allows the court to make an adverse cost order against a party after appraising the extent to which they have complied with pre-action protocols, including considering ADR processes for most civil claims.

7.1.85 The CPR therefore introduced a quasi-compulsory system of ADR, although the parties maintain a significant discretion with regard to determining the appropriateness of out-of-court procedures for their dispute.[150]

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147 Rycroft A "Settlement and the law" 2013 130 ***SALJ*** 187 at 200.

148 Spruyt at 86.

149 Civil Procedure Rules 1999 r 1.4(2); Quek at 503.

150 Hanks at 940.

7.1.86 The English courts have shown support for mediation in their enforcement of the pre-action requirements:

a) In ***Dunnett v Railtrack plc***,[151] the court made a cost order against the successful party for refusing to submit to mediation. The court's power to make a cost order based on an unreasonable refusal to submit to mediation was confirmed by the English Court of Appeal in ***Halsey***, which is still the leading case on court powers regarding mediation.

b) In ***Halsey***,[152] Dyson LJ, delivering the judgment of the Court, noted that mediation can benefit parties by reducing the cost of the proceedings, offering a range of solutions that are not available to the courts, such as an apology, and the potential for greater party satisfaction at the outcome of the process. His Lordship went on to set out a non-exhaustive list of factors to consider when a court has to determine whether a party's refusal to submit to mediation is unreasonable, as follows:[153]

   (i) The nature of the dispute;
   (ii) the merits of the case;
   (iii) the extent to which other settlement methods have been attempted;
   (iv) whether the costs of the ADR would be disproportionately high;
   (v) whether any delay in setting up and attending the ADR would have been prejudicial; and
   (vi) whether the ADR had a reasonable prospect of success.

   The decision in *Halsey* helps disputants by clarifying the potentially ambiguous term "unreasonable".

c) More recent examples of the application of ***Halsey*** can be found in the English Court of Appeal's decision in ***Rolf v De Guerin***[154] and the High Court's decision in ***PGF II SA v OMFS Company***,[155] both of which indicate that the courts are

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151 ***Dunnett v Railtrack plc*** [2002] 2 All ER 850. Cf ***Swain Mason v Mills & Reeve*** [2012] EWCA Civ 498, in which the refusal by one party to mediate was found to be not unreasonable; see also ***Burchall v Bullard*** [2005] EWCA Civ 358.

152 ***Halsey v Milton Keynes General NHS Trust***[2004] 4 All ER 920.

153 At 926.

154 ***Rolf v De Guerin*** [2011] EWCA Civ 78.

155 ***PGF II SA v OMFS Company*** [2012] EWHC 83.

willing to enforce the provisions of the CPR and expect parties at least to consider mediation as an alternative to litigation.

7.1.87 In 2009, Italy passed legislation empowering the government to issue statutory instruments on mediation that allow courts to award costs against a successful party who refused a recommendation which was the same as the judgment.[156]

7.1.88 Quasi-compulsory mediation has also been implemented in Australia. In 2009, NADRAC recommended introducing a quasi-compulsory system at federal level similar to the CPR in England, allowing cost orders against parties that do not take appropriate steps to resolve their dispute before trial.[157]

7.1.89 Notably, it warned against imposing cost orders against a party based on his or her conduct during the ADR process.

7.1.90 The *ADR Blueprint*,[158] released by the NSW Attorney General's Department in the same year, expressed ideas similar to that of NADRAC. It recommended the increased use of ADR by government bodies by including an ADR clause in all appropriate government contracts, as has been done in England. It also made recommendations relating to pre-action protocols, including extending section 56 of the Civil Procedure Act 2005 (NSW) to cover pre-action conduct, developing pre-action protocols for appropriate types of disputes, and requiring parties to advise the court if they have attempted, or are willing to attempt, ADR.[159]

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156 Law No 69 of 19 June 2009 access at http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2009;69; Legislative Decree No 5 of 17 January 2003 access at http://www.camera.it/parlam/leggi/deleghe/testi/03005dl.htm.

157 NADRAC at 37 [Recommendation 2.6].

158 NSW Attorney-General's Department ***ADR Blueprint*** Discussion Paper: Framework for the Delivery of Alternative Dispute Resolution Government of NSW, April 2009 at 14 [Proposal 8] access at http://www.courts.lawlink.nsw.gov.au/agdbasev7wr/_assets/cats/m402652l3/adr_blueprint.pdf; NSW Department of Justice and Attorney-General ***ADR Blueprint Draft Recommendations Report 2: ADR in Government*** Government of NSW September 2009 at 12 access at http://www.courts.lawlink.nsw.gov.au/agdbasev7wr/_assets/cats/m402652l3/250909_updated_adr_recommendations_report2.pdf.

159 NSW Department of Justice and Attorney-General ***ADR Blueprint*** *Draft Recommendations Report 1: Pre-Action Protocols and Standards* Government of NSW August 2009 2 access at http://www.courts.lawlink.nsw.gov.au/agdbasev7wr/_assets/cats/m402652l3/adr_blueprint_draft_recs1_preaction_protocols.pdf.

7.1.91 The Civil Dispute Resolution Act 2011 (Cth)[160] is an example of such a scheme. It permits cost sanctions against parties who do not reasonably attempt to settle the dispute. Although mediation in such cases is not categorically mandated, the possibility of adverse cost orders is a strong motive to attempt ADR. See section 4 for the criteria to determine whether reasonable steps had been taken to resolve the dispute. [161]

7.1.92 In South Africa in 2009, in the case of ***MB v NB***,[162] the South Gauteng High Court in Johannesburg expressed its displeasure with attorneys who failed to advise their clients in family matters to attempt mediation before approaching the court. Brassey AJ reduced the costs which such attorneys could recover from their clients to costs taxed on the party and party scale, and thus deprived them of their full attorney and client fees.

7.1.93 The court noted that one of the matters that must be considered at a pre-trial conference is whether the dispute *should*[163] be referred for possible settlement by mediation. In that case, the attorneys had no hesitation in answering this question in the negative or flatly rejecting it. The legal profession in South Africa has, however, virtually ignored the ***MB v NB*** decision with regard to sanctions on parties who unreasonably refuse or fail to attempt mediation.[164]

7.1.94 A South African statutory example of the voluntary (but with cost sanctions) approach would be the 2011 Draft Mandatory Mediation Rules, developed by the Rules Board. It regulated the procedure for the mandatory referral of disputes to mediation and the conduct of mediation in accordance with the objectives of these rules.[165]

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160 Civil Dispute Resolution Act 2011 (Cth) s 2.

161 For example, the Civil Dispute Resolution Act 2011 (Cth) s 4(d)–(e) lists "genuine steps" as including:

…

(d) whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process;

(e) if such a process is agreed to:
(i) agreeing on a particular person to facilitate the process; and
(ii) attending the process.

162 ***MB v NB*** 2010 (3) SA 220 (GSJ).

163 In fact, Rule 37(6)(d) of the Uniform Rules of Court simply requires the parties to record *whether any issue has been referred* by the parties for mediation.

164 Joubert supra.

165 The Rules were never put into operation and were replaced with the voluntary mediation rules of 2014.

7.1.95 Rule 3[166] provided that whenever an appearance to defend is filed in action proceedings, or a notice of intention to oppose is delivered in application proceedings, the matter must first be referred to mediation in an attempt to settle and resolve the dispute.

7.1.96 Rule 5(6)[167] provided that in the event of the disputants' being unable to resolve their dispute or conclude a settlement agreement during the mediation process, the matter is referred back to the conventional process of litigation to be adjudicated at court as a defended action or opposed application procedure.

7.1.97 Rule 6 provided that a litigant may refuse to submit to mediation notwithstanding the provisions of subrule (3), and subrule (6)[168] that deals with the consequences of such refusal, namely, a possible cost sanction.

7.1.98 In response to the question in SALRC Issue Paper 31[169] whether any adverse decisions should be made against a party who fails to attend a mediation and, if so, what this decision should entail, the following responses were received:

a) No adverse decision should be made because of a person's failure to attend mediation if there was good reason not to attend, and provided that the reason does not affect the merits of the dispute. A non-cooperative party should be made aware that an adverse determination

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166 "**3. Mandatory referral of dispute to mediation**
Whenever an appearance to defend is entered in action proceedings or a notice of intention to oppose is delivered in application proceedings, the clerk or registrar of the court must refer the dispute to a dispute resolution officer to facilitate mediation of the dispute between the parties."

167 "**5. Functions of dispute resolution officer**
(1)-(5) ...
(6) In the event of the parties not being able to resolve their dispute or conclude a settlement agreement where the dispute has been referred to mediation, the dispute resolution officer must upon receipt of a report from the mediator, refer the matter back to the clerk or registrar of the court to enable the dispute to proceed as a defended action or apposed application."

168 "**6. Refusal of litigants to submit to mediation**
(1)-(5) …
(6) At the trial of any action or the hearing of an opposed application where mediation was refused, should the court find that the refusal was unreasonable and that mediation may have resulted in substantially the same finding as the court, the court may make such an order as to costs as it considered appropriate, against the litigant that refused mediation."

169 Question 20, SALRC Issue Paper 31.

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can be made in their absence on the information placed before the mediator.[170]

b) A cost order may be made.[171] Should a party fail to attend mediation despite numerous requests by the other party to do so, an adverse cost order can be made against the party who fails to attend mediation, or fails to participate in a meaningful way at the hearing of the matter.[172]

c) Mediation should not be mandatory unless a court orders it. If a party fails to attend, the mediation may be postponed and, thereafter, referred to court.[173]

d) Mediation that is not attended by one party should lead to an investigation either by the Office of the Family Advocate or a social worker in practice and the matter may then be referred back to court.[174]

e) It should at the very least be noted on the certificate of outcome that a party did not participate.[175]

d) Consensual approach

7.1.99 This approach refers to mandatory mediation agreed on in a contract. It is, in effect, a self-activating mechanism because it is the product of the parties' consensus.[176]

7.1.100 The enforcement of an agreement to mediate is not currently regulated by statute. Such agreements are in principle regarded as conventional contracts and regulated by the law of contract. They can, therefore, be distinguished from arbitration agreements, which are regulated in terms of the Arbitration Act 42 of 1965.[177]

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170 Office of the Family Advocate.

171 Ms Karen Botha; Cape Law Society (Ms Zenobia du Toit) No 2; Mr Craig Schneider.

172 LSSA.

173 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

174 Department of Social Development, Directorate: Families, Children's Act and Comprehensive Social Security.

175 Dr Astrid Martalas.

176 Spruyt at 99.

177 Ibid.

7.1.101 In ***Townsend-Turner v Morrow***,[178] the court confirmed a mediation agreement between the parties[179] and added that the parties had to attend at least four mediation sessions.

7.1.102 Further examples of this approach include the following:

a) The **National Forests Act 84 of 1998** provides that a Community Forestry Agreement must provide for dispute resolution through informal mediation or arbitration methods. The powers and duties of the Minister include making regulations to deal with the processes of facilitation, mediation and arbitration held before a panel member who has been selected from a collective panel of facilitators, mediators and arbitrators.

(b) The **National Land Transport Transition Act 22 of 2000** makes provision for *pro forma* founding agreements for transport authorities. A section on mediation is provided for in these agreements.

7.1.103 The enforcement of mediation agreements is not without challenges. For example, it is not clear whether remedies for breach of contract are available. The success of an action for damages is uncertain, since it would be difficult to prove damages in this context. The desirability of an order for specific performance is also uncertain, because it is unlikely that the party who indicated his or her unwillingness to submit to mediation, but is nevertheless compelled to do so, will take part in good faith. The courts are therefore not as eager to enforce mediation agreements as in the case of arbitration agreements.[180]

7.2 Timing of mandatory mediation (when should the process be initiated?)

7.2.1 Several key points can be identified where some kind of intervention can be effected. The stages at which mediation may perhaps be considered are as follows:[181]

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178 ***Townsend-Turner v Morrow*** 2004 (2) SA 32 (C).

179 At 48A: "Accordingly I intend to make the order with regard to the mediation which the parties have agreed to."

180 Spruyt at 103 with reference to Boulle & Rycroft Mediation 227.

181 Mr Charles Mendelow, Cape Town Conference.

- Mandatory pre-action mediation (before summons is issued);
- mandatory pre-trial mediation (at the stage of the close of pleadings); and
- case management or court-referred mediation.

7.2.2 The Constitutional Court[182] expressed itself as follows regarding the timing of mediation:

> [47] The question arises whether it is permissible or appropriate for this Court to order mediation when its use or non-use has not been considered either by the Court of first instance or by the SCA. By the time an appeal is heard, some of the advantages of mediation are lost. There is no saving on forensic expense, no avoidance of the law's delay, and no minimisation of litigious rancour. Further, the chances of successful mediation are usually at their highest when the outcome of litigation is at its most uncertain. In the present matter, neither party supports it unconditionally at this stage. Not without hesitation, I have come to the conclusion that too much water has flowed under the bridge to make it appropriate that mediation be attempted now. The fact that mediation has not been tried will, however, be an important factor in determining whether it is just and equitable for an eviction order to be made. With this consideration in mind, I turn to consider the municipality's appeal against the decision of the SCA.

7.2.3 In response to the question posed in SALRC Issue Paper 31[183] with respect to the timing of mediation, most of the respondents indicated that the mediation should take place as early as possible, but should not be discounted at any stage of the process. The respondents commented as follows on the possible stages to be considered:

a) Mandatory pre-action mediation

(i) In so far as family mediation in Australia is concerned, parties have to resort to mediation before the court process commences. Realistic claims can be set out in the summons if the mediation has taken place before the court process.[184]

(ii) When children are involved, a court case has an immediate impact and mediation should therefore be initiated as early as possible. When parties are getting divorced, high emotions are involved; add the legal practitioners and our adversarial system and you have a major firestorm. With mediation, no matter what the attitude of the parties is, if the

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182 ***Port Elizabeth Municipality v Various Occupiers*** 2005 (1) SA 217 (CC) at par. 47.

183 SALRC Issue Paper 31, Question 44.

184 Prof. Madeleen de Jong, Cape Town conference.

mediator is properly trained, he or she can manage the situation since mediators are required to be independent and neutral. After the mediation, even if it has not been successful, a party should have a better understanding of the matter and of his or her position. To have to wait four years for a trial is an indictment of the system. The CCMA is an excellent example of how successful mediation can be. Every commissioner will conciliate before the case proceeds to the next step.[185]

(iii) Many divorces are unopposed. However, when parties get their matter placed on the unopposed role, they have already suffered a lot of harm. One of them may just have given up, either because of financial constraints or because they have run out of emotional resources. The idea that they are going through the divorce supposedly happily is a fallacy. Therefore, mediation should be mandatory prior to the divorce going ahead.[186]

(iv) Mediation should commence immediately. It should begin prior to summons being issued and the parties must produce a certificate of outcome by a duly accredited mediator prior to being entitled to launch any proceedings, whether by action or application.[187]

(v) Mediation should, where possible, commence before summons is issued, as the acrimony escalates enormously once litigation starts. As soon as a person consults an attorney with a view to divorcing, the attorney should be required by regulation to refer the person to mediation. The attorney should be required to issue a certificate indicating that mediation was suggested, and if this was not done, the attorney should give reasons for not doing so[188]

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185 Mr PJ Cloete, National Executive Director: Child Welfare SA, Cape Town Conference.

186 Dr Lynette le Roux, Cape Town Conference.

187 Dr Astrid Martalas; Mr Craig Schneider.

188 Ms Karen Botha.

(vi) If parties move too far down the path, their positions may harden. It is therefore accepted that early referral is best.[189] It should be the first step in the divorce process.[190]

(vii) It would be beneficial if there could be a parenting plan right from the outset, even before the summons is issued, so that the children's issues could be kept out of the litigation arena, out of the confrontation, and so that only the financial matters are on the agenda.[191]

(viii) Mediation sessions should be mandatory irrespective of whether or not parties have reached agreement on a parenting plan.[192] Should the parties have reached agreement on a parenting plan, the mediation process will assist the parties to ensure that they are "on the same page" as to how to implement the parenting plan and how to co-parent in the future and how to communicate in the best interests of the children. This process is very important, since it can reduce post-divorce or post-separation disputes and can reduce the need for parenting coordination post-divorce or post-separation.[193] However, very few parties actually have parenting plans, so the mediation should help them to deal with arrangements with regard to their minor children. Mediation will also help to solve other disputes apart from those concerning their children.[194]

(ix) All but one of the respondents to SALRC Issue Paper 31[195] were of the opinion that the question whether or not parties should be compelled to attend a mediation session should not be determined at the discretion of

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189 Prof. Madeleen de Jong, meeting of experts, Cape Town, 16 February 2017.

190 Ministry for Social Development of the Western Cape.

191 Ms Zenobia du Toit, Cape Town meeting of experts.

192 Dr Astrid Martalas; Mr Craig Schneider; Office of the Family Advocate; Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division.

193 Dr Astrid Martalas; Mr Craig Schneider.

194 Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division.

195 SALRC Issue Paper 31, Question 48.

the Office of the Family Advocate.[196] It was suggested that it should rather be legislated that mediation is mandatory.[197] The Office of the Family Advocate usually becomes involved only later in the course of events and mediation needs to be the first port of call.[198] One stakeholder[199] indicated that the Office of the Family Advocate may be best suited to determine the need or viability of mediation. That option can be presented to the parties but cannot be enforced.

(x) In a contrary view it was stated that when the parties are able to settle the matter between themselves, there should be no need for mediation.[200] Again, no mediation should be mandatory. It is unclear what the purpose of mediation would be if parties have already reached agreement.[201]

b) Mandatory pre-trial mediation

(i) Parties may seek legal advice, institute action or launch an application but should not be able to receive a date for a hearing until such time as they have completed the mediation process and have received a certificate of outcome from a suitably qualified mediator.[202]

(ii) Mediation throughout the process is a viable option and may render positive results.[203]

(iii) One respondent[204] referred the SALRC to the position of the Road Accident Fund, where a party cannot go to trial before the parties have

196 Dr Astrid Martalas; Mr Craig Schneider; Office of the Family Advocate; Ms Karen Botha; Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division.

197 Dr Astrid Martalas; Mr Craig Schneider.

198 Ms Karen Botha.

199 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

200 Ms Karen Botha.

201 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

202 Dr Astrid Martalas. Mr Craig Schneider stated that mediation should be required in Hague matters as well. In this regard the European Mediation Directive issued by the European Parliament and the Council of Europe on 21 May 2008 and the European Code of Conduct for Mediators may prove very helpful.

203 Prof. Madeleen de Jong, Cape Town meeting of experts, 16 February 2017.

had a pre-trial meeting in the presence of the judge, and even at the stage of issuing of summons, a party has to state whether it is going to call experts. At this stage, matters can be referred to mediation as a matter of course.

(iv) Another possibility is that mediation should start after the commencement of the court process and after summons has been issued. The problem with our current court-annexed mediation is that there is no one to initiate the process apart from the parties themselves or the legal practitioners.[205]

(v) In summary, it is appropriate for the mediation to begin before the trial commences at Rule 37(8) level. In the Western Cape, the judges often order mandatory mediation at this stage before they are willing to provide a trial date.[206]

c) Case management mediation/court-referred mediation

(i) Restricting mediation to a specific stage may prove to be problematic. Very often parties are not ready to settle immediately. It is a sense that arises later, and it would be wrong to close the door, as a matter of course, on the possibility of mediation anywhere in the process.[207]

(ii) Mandatory court-based mediation means that a civil dispute is referred to mediation once an intention to defend is filed at court, in order to attempt the settlement of the matter. In the event of the dispute not being resolved, the matter is then referred back to the conventional litigation process for resolution.[208]

(iii) Most of the so-called amicable divorces later end up in mediation. All of them have consent papers and settlement agreements which intimate that mediation would be necessary later as circumstances change. These matters do not end up in mediation because there had not been

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204 Mr Charles Mendelow.

205 Prof. David Butler, Cape Town meeting of experts, 16 February 2017.

206 Ms Zenobia du Toit, Cape Town Conference.

207 Ms Zenobia du Toit, Cape Town Conference.

208 Maclons at (v).

mediation before, but rather because it was anticipated that there would be a need for mediation at a later stage.[209]

7.3 Refusal of parties to participate[210]

7.3.1 Paleker[211] submits[212] that in cases where intervention is unsuccessful because a party refuses to participate in mediation or abuses the mediation process, the Minister should, by means of regulations promulgated in terms of the Act, require a certificate of mediation to be furnished before the matter can be brought to court. Although this certificate should not reveal the content of communications that took place during the mediation process, such a certificate could be used to show the court that a party refused to participate in mediation, or abused the mediation process.[213]

7.3.2 It is noteworthy that courts in the United Kingdom impose cost sanctions on parties who unreasonably refuse or fail to submit to mediation. In the US, mediation is more firmly embedded in the litigation process, with courts applying various degrees of coercion to encourage parties to mediate.[214]

7.3.3 In an opposite view it was argued that issuing a punitive cost order would be contrary to the spirit of mediation, as such an order is essentially of a punitive nature. [215]

7.3.4 A number of commentators who responded to SALRC Issue Paper 31[216] agreed that an unsuccessful intervention should be recorded in a certificate of outcome.[217] In such a certificate

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209 Ms Sandra van Staden, attorney/arbitrator, Cape Town Conference.

210 See also discussion above.

211 Paleker at 13.

212 See also SALRC Issue Paper 31 at par. 3.7.32.

213 DSD ***Social Services Professionals Mediation Framework*** 2012 at 90.

214 Joubert 2014.

215 Hawkey at 21.

216 In response to Questions 25 and 62.

217 Ms Karen Botha; Mr Craig Schneider; Dr Astrid Martalas.

of outcome, no mention should be made of the discussions held, but if a party's conduct was obstructive or abusive, so preventing a successful mediation from taking place, this should be recorded.[218] The certificate of outcome should also include the number, dates and duration of the mediation sessions held.[219]

7.3.5 In the SALRC Issue Paper 31 the question was posed whether any adverse decision should be made against a party who fails to attend mediation. If so, what should this entail? Many different responses were received:

a) Many respondents[220] were of the opinion that should a party fail to attend mediation despite numerous requests by the other party to do so, or fail to participate in a meaningful way at the mediation, an adverse cost order should be made against that person at the subsequent hearing of the matter.[221]

b) The reasons for an unsuccessful outcome should be considered when cost orders are sought.[222] In extreme cases, a suggestion in respect of a punitive cost order/ruling can be suggested in the certificate of outcome.[223]

c) The Office of the Family Advocate stated that some mothers ignore their notices to attend mediation at the Office of the Family Advocate, and the unmarried father is then forced to engage in litigation that is extremely costly.[224] However, in cases that involve abuse or allegations of abuse, the refusal to attend might be justified. An exception for these cases could be considered.

7.3.6 Respondents[225] felt that, apart from a possible punitive cost order, the matter should be referred to court[226] or referred to further mediation[227] or arbitration[228] or round-table discussions

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218 Mr Craig Schneider.

219 Mr Craig Schneider; Dr Astrid Martalas.

220 Ms Karen Botha; LSSA; Cape Law Society; Mr Craig Schneider.

221 See discussion above.

222 Ms Karen Botha.

223 Mr Craig Schneider.

224 Supra at 21.

225 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD; Department of Social Development, Directorate: Families, Children's Act and Comprehensive Social Security.

226 Office of Family Advocate; Cape Law Society (Ms Zenobia du Toit); Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD; LSSA.

through attorneys,[229] or to parenting coordination. Recommendations and a report by an expert,[230] perhaps after having been investigated by the Office of the Family Advocate,[231] must in any event be obtained. At the very least it should be entered on the certificate of outcome that a party did not participate.[232] This would be in accordance with section 6(4) of the Children's Act, which requires parties to avoid delaying a matter or proceeding to court unnecessarily.[233]

7.3.7 Reference has been made to the fact that in labour law procedures, it is not possible to obtain a date either for trial in the Labour Court or for an arbitration hearing unless, and until such time as, the parties have attempted conciliation through the Commission for Conciliation, Mediation and Arbitration (CCMA).[234] Only after the parties have attempted to conciliate the matter, and a certificate of outcome has been issued (which either sets out the agreement reached or states that an agreement could not be reached) a party may apply to the CCMA for a date for arbitration or for referral to the Labour Court.[235]

7.4 Conclusion: Proposed draft legislation

7.4.1 In designing a mandatory mediation model the following points should be taken into account:[236]

a) Every programme, regardless of whether it entails discretionary or mandatory referral of cases to mediation, should permit the parties to opt out of the scheme in exceptional circumstances. The "opt-out" provision functions as a safety valve to

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227 Office of Family Advocate.

228 Dr Astrid Martalas; Mr Craig Schneider; Office of the Family Advocate; Cape Law Society (Ms Zenobia du Toit); LSSA.

229 Cape Law Society (Ms Zenobia du Toit); LSSA.

230 Cape Law Society (Ms Zenobia du Toit); LSSA.

231 Department of Social Development, Directorate: Families, Children's Act and Comprehensive Social Security.

232 Dr Astrid Martalas.

233 Dr Astrid Martalas; Mr Craig Schneider.

234 Schneider presentation at 4.

235 ***NUMSA v Intervalve (Pty) Ltd ao*** [2014] ZACC 35. See discussion in par. 5.3.7 above.

236 Quek at 508.

reduce the level of arbitrariness and, consequently, the degree of coercion in the program.

b) The criteria for opting out should not be couched in vague terms or be too lenient.

c) The mandatory nature of the mediation program should be mitigated by other ways of increasing the parties' autonomy. This can take the form of giving the parties their choice of a mediator or providing them with a mechanism to lodge complaints about the misconduct of a mediator.

d) The court should ensure that the quality of mediation is closely monitored. This can be done by introducing a mediator grievance system, as in Florida, or by other means such as providing clear ethical guidelines for court-annexed mediation.

e) The required participation standards should be simple and specific so as to prevent unnecessary litigation and uncertainty.

f) The sanctions to be imposed for non-compliance should not be so draconian as to overshadow the informal and voluntary nature of mediation.

7.4.2 The proposed draft legislation for inclusion in a Family Dispute Resolution Act could be worded as follows:

CHAPTER 4

FAMILY MEDIATION[237]

Application of Mediation Act

16*. The provisions of the Mediation Act, 2019, apply to any mediation matter conducted in terms of this Chapter, to the extent that—*

a) such a matter has not been dealt with in this Chapter; and

b) the applicable provision of the Mediation Act is capable of operating concurrently with this Act.

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[237] The following definitions contained in the Family Dispute Resolution Bill, enclosed as Annexure B below, are specifically relevant to this Chapter:
"certified mediator" means a person whose name has been entered in the register of certified mediators under the Mediation Act, 2019;
"mediation" means a process in which a mediator facilitates and encourages communication and negotiation between the mediating parties and seeks to assist the mediating parties in arriving at a voluntary agreement;
"mediator" means a neutral third party who conducts the mediation.

Commencement of mediation before litigation

17.*(1) In order to attempt the resolution of a family law dispute, the parties to the dispute must, once they have complied with section 13, submit to mediation in terms of this Act before any other proceedings (including the issuing of summons, or a notice of motion) may commence.*

(2) The mediation must be performed by a certified mediator agreed on by the parties or, if the parties are unable to agree, by a certified mediator appointed by a mediation service provider as prescribed or by the Court.

(3) Subject to subsection (2), nothing precludes a programme provider from making available his or her services to the parties to facilitate the mediation as a certified mediator.

(4) The parties are not compelled to submit to mediation if—

- *(a) they intend to file a consent order and both parties consent to the order that is being requested;*
- *(b) they have previously attempted to mediate the dispute concerned but that mediation was unsuccessful;*
- *(c) a mediator, after assessing, as prescribed, whether family violence may be present, is of the opinion that family violence is present and that the family violence may adversely affect the safety of a party or a family member of that party or the ability of that party to negotiate a fair agreement;*
- *(d) a court is satisfied that there are reasonable grounds to believe that abuse of a child by one of the parties has occurred or there would be a risk of abuse of the child if there were to be a delay in applying for protection of the child;*
- *(e) they have signed a collaborative dispute resolution participation agreement; or*
- *(f) a court determines that participation is not in the best interests of the parties or the child, including urgency or potential hardship.*

Jurisdiction of court

18.*(1) A court may at any stage of litigation, if it deems it in the best interests of any member of the family concerned, refer a matter to a certified mediator to facilitate mediation of the family*

law dispute between the parties, and may do so with or without the consent of the parties to the proceedings.

(2) A litigant may, at any stage of the litigation, apply to court for the referral of a dispute to mediation with such order as to costs as the court deems appropriate.

(3) Subject to section 17(4), a court exercising jurisdiction under this Act must not hear a family dispute unless a party files with the court a certificate of outcome furnished to that party by a certified mediator in terms of section 21.

Refusal to submit to mediation

19.*(1) Notwithstanding the provisions of sections 17 and 18, a party may, within five days after attending one session with a certified mediator to determine whether mediation appears to be appropriate for the resolution of the dispute, the parties and the circumstances, opt out of further mediation contemplated in those sections, on the following grounds:*

a) The issue constitutes a question of law only; or

b) any other good cause shown, including urgency and potential hardship.

(2) Parties who refuse to participate in further mediation must provide the mediator with an explanation in writing for their refusal.

(3) The court may impose a punitive order as to costs, or another appropriate order, if, during a subsequent hearing, it concludes that a party unreasonably refused to engage in mediation.

Time limit for completion of mediation

20. *The time limit for completion of the mediation is 90 days from the date of referral, and on expiry of this date the parties may institute legal proceedings even if the mediation has not been completed, unless the mediator provides the parties with a reasonable explanation, in writing, for the delay.*

Certificate of outcome

21. *A mediator must provide the parties with a certificate of outcome—*

a) setting out the agreement reached between the parties; or

b) stating that an agreement between the parties could not be reached.

Costs, funding and fees

22.*(1) The parties participating in the mediation process must pay the fees of the mediator in full, except when the services of the mediator are provided free of charge or when a sliding scale, as prescribed, applies owing to the indigence of a party or the parties.*

(2) Liability for the fees of the mediator must be borne equally between the opposing parties participating in the mediation process: Provided that any party may offer or undertake to pay the fees of the mediator in full.

(3) The tariff of fees chargeable by mediators must be published by the Minister of Justice and Correctional Services.

PART D: COLLABORATIVE DISPUTE RESOLUTION

Chapter 8: Collaborative dispute resolution[1]

8.1 Introduction

8.1.1 For many years, litigation has been a mechanism to resolve family disputes, but in recent years there has been a deliberate effort to encourage people to resolve their family disputes by means of ADR mechanisms. [2]

8.1.2 Collaborative dispute resolution is one of the alternative dispute resolution mechanisms that have been employed by family law practitioners to resolve family law disputes.[3]

8.1.3 An American family law attorney, Stu Webb, is credited for having started the collaborative law movement in the United States of America (USA). This practice was the result of Webb's unhappiness and bitterness about the traditional adversarial nature of family law litigation.[4] In 1990, in order to attempt to formalise this new process, a global collaborative organisation, the International Academy of Collaborative Professionals (IACP), was founded in the USA.[5]

8.1.4 Duhaime's Law Dictionary[6] defines "collaborative law" as –

> A family law dispute resolution encouragement process set in writing which includes a promise to negotiate in good faith, to engage in the exchange of private and confidential information on a without prejudice basis, and a motivational commitment

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1 This section is based on par. 3.12 of SALRC Issue Paper 31, 2016, except where otherwise indicated.

2 Marumoagae MC "Does collaborative divorce have a place in South African divorce law?" 2016 ***De Jure*** 41 (hereafter referred to as "Marumoagae ***De Jure***") at 56. See also the discussion above in Chapters 2, 3 and 4 in this regard.

3 Marumoagae ***De Jure*** at 41.

4 Hansen SA & Hildebrand GM "Collaborative practice" Chapter 2 in Association of Family and Conciliation Courts (AFCC) ***Innovations in family law practice*** (Olson KB & Ver Steegh N (ed)) access at https://www.afccnet.org/Resource-Center/Resources-for-Professionals/Innovations-in-Family-Law-Practice (hereafter referred to as "Hansen & Hildebrand Chapter 2") at 31. See also Webb "Collaborative law: A practitioner's perspective on its history and current practice" 2008 ***Journal of the American Academy of Matrimonial Lawyers*** 156 as referred to by Marumoagae ***De Jure*** at 41.

5 See discussion on the IACP in par. 8.6 below.

6 Marumoagae C "Resolving divorce disputes through a collaborative process" April 2017 ***De Rebus*** 22 (hereafter referred to as "Marumoagae ***De Rebus"***) at 22 referring to www.duhaime.org.

that the participating legal practitioners or law firms would withdraw if the negotiations fail.[7]

8.2 Nature of collaborative dispute resolution

8.2.1 Divorce or separation is often a client's first encounter with the judicial system. The encounter comes at a time when most people are experiencing intense stress, which impairs their ability to cope with the confusing and frightening experience of litigation. They may harbour unrealistic expectations – both positive and negative – about the process based on gossip and the media.[8]

8.2.2 Collaborative dispute resolution is regarded as arguably the most advanced dispute resolution process currently available anywhere in the world. It is a desirable choice for parties who wish to avoid the costs and stress of litigation, who value creative options unavailable to judges, and who prioritise being able to provide high-quality parenting for their children during and after the divorce or separation.[9] The collaborative process is used to resolve many kinds of family law cases and issues. Such matters include gay and lesbian couples and their families, opposite sex couples who have chosen not to marry, and paternity disputes.[10]

8.2.3 Collaborative dispute resolution offers spouses the support, protection and guidance of their own legal practitioners without having approached the court. It has been argued that it is not about "fairness" – since what is "fair" to one person may not be "fair" to the other – but about

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7 The IACP definition of "collaborative practice" adopted by the IACP Board of Directors on 13 October 2011, as amended in 2017, reads as follows:
"Collaborative Practice is a voluntary dispute resolution process in which clients resolve disputes without resort to any process in which a third party makes a decision that legally binds a client. In Collaborative Practice:
1. The clients sign a Participation Agreement describing the nature and scope of the matter that is consistent with the IACP Ethical Standards;
2. The clients voluntarily disclose all information which is relevant and material to the matters to be resolved;
3. The clients agree to use good faith efforts in their negotiations to reach a mutually acceptable resolution;
4. Each client must be represented by a Collaborative Lawyer whose representation terminates upon the undertaking of any Proceeding as defined in the IACP Ethical Standards;
5. The clients may engage mental health and financial professionals whose engagement terminates upon the undertaking of any Proceeding; and
6. The clients may jointly engage other experts as needed."

8 Wright JK "Connect with J. Kim Wright on Linked In" access at www.linkedin.com/in/jkimwright/ or www.JKimWright.com.

9 Kopping-Pavars N "Collaborative family law" Paper read at SAAM Mediation Conference Johannesburg 30-31 July 2014 (hereafter referred to as "Kopping-Pavars").

10 Hansen & Hildebrand Chapter 2 at 30.

"equality". Parties should walk away feeling that the playing field was level. It is also not about the differing "positions" of the parties, but rather about their interests.[11]

8.2.4 In terms of collaborative dispute resolution, both spouses and their legal representatives pledge in a binding written agreement (the Collaborative Practice Participation Agreement)[12] not to litigate while the process is pending, but to work together constructively and in a respectful manner to settle the case by way of consensus The agreement stipulates that legal representatives are engaged for the sole purpose of negotiating a divorce or separation settlement. If a settlement cannot be reached, the attorneys agree to step out of the picture and the parties may consult other legal representatives if they choose to litigate. The core collaborative commitment of a "disqualification agreement" was developed so that clients could engage legal practitioners to assist them in resolving disputes without the fear that the legal practitioners would provoke disagreement or exacerbate conflict resulting in court battles.[13] This is also known as the "collaborative commitment". The collaborative process is client-centred and relatively predictable, and allows the parties to limit their costs.[14] The indispensable defining element of the process is that the parties and legal practitioners stipulate in writing that the process will be terminated and the collaborative legal practitioners will be disqualified from continued representation of their respective clients if either party resorts to litigation.[15]

8.2.5 It is interesting to note that in Italy legislation does not provide expressly for the so-called "Golden Rule" (that both attorneys must withdraw if negotiation breaks down). Such an agreement would be redundant since a lawyer who files suit against a party to a contract with

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11 Kopping-Pavars.

12 It has been argued by Schriner "Agreements to participate in the collaborative law process"' in Gutterman (ed) ***Collaborative law: A new model for dispute resolution*** (2004) 49, as referred to in Marumoagae ***De Jure*** at 47, that the agreement to participate gives collaborative law proceedings its spine. This is a document that –
(1) stipulates the constraints on the lawyer and consulting professionals' participation;
(2) spells out the ethical principles and procedural guidelines for the practice of collaborative law;
(3) renders resorting to court a failure (requiring professionals to withdraw); and
(4) once understood, voluntarily agreed to, and signed by the participants, gives the teams professional Super Glue to keep the clients from bailing out when the going gets tough.
This is a document that defines the "container" for the process and, particularly because it defines the sole goal as collaborative settlement, causes a profound change in mind-set and frees the problem-solving creativity of the participants.

13 Hansen & Hildebrand Chapter 2 at 31.

14 For more information about the international collaborative divorce movement, see http://collaborativepractice.com/. *Collaborative Review* is the official publication of the International Academy of Collaborative Professionals (IACP).

15 Hansen & Hildebrand Chapter 2 at 30.

whom he or she has signed a confidentiality agreement risks being disbarred under the National Bar Ethical Rules.[16]

8.2.6 In the United States, the disclosure in the collaborative process is limited to information that is relevant to settling a dispute. If there is any other information that a party does not want to share during the collaborative process, the person receiving the request may refuse to disclose the information but he or she must be truthful as to the existence of the information.[17]

8.2.7 The duty to withdraw in a collaborative case generally arises when an impasse is reached or when any party wishes to terminate the process. The term "withdrawal" is actually somewhat of a misnomer, since the process is more accurately described by the term "limited-scope representation".[18]

8.2.8 A significant development in the collaborative movement took place when it shifted from being a legal practitioner-only method to an interdisciplinary model. The concept of an interdisciplinary collaborative practice implies a partnership between mental-health professionals and collaborative legal representatives.[19] It also includes roles for communication and parenting divorce coaches, child specialists and financial specialists.[20] Each legal representative functions as an adviser, advocate and educator, and all of the professionals work together to assist the client in identifying interests in the negotiation process.[21]

8.2.9 Multidisciplinary teams are assembled to assist clients in resolving the parenting, financial and personal issues that inform the circumstances of their divorce or separation.[22] This

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16 Calabrese M ***Collaborative practice in Italy: Statutory Law N. 162/2014*** (a.k.a. Negoziazione Assistita) access at https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/newsletter/july2017/calabrese_the_evolution_of_collaborative_law_in_italy.authcheckdam.pdf (hereafter referred to as "Calabrese") at 2.

17 American Bar Association Section of Dispute Resolution Ethics Subcommittee ***Summary of ethics rules governing collaborative practice*** Draft 10 October 2009 (hereafter referred to as "ABA ***Draft ethics rules***") at 14. See also Maxwell LR (Jr) ***Update of 2009 Summary of ethics rules governing collaborative practice*** April 2014 for confirmation of the draft rules.

18 ABA ***Draft ethics rules*** at 10.

19 Webb S & Ousky R "History and development of collaborative practice" 2011 49 ***Family Court Review*** 213 (hereafter referred to as "Webb & Ousky") at 216.

20 Hansen & Hildebrand Chapter 2 at 37.

21 Hansen & Hildebrand Chapter 2 at 30.

22 Mendelow submission 23 July 2014.

approach arguably allows for a deeper and more durable resolution than was possible in family law matters before the advent of collaborative dispute resolution.

8.2.10 The clients have the option of starting their divorce with the professional with whom they had initial contact or with whom they feel most comfortable. The clients and their initially retained professionals then elect the other professionals needed to help resolve the issues.[23]

8.2.11 In Italy, however, there is no provision for a coach, a mediator, a child expert or a financial neutral. The economics of divorce in Italy do not support this as a mandatory matter. The litigation alternative is not nearly as expensive as in North America.[24]

8.2.12 It is important to note that legal counsel, financial professionals,[25] mental-health practitioners, experts, divorce coaches[26] and child specialists[27] all work together as a team, rather than on behalf of one spouse or the other.

8.2.13 Any experts needed (for instance appraisers) will also be retained jointly. In the event that the collaborative process is terminated, all experts will be disqualified from providing information, responding to discovery requests, appearing as a witness or being subject to discovery for either party or the court. The notes, work papers, summaries and reports of such experts will be inadmissible as evidence in any proceedings involving the parties. This disqualification may not be waived or modified by a subsequent court order, unless agreed to in writing by both parties and the expert concerned.[28] This disqualification does not apply to

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23 Hansen & Hildebrand Chapter 2 at 30.

24 Calabrese at 3.

25 Hansen & Hildebrand Chapter 2 at 43: "The financial specialist is a neutral financial professional who is retained by both clients. Financial specialists are typically certified financial planners or accountants. The financial specialist helps clients gather, organize, understand and analyse financial data relevant to the case. They help the clients identify financial concerns, interests and goals."

26 Hansen & Hildebrand Chapter 2 at 40: "The collaborative coach (also referred to as a 'divorce coach') is a mental health professional whose role is to prepare the client to participate effectively within the collaborative process. The collaborative coach helps the client understand and work through emotions and understand relationship and family patterns. The coach may also teach positive co-parenting skills, educate the client about ways to create a healthy divorce outcome for children, assist in developing a parenting plan, and help the client communicate in a positive and productive way with his or her spouse."

27 Hansen & Hildebrand Chapter 2 at 42: "The child specialist is a mental health professional with specific training and expertise in child psychology, child development, and family system. The child specialist assists parents in understanding and addressing their children's unique needs and provides tools for use by parents and other team members seeking to promote on-going healthy family relationships. The child specialist serves as a neutral advocate for the interest of the child."

28 Hansen SA & Hildebrand GM Chapter 2: "Collaborative practice", Appendix B: Stipulation and order for collaborative law in AFCC ***Innovations in family law practice*** Olsen KB & Ver Steegh N (eds) (hereafter referred to as "Hansen & Hildebrand Appendix B" at 3).

documents that are otherwise available from other sources (for example, tax returns, police reports and documents obtained from third parties or obtained through formal discovery).[29]

8.2.14 It is the collaborative legal practitioner's responsibility to assist the parties in implementing the agreement. This includes not only preparing a written document that confirms the terms of the final agreement, but also providing whatever legal assistance might be needed to carry out the terms. Thus, the role of the collaborative legal practitioner is a combination of educator, advocate, process guide, creative problem solver, settlement specialist and team member.[30]

8.2.15 In contrast to traditional litigation, the collaborative process is less constrictively defined and more adaptable to the individualised needs of the clients. The clients and collaborative professionals, rather than the court or legal mandates, dictate the timelines and agenda.[31] The collaborative process is a good option for people who wish to maintain privacy and control over their own case as in mediation, but who also want the individualised assistance of legal practitioners.[32]

8.2.16 The distinction between the role of the collaborative legal practitioner and the traditional legal practitioner should be made clear to the client, who must accept it in a fully informed decision before the collaborative process commences. Unbundled legal services and limited representation have become more common, but an informed decision by the client is imperative.[33]

8.2.17 The role of the collaborative legal practitioner is to guide the negotiation process, not to control it. Legal practitioners with extensive experience in traditional negotiation or litigation may have become accustomed to directing a client to a preferred legal alternative. In collaborative practice, the ultimate goal is to assist the parties to explore and define their own resolution in a creative manner.[34]

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29 Hansen & Hildebrand Appendix B at 2.

30 Hansen & Hildebrand Chapter 2 at 39.

31 Hansen & Hildebrand Chapter 2 at 47.

32 Hansen & Hildebrand Chapter 2 at 48.

33 Hansen &Hildebrand Chapter 2 at 49.

34 Hansen & Hildebrand Chapter 2 at 54.

8.2.18 The collaborative process concludes with the parties' reconciliation, a full, negotiated agreement, or the termination of the process based on a resort to litigation. Either party has the option of electing to terminate the collaborative process. The vast majority of collaborative cases are resolved pursuant to a mutually agreed-upon settlement. Preliminary data suggest that fewer than 5% of collaborative cases are terminated and move on to litigation. Potential terms for final agreements are generally discussed with clients to help them establish a mutually agreed-upon approach to address any post-judgment issues or concerns that may arise.[35]

8.2.19 In the United States, the IACP Standards set the boundaries and specify the roles for the neutrals, the financial specialists and the child specialists involved in collaborative practice. The Standards prohibit any dual roles for neutrals. Working with either client separately after the collaborative process has come to an end is inconsistent with serving in a neutral capacity in the collaborative model.[36]

8.3 Collaborative dispute resolution vs mediation vs settlement negotiations

Collaborative dispute resolution vs mediation

8.3.1 Collaborative dispute resolution is not the same as mediation. Both mediation and collaboration assist parties to resolve their disputes in a more relaxed atmosphere, take them away from the adversarial court environment and improve the communication between parties by actively involving them in the process.[37] It has been argued that mediation, in general, is an inherently collaborative process. However, collaborative dispute resolution is functionally different from mediation in many ways.

8.3.2 The collaborative process expands the interest-based negotiation approach used in divorce mediation through the addition of individualised legal and mental-health advice and advocacy.[38]

8.3.3 Certain circumstances are ideal for mediation, whereas in others spouses may experience intense and overwhelming emotions that may impair their ability to engage in long-term thinking and self-interested problem-solving. Clients may delay, obstruct, become angry

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35 Hansen & Hildebrand Chapter 2 at 55.

36 Hansen & Hildebrand Chapter 2 at 58.

37 Marumoagae ***De Jure*** at 52.

38 Hansen & Hildebrand Chapter 2 at 31.

and uncivil toward one another, seek revenge and generally behave in ways that would make resolution of the dispute difficult and the role of the mediator impossible. In such matters, allowing the parties to have their own legal practitioners could be more productive.[39]

8.3.4 The collaborative law movement draws on mediation theory and practice, but adds its own unique feature: legal practitioners who are focused on reaching settlement because they are disqualified from handling the litigation should negotiations fail.[40] Statements made during the mediation can therefore never be used in court.

8.3.5 The mediator may or may not be a legal practitioner. A mediator can provide information about the law and the legal process, and can guide discussion to help resolve issues, but the mediator does not represent either party and should not provide legal advice. Mediation may be conducted between parties who have retained legal practitioners as well as parties who are not represented.[41]

8.3.6 An important difference is also that in collaborative practice legal advice is concurrent with and integrated into the negotiations.[42]

8.3.7 Collaborative dispute resolution represents two professionals acting for opposing parties, working together. It is also a four-way process, since each party is represented by his or her own legal practitioner. In mediation there is only one professional trying to find a solution for the parties, which makes it a three-way process.[43]

Collaborative dispute resolution vs settlement negotiations

8.3.8 Litigation is the traditional legal process. Both parties engage legal practitioners, who provide legal advice and represent the positions of their clients in negotiations and court proceedings. Negotiation occurs in the context of the adversarial system, and the parties and

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39 Schepard A "Editorial notes – Special Issue: Collaborative practice" 2011 49 ***Family Court Review*** 207 (hereafter "Schepard") at 208.

40 For more information about the international collaborative divorce movement, see http://collaborativepractice.com/. *Collaborative Review* is the official publication of the International Academy of Collaborative Professionals (IACP).

41 Hansen & Hildebrand Chapter 2 at 35.

42 De Jong M Chapter 13 "Mediation and other appropriate forms of alternative dispute resolution upon divorce" in Heaton J (ed) The law of divorce and dissolution of life partnerships in South Africa, Juta & Co 2014 (hereafter referred to as "De Jong Chapter13") at 625.

43 Marumoagae ***De Jure*** at 45.

legal practitioners retain the option of turning to the court as a third-party decision maker if resolution is not reached in respect of all issues. The parties generally communicate through their legal practitioners with regard to their positions, proposals and counter-proposals. Most negotiations occur within the confines of statutory and case law precedent and legal formulas and against the backdrop of potential court intervention and judgment.[44] In collaborative dispute resolution, court intervention is not an option and the adversarial system is avoided.

8.4 Benefits of collaborative dispute resolution

8.4.1 The benefits of collaborative dispute resolution are expressed as follows by the UCLA Task Force:[45]

a) Collaborative dispute resolution in most cases is highly successful, with 87% of collaborative dispute resolution cases settled in the collaborative process, while an additional 3% result in reconciliation.

b) In family law cases, out-of-court settlements have been shown to have significant benefits to families:

(i) Conflict is lessened;

(ii) children benefit by reduced conflict;

(iii) costs are reduced;[46] and

(iv) co-parenting relationships are supported.

c) Children are often given a voice in the process in a safe, neutral venue. Research shows that parenting plans in which children have had a voice are more durable and developmentally responsive to the children.

d) Parties are more vested in the outcome and satisfied with the process when they are part of the dispute resolution process, as in the case of collaborative divorce, than when the outcome was imposed upon them by a third-party decision-maker.

e) Families in collaborative cases gain experience when they successfully resolve conflict, which aids them in resolving conflict post-divorce or post-separation. If families cannot resolve post-divorce or post-separation conflict, they have a network of professionals from their collaborative case to help them deal with the dispute (parties are probably less likely to go back to court if they participate in a collaborative case as opposed to litigation).

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44 Hansen & Hildebrand Chapter 2 at 35.

45 IACP UCLA Task Force ***UCLA - Proposed talking points for communications to those interested in the UCLA*** 9 September 2009 access at http://uniformlaws.org/Acts.aspx.

46 Marumoagae ***De Rebus*** at 28: The Law Society of Australia observed that it reduces costs by turn off open-ended litigation expenses.

f) Collaborative dispute resolution reduces court files and the burden on courts, benefits society and is good public policy.

8.4.2 Many of the benefits referred to above are also relevant for other ADR processes. However, according to Webb and Ousky, additional benefits of the collaborative model are as follows:[47]

a) Each party is represented by an attorney of his or her choice.
b) Legal practitioners are focused on settlement without the "threat of going to court" lurking around the corner.
c) The continuity between settlement and processing of the final dissolution (in mediation, legal practitioners do not always approve of the mediated settlement).
d) Legal practitioners are free to use their real legal-practitioner skills, such as analysis, problem-solving, creating alternatives, tax and estate planning.
e) A four-way conference provides a high potential for clients to give their input.

8.4.3 Collaborative practice is also appropriate in many of the instances where mediation is likely to be inappropriate, because the parties' attorneys are present throughout the process to address and prevent power imbalances and to deal with difficult legal issues while divorce coaches can deal with any psychological problems the parties may have.[48]

8.5 Challenges or criticism

8.5.1 While collaborative dispute resolution has grown significantly in various countries, it has nonetheless not escaped criticism.[49]

8.5.2 The challenges faced by the collaborative dispute resolution movement are the following:

a) Some legal practitioners and judges have questioned the no-court agreement requiring legal representatives to withdraw if the negotiations failed. They are of the view that parties would incur further and unnecessary costs by bringing new legal representatives on board to assist them to start all over again with litigation and,

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47 Webb & Ousky at 214.

48 De Jong Chapter 13 at 628.

49 Marumoagae ***De Jure*** at 48; ABA ***Draft ethics rules*** at 11.

further, that they would have to start and build a new relationship with new legal representatives during their time of emotional distress.[50]

b) The collaborative process has been criticised for the possibility of leaving clients in a precarious position because of the withdrawal of their collaborative counsel. For example, the Colorado Opinion[51] notes that "[w]here the client is of relatively meagre means, the legal practitioner's withdrawal may be materially adverse to the client. Under such circumstances, the legal practitioner's withdrawal may be unethical."[52] As discussed elsewhere, careful screening by the collaborative legal practitioner to determine if the dispute is a candidate for the collaborative process will reduce the likelihood of taking on the client's dispute and then failing to settle it.[53]

c) Doubts may be expressed[54] as to whether the disqualification clauses comply with ethical rules:[55]

(i) These agreements may be unethical because they might place excessive pressure on clients to settle.[56]

(ii) Conflict will arise every time the collaborative dispute resolution process is unsuccessful, because the legal practitioner's obligation to the "opposing party" would conflict with the legal practitioner's duty to "recommend or carry out an appropriate course of action" (i.e., litigation) for the client.[57]

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50 Marumoagae ***De Jure*** at 48.

51 Colorado Bar Association's Ethics Committee ***Formal Opinion*** 115 (2007).

52 As referred to in the ABA ***Draft ethics rules*** at 11.

53 ABA ***Draft ethics rules*** at 11.

54 Marumoagae ***De Jure*** at 48.

55 In the USA, however, the ABA Committee on Ethics and Professional Responsibility concluded that collaborative practice represents a permissible limited-scope representation under ABA Model Rule 1.2(c), which states "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent". See ABA ***Draft ethics rules*** at 3.

56 Marumoagae ***De Rebus*** at 28 argues that it would not be easy for legal representatives to pressure clients during this process because clients are given wide autonomy to determine the resolution of their disputes, are part of the negotiations and raise concerns freely. The ABA ***Draft ethics rules*** at 11 refer to the fact that this potential situation has given rise to the question "Will the collaborative lawyer attempt to force the client to settle to prevent losing the case?" That possibility exists just as there is the possibility that a litigation lawyer will encourage a client to try a case that could be settled on reasonable terms. However, in the collaborative situation, the client is involved in each step of the process, participates in all settlement discussions, actively gathers information and, as a result, is better informed to make decisions regarding whether or not settlement is reasonable or affordable.

57 Marumoagae ***De Jure*** at 48 states that this argument was made by the Colorado Bar Association. However, the American Bar Association concluded that collaborative practice is not unethical *per se*, does not involve an "unconsentable" conflict and, indeed, creates no lawyer-client conflict.

(iii) It empowers one party to terminate the mandate of the other party's legal representative, so ending the collaborative process.[58]

d) Few couples actually understand the process or are even prepared to attempt it. Parties want a legal practitioner to accompany them on the journey – otherwise why go to the trouble of choosing the right legal practitioner in the first place if the legal practitioner might be lost in a collaborative process?[59]

e) To date, collaboration has been accessible mostly to high- and upper-middle-income families that have two incomes. Diversifying its models of service delivery to accommodate the needs of people who cannot pay for many professionals should be investigated.[60] A possible solution to ensure that low-income families would also have access to this form of dispute resolution is the unbundling of legal-service delivery by offering components "à la carte" – that is, tailored to each client's needs.[61]

f) Collaborative practitioners require training in the techniques of collaborative practice, but the problem is that there are currently only a small number of training programmes available that are aimed specifically at collaborative practice.[62]

g) Legal practitioners can always find their way around a statute. Some legal practitioners are using the statutory procedure in a way that undercuts Parliament's intention. A practice that has been noted in Italy is that the legal practitioners negotiate between themselves without signing the participation agreement for fear of losing their clients if a matter has to be litigated. Only after the negotiation process has been completed all the parties come together and sign the four-way participation agreement. The parties then wait for 30 more days and meet again for the final settlement.[63]

h) The collaborative process may be challenging or even inappropriate in certain cases. Caution, thoughtful consideration and involvement of appropriate team

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58 Marumoagae ***De Jure*** at 49.

59 Stowe M "Family law arbitration: A new dawn for ADR?" access at http://www.marilynstowe.co.uk/2011/11/30/family-law-arbitration-a-new-dawn-for-alternative-disputeresolution/.

60 Schepard at 208.

61 Banks L, Bigsby L, Conroyd M, First C, Griffen C, Grissom B, Lancaster B, Millar D, Perry A, Scudder K & Shushan J "Hunter-gatherer collaborative practice" 2011 49 ***Family Court Review*** 251.

62 De Jong Chapter 13 at 626.

63 Calabrese at 2.

members are necessary in cases where issues of domestic violence, mental health impairment or significant mistrust or dishonesty are evident.[64]

8.6 Comparative law

8.6.1 The primary global collaborative organisation is the International Academy of Collaborative Professionals (IACP), which was founded in the 1990s in the USA.[65]

8.6.2 The IACP[66] is an international interdisciplinary organisation that has drawn up a uniform definition of collaborative practice, standards for collaborative practitioners and trainers, a model code of ethics, and public and professional education programmes.[67]

8.6.3 The IACP developed "Principles of Collaborative Practice" and "Minimum Standards for Collaborative Practitioners and Trainers," which set basic credentials, training and experience standards for trainers and all collaborative practitioners. It also developed the "IACP Minimum Ethical Standards for Collaborative Professionals," which apply to all disciplines.[68]

8.6.4 Collaborative dispute resolution has been practised in North America, the United Kingdom, and Australia for roughly 15 years.[69]

8.6.5 In the USA, the Uniform Collaborative Law Act (UCLA) was adopted in 2009 by the Uniform Law Commission, and thereby became available to individual American states to enact into law. The stated purpose of the Uniform Collaborative Law Act is "to support the continued development and growth of collaborative law by making it a more uniform, accessible dispute resolution option for parties."[70]

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64 Hansen & Hildebrand Chapter 2 at 56.

65 For more information about the international Collaborative Divorce movement, see http://collaborativepractice.com/. *Collaborative Review* is the official publication of the IACP.

66 IACP access at www.collaborativepractice.com,

67 Hansen & Hildebrand Chapter 2 at 32.

68 IACP ***Standards and ethics*** access at https://www.collaborativepractice.com/sites/default/files/IACP. Initially adopted in 2004, the ethical standards were revised in 2008 and restated in June 2017. See also Hansen & Hildebrand Chapter 2 at 38.

69 Collaborative practices have spread to countries such as New Zealand, Germany, Austria, Switzerland and the Netherlands as well. See De Jong Chapter 13 at 625.

70 Maxwell LR Jr & Atha MM ***Uniform Collaborative Law Act — Spring 2017 update*** access at https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/newsletter/july2017/ucla_update_maxwell_and_atha.authcheckdam.pdf (hereafter referred to as "Maxwell & Atha") at 1.

8.6.6 In 2010, the Commission adopted Uniform Collaborative Law Rules (UCLR), which mirror the Act, thereby giving states the option to enact the statute or adopt Court Rules, or a combination of the two. Also, the Commission made provision for states to enact the UCLA with no limitation on matters that would be covered by the Act, or to limit the Act's applicability only to matters arising under the family laws of the state.[71]

8.6.7 It standardises the most important features of collaborative dispute resolution practice, while ensuring ethical safeguards for the process. It enjoys broad support in the USA.[72]

8.6.8 The UCLR/A, inter alia, creates minimum standards for a collaborative dispute resolution participation agreement; creates a privilege for communications made during the process; provides that the filing of a notice of a collaborative process operates as a stay of any pending legal proceedings; mandates full disclosure during the collaborative process through use of informal discovery; requires the prospective collaborative attorney to obtain informed consent from the prospective client, prior to entering into a participation agreement; and requires the collaborative dispute resolution attorney to "screen" for domestic violence, prior to beginning as well as during the collaborative process.

8.6.9 In Italy, Parliament adopted a National Statute on Collaborative Law, which is modelled on the Collaborative Standards of the IACP. There are now tens of thousands of (voluntary) collaborative divorce cases in Italy every year, with a requirement for mandatory pre-trial ADR for civil cases involving less than €50 000 as well.[73]

8.6.10 In the UK, Lord Kerr of Tonaghmore became the first member of the Supreme Court to publicly endorse collaborative law, in October 2009 in an address to London family lawyers.[74]

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71 Maxwell & Atha at 1. The provisions for the regulation of collaborative law are, therefore, presented in two formats for enactment: by court rules or by legislation. The substantive provisions of each format are identical, with the exception of several standard form clauses typically found in legislation. Each state considering adopting the UCLR or the UCLA should first review its practices and precedent to determine whether the substantive provisions are best adopted by court rules or statute.

72 A form of the UCLA/UCLR, as approved by the Uniform Law Commission, has been enacted or adopted in Utah, Nevada, Texas, Hawaii, Washington, Alabama, Maryland, Ohio, Michigan, New Jersey, Montana, Arizona, Florida, North Dakota, New Mexico and the District of Columbia. The Act or Rules in Hawaii, Montana, Washington, North Dakota and Utah apply to all civil disputes, while in Michigan, New Mexico, New Jersey, Texas, Ohio, Nevada, Florida, Arizona, the District of Columbia, and Maryland they apply only to family law matters. The Act/Rules in Alabama apply in family and probate matters.

73 Calabrese at 2.

74 ***The Times*** "Senior judge says 'collaborative' approach can be extended" 8 October 2009 access at http://business.timesonline.co.uk/tol/business/law/article6866885.ece.

8.7 Consultation process

8.7.1 The SALRC received responses to the questions about the collaborative dispute resolution process in SALRC Issue Paper 31[75] as well as similar questions posed at the subsequent meeting of experts held in Cape Town.[76]

8.7.2 With regard to the extent of use in South Africa it was noted that there are a few trained collaborative dispute resolution practitioners in the country who have undergone training with the well-known international trainers Pauline Tesler, Kim Wright and Nicolene Kopping-Pavers.[77]

8.7.3 Clients who used the process felt comfortable having legal practitioners involved. The withdrawal clause also encouraged clients to negotiate in good faith.[78]

8.7.4 It has, however, been a slow start to a very specific field of law. Worldwide, the movement is growing, however. The IACP has grown from family law to all areas of the law, and the success rate with respect to the resolution of disputes is 95%. It is mostly used in Canada, America and Australia.[79]

8.7.5 The causes of the low levels of use include the fact that some legal practitioners are not even convinced of the benefits of mediation, let alone this new additional development.[80]

8.7.6 From the clients' point of view, the difficulty is how to get the other party to agree when one party wants to use this form of dispute resolution. If both attorneys are not trained, it may be

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75 In SALRC Issue Paper 31, Question 89 asked whether South Africa should make legislative provision for collaborative dispute resolution. If so, how?

76 The following questions were put:
Question 1. What is the time and cost impact of collaborative dispute resolution?
Question 2. To what extent is collaborative dispute resolution used in South Africa? What are the causes for the low levels of use?
Question 3. Should legislative provision be made for this ADR option? If so, how?

77 Ms Sunelle Beeslaar, attorney, Cape Town.

78 Mr Craig Schneider, attorney, Cape Town.

79 Ms Sunelle Beeslaar.

80 Ms Sunelle Beeslaar.

a problem to get buy-in. Attorneys would say they all do round-tables, but that is not the same.[81] Collaborative dispute resolution is an open and honest system, whereas legal practitioners in the conventional practice tend to keep the trump card until the last minute.[82]

8.7.7 Clients are also worried about losing their attorney. They do not want to proceed with a new attorney. It was suggested that parties need to be educated in terms of the advantages of this model. One has to accept that there will be growing pains and that the system is also not suitable for all matters.[83]

8.7.8 On the question of whether legislative provision should be made for collaborative dispute resolution, mixed responses were received. On the one hand, collaborative dispute resolution was regarded as a viable option, although further investigation into the matter would be needed.[84] On the other hand it was argued that legislation is unnecessary, because collaborative dispute resolution should just be available as a further ADR option.[85] More effort should rather be invested in educating people and in marketing this option.[86] It was argued that people are hesitant to use the process because they do not understand it.[87]

8.7.9 After discussion at the Cpe Town meeting of experts, the delegates agreed that it probably was not advisable to legislate for collaborative dispute resolution on its own, but that it would be better to incorporate collaborative dispute resolution in an umbrella Family Dispute Resolution Act.

8.7.10 Legislative provision for this option would enhance it.[88] If one did not deal with collaborative dispute resolution at all, it would be off the radar, so it should be included in its appropriate place. One should understand that the aim of the Family Dispute Resolution Act would be to provide better access to justice, which could perhaps more easily be accomplished through mediation. That does not mean, however, that other forms of ADR should be ignored.

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81 See discussion above.

82 Ms Sunelle Beeslaar.

83 Ms Sunelle Beeslaar.

84 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

85 Office of the Family Advocate.

86 Mr Craig Schneider.

87 Mr Craig Schneider.

88 Ms Sunelle Beeslaar.

8.7.11 Law can also have an educational function. Collaborative dispute resolution will be suitable for use in South Africa for a specific sector of the community and its inclusion in legislation will ensure the educational function assists in marketing the process and helps to make people aware of it.[89]

8.7.12 In so far as costs are concerned it was noted that the process is not necessarily cheap, but still less expensive than formal litigation.[90]

8.7.13 It was also noted that, should collaborative dispute resolution be regulated, the process should not be client-centred, but child-focused, and that the Office of the Family Advocate could be of assistance. The role of attorneys should be strictly regulated so as to save time and costs.[91]

8.8 Conclusion: Proposed draft legislation[92]

8.8.1 The Act will provide the necessary comprehensive statutory framework to guarantee the benefits of the collaborative process and further enhance its use. In addition, because collaborative dispute resolution is a form of limited-scope representation (where a legal representative is retained solely for the purpose of reaching a settlement, and expressly not for the purpose of litigation) clear rules about the mechanics of the practice will assist both legal representatives and clients. The Act will provide clarity, allowing parties and counsel consistently to rely on a statutorily enacted privilege governing communications during a collaborative dispute resolution process. It further provides legal representatives with guidance in determining whether collaborative dispute resolution is appropriate for a particular dispute or client. To this end, the *proposed Act* includes explicit informed-consent requirements for parties to enter into collaborative dispute resolution with a clear understanding of the costs and benefits of participation.[93]

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89 Prof. Tshepo Mosikatsana.

90 Mr Craig Schneider.

91 Office of the Family Advocate.

92 Based on the Uniform Law Commission's Uniform Collaborative Law Act 2009 and the Pennsylvania Bill 1644, 2017, Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, providing for collaborative law process.

93 Uniform Law Commission (The National Conference of Commissioners on Uniform State Laws) ***The Uniform Collaborative Law Rules/Act – A Summary*** access at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=fe28a68e-2b4a-21c5-1ae1-ce156a4a283a&forceDialog=0

8.8.2 The appendices to Chapter 2 of the AFCC Innovations report,[94] as discussed above,[95] should provide valuable guidelines for drafting detailed regulations as provided for in the Family Dispute Resolution Bill.[96]

8.8.3 The proposed draft legislation for inclusion in a Family Dispute Resolution Act could be worded as follows:

CHAPTER 5

COLLABORATIVE DISPUTE RESOLUTION[97]

Requirements for a collaborative dispute resolution participation agreement

23.*(1) A collaborative dispute resolution participation agreement must—*

(a) be in writing;

(b) be signed by the parties;

(c) state the intention of the parties to resolve a matter through a collaborative dispute resolution process in terms of this Act;

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94 Hansen & Hildebrand Chapter 2.

95 See par 8.1.3, fn 4 at 219.

96 Appendices to Hansen & Hildebrand Chapter 2 are as follows:
Appendix A: Principles and Guidelines for the Practice of Collaborative Law
Appendix B: Stipulation and Order for Collaborative Law
Appendix C: Domestic Violence Screening in Collaborative Law
Appendix D: Collaborative Representation Agreement
Appendix E: Divorce Coach/Child Specialist Retainer;
Appendix F: Financial Specialist Retainer
Appendix G: Meeting Minutes
Appendix H: Parenting Issue Resolution Language

97 The following definitions contained in the Family Dispute Resolution Bill, enclosed as Annexure B below, are specifically relevant to this Chapter:

"collaborative dispute resolution participation agreement" means an agreement in writing by persons to participate in a collaborative dispute resolution process;
"collaborative dispute resolution process" means a procedure intended to resolve a collaborative matter, without the intervention of a court, in which persons—
(a) sign a collaborative dispute resolution participation agreement; and
(b) are represented by collaborative legal practitioners;
"collaborative legal practitioner" means a legal practitioner who represents a party in a collaborative dispute resolution process;
"collaborative matter" means a family law dispute which is described in a collaborative dispute resolution participation agreement;
"non-party participant" means a person, other than a party and the party's collaborative legal practitioner, that participates in a collaborative law process, including support persons, mental-health professionals, financial neutrals and potential parties.

(d) describe the nature and scope of the matter;

(e) identify the collaborative legal practitioner who represents each party in the process;

(f) contain a statement by each collaborative legal practitioner confirming the legal practitioner's representation of a party in the process; and

(g) include a statement that the representation of each collaborative legal practitioner is limited to the collaborative dispute resolution process and that the collaborative legal practitioners are disqualified from representing any party or non-party participant in proceedings other than a collaborative dispute resolution in connection with a collaborative matter consistent with this Chapter.

(2) Parties may agree to include additional provisions not inconsistent with this Act in a collaborative dispute resolution participation agreement, including, but not limited to—

(a) an agreement concerning the confidentiality of communications made during the collaborative process;

(b) an agreement that a part or the whole of the collaborative dispute resolution process must not be privileged in any proceeding;

(c) the scope of voluntary disclosure;

(d) the role of non-party participants; and

(e) the retention and role of non-party experts.

Commencement and conclusion of a collaborative dispute resolution process

24.*(1) Parties may engage in the collaborative dispute resolution process only once they have obtained a certificate in accordance with section 13.*

(2) Participation in a collaborative dispute resolution process is voluntary and the process commences when the parties sign a collaborative dispute resolution participation agreement.

(3) A court may not order a party to participate in a collaborative dispute resolution process in the face of that party's objection to participation.

(4) A collaborative dispute resolution process is concluded by—

(a) the resolution of a collaborative matter as reflected in a signed settlement;

(b) the resolution of a part of the collaborative matter as reflected in a signed settlement in which the parties agree that any remaining parts of the matter must not be included in the process;

(c) the termination of the process; or

(d) a method specified in the collaborative dispute resolution participation agreement.

(5) A collaborative dispute resolution process terminates when a party—

(a) gives notice in writing to the other parties that the process has ended;

(b) initiates a proceeding other than a collaborative dispute resolution process in connection with a collaborative matter without the agreement of all the parties;

(c) in pending proceedings other than a collaborative dispute resolution process in connection with the matter—

(i) initiates an action, motion, or application to show cause;

(ii) requests that the proceeding be put on the court's active roll;

(iii) takes any similar action that requires a notice to be delivered to the parties; or

(d) except as otherwise provided in subsection (7), discharges a collaborative legal practitioner or when a collaborative legal practitioner withdraws from further representation of a party.

(6) A party's collaborative legal practitioner must give prompt notice in writing to all other parties of a discharge or withdrawal.

(7) A party may terminate a collaborative dispute resolution process with or without cause.

(8) Notwithstanding the discharge or withdrawal of a collaborative legal practitioner, the collaborative dispute resolution process concerned continues if, not later than 30 days after the date on which the notice of the discharge or withdrawal in terms of subsection (6) was delivered to the parties—

(a) the unrepresented party engages a new collaborative legal practitioner; and

(b) in a signed notice—

(i) the parties consent to continue the process by reaffirming the collaborative dispute resolution participation agreement;

(ii) the agreement is amended in order to identify the new collaborative legal practitioner; and

(iii) the new collaborative legal practitioner confirms his or her representation of the party concerned in the collaborative process.

(9) The provisions of subsection (4) notwithstanding, a collaborative dispute resolution process does not conclude until a party, with the consent of all the parties, requests a court to approve the resolution of the collaborative matter or any part thereof as recorded in a signed document.

(10) A collaborative dispute resolution participation agreement may provide additional methods of concluding a collaborative dispute resolution process.

Proceedings pending before court

25.*(1) Persons in proceedings pending before a court may enter into a collaborative dispute resolution participation agreement seeking to resolve a collaborative matter related to the proceedings.*

(2) The parties must, within three days of the conclusion of such agreement, file a duly signed record of the agreement with the court.

(3) Subject to subsection (6), the filing operates as an application for a stay of the proceedings.

(4) The parties must within three days of the conclusion of the collaborative dispute resolution process, file a duly signed record of the conclusion with the court, which filing will have the effect of lifting the stay of the proceedings in terms of subsection (3).

(5) The notice may not specify any reason for termination of the process.

(6) A court in which proceedings have been stayed in terms of subsection (3) may require the parties and collaborative legal practitioners to furnish a status report on the collaborative dispute resolution process and the proceedings, which—

(a) may include only information on whether the process is ongoing or has been concluded; and

(b) may not include a report, assessment, evaluation, recommendation, finding or other communication regarding a collaborative dispute resolution process or collaborative dispute resolution matter.

Confirmation of agreement by court

26. *A court may confirm a settlement agreement resulting from a collaborative dispute resolution process.*

Time limit for completion of collaborative dispute resolution process

27. *The time-limit for completion of the collaborative dispute resolution process, after the collaborative agreement has been signed, is 90 days, and on expiry of that date the parties may institute legal proceedings, even if the collaborative dispute resolution process has not been completed, unless the collaborative legal practitioner provides the parties with a reasonable explanation in writing for the delay.*

Disqualification of collaborative legal practitioner and legal practitioners in associated law firm

28.*(1) Except as otherwise provided in subsection (3), a collaborative legal practitioner is disqualified from appearing before a court or in arbitration proceedings to represent a party in a matter relating to the collaborative matter.*

(2) Except as otherwise provided in subsection (3), a legal practitioner in a law firm with

which the collaborative legal practitioner is associated is disqualified from appearing before a court to represent a party in proceedings relating to the collaborative matter if the collaborative legal practitioner is disqualified from doing so in terms of subsection (1).

(3) A collaborative legal practitioner or a legal practitioner in a law firm with which the collaborative legal practitioner is associated may represent a party—

(a) to request a court to approve an agreement resulting from the collaborative dispute resolution process; or

(b) to seek or defend an urgent application to protect the health, safety, welfare or interests of a party, or a family member of a party, if a new legal practitioner is not immediately available to represent that person.

(4) If subsection (3)(b) applies, a collaborative legal practitioner, or a legal practitioner in a law firm with which the collaborative legal practitioner is associated, may represent a party or a family member of a party only until the person is represented by a new legal practitioner or reasonable measures are taken to protect the health, safety, welfare or interests of the person.

Confidentiality of collaborative dispute-resolution communication

29. A collaborative dispute resolution communication is confidential to the extent agreed on by the parties in a signed document or as provided by a law of the Republic other than this Act.

Privilege, admissibility and discovery

30.*(1) Subject to sections 31 and 32, a collaborative dispute resolution communication is privileged in terms of subsection (2), is not subject to discovery, and is not admissible in evidence.*

(2) In court or arbitration proceedings, the following privileges apply:

(a) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative dispute resolution communication; and

(b) a non-party participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative dispute resolution communication made by the non-party participant.

(3) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely on account of its disclosure or use in a collaborative dispute resolution process.

Waiver and exclusion of privilege

31.*(1) A privilege in terms of section 30 may be waived in writing in a record or orally during proceedings if it is expressly waived by all parties and, in the case of the privilege of a non-party participant, if it is also expressly waived by the non-party participant.*

(2) A person who makes a disclosure or representation about a collaborative dispute resolution communication which prejudices another person in court or arbitration proceedings may not be allowed to claim a privilege in terms of section 30, but this preclusion must apply only to the extent that it is necessary for the person prejudiced to respond to the disclosure or representation.

Limits of privilege

32.*(1) There is no privilege in terms of section 30 for a collaborative dispute resolution communication that is—*

(a) available to the public in terms of any law or made during a session of a collaborative dispute resolution process that is open to, or is required by law to be open to, the public;

(b) a threat or statement of intention to inflict bodily harm or commit a crime of violence;

(c) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity;

(d) part of an agreement resulting from the collaborative dispute resolution process reflected in a document signed by all parties to the agreement; or

(e) not subject to a privilege in accordance with the terms of a collaborative dispute-resolution participation agreement between the parties.

(2) Privileges in terms of section 30 do not apply to the extent that a communication is—

(a) sought or presented to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or relating to a collaborative dispute resolution process; or

(b) sought or presented to prove or disprove abuse, neglect, abandonment or exploitation of a child or adult, unless the child protection services agency or adult protection services agency is a party to or otherwise participates in the process.

(3) There is no privilege in terms of section 30 if a tribunal finds, after a hearing in camera*, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, the need for the evidence substantially outweighs the importance of protecting confidentiality, and the collaborative dispute resolution communication is sought or presented in—*

(a) court proceedings involving an offence; or

(b) proceedings seeking rescission of a contract arising out of the collaborative dispute resolution process or in which a defence to avoid liability under the contract is raised.

(4) If a collaborative dispute resolution communication is subject to an exception in terms of subsection (2) or (3), only that part of the communication necessary for the application of the exception may be disclosed or admitted.

(5) Disclosure or admission of evidence excluded from privilege in terms of subsection (2) or (3) does not render the evidence or any other collaborative dispute resolution communication discoverable or admissible for any other purpose.

(6) The privileges in terms of section 30 do not apply if the parties in a signed document agree in advance, or if the record of proceedings reflects that the parties agree, that all or part of a collaborative dispute resolution process is not privileged.

Severability

***33**. If any provision of this Chapter or its application to any person or circumstance is held to be invalid, the invalidity does not affect other provisions or applications of this Act, which can be given effect to without the invalid provision or application, and to this extent the provisions of this Act are severable.*

PART E: FAMILY ARBITRATION

Chapter 9: Family arbitration

9.1 Current legal position in South Africa

9.1.1 The aim of arbitration is to obtain a fair resolution of a dispute by an independent and impartial arbitral tribunal without unnecessary delay or expense.[1]

9.1.2 Section 2 of the Arbitration Act, 1965,[2] currently prohibits[3] arbitration in family matters. It reads as follows:

> **Matters not subject to arbitration**
> 2. A reference to arbitration shall not be permissible in respect of—
> (a) any matrimonial cause or any matter incidental to any such cause; or
> (b) any matter relating to status.

9.1.3 In ***Ressell v Ressell*** [4] Davidson J considered a settlement agreement which had been made an order of court and in which the custody and access rights of the parties had been set out. The agreement also contained an arbitration clause. In discussing section 2 of the Arbitration Act, 1965, the judge stated as follows:

> ….the intention of the statute, as was the intention of the common law hitherto, was to reserve jealously for the court control of this and the right to determine what was good or what was not good for a child in a matrimonial dispute, whether the dispute was before or after divorce. In my view there is nothing to be said for the proposition that this is a fit subject for arbitration.

9.1.4 In ***Pitt v Pitt***,[5] in respect of an oral agreement to appoint an arbitrator to determine the proprietary rights in relation to the furniture of divorced parties, it was stated:

> ….I have no doubt that it points in the direction that the Arbitration Act would not countenance the reference to arbitration of a dispute of this nature.

9.1.5 In the Constitutional Court case of ***Cool Ideas 1186 CC v Hubbard ao***,[6] the question was posed whether an arbitration award ought to be made an order of court if the court order

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1 SALRC ***Domestic arbitration*** Report Project 94 2001 (hereafter referred to as "SALRC Report 2001") par. 1.03 at 2.

2 Arbitration Act 42 of 1965.

3 See, however, par. 9.1.6 below.

4 ***Ressell v Ressell*** 1976 (1) SA 289 (W) at 292A.

5 ***Pitt v Pitt*** 1991(3) SA 863 (D) at 864I.

would be contrary to a plain statutory prohibition. The court stated that it would often, but not always, be contrary to public policy[7] for a court to enforce a *commercial* arbitration award that is at odds with a statutory prohibition. The force of the prohibition must be weighed against the important goals of private arbitration that the court has recognised. However, arbitral awards that sanctioned illegalities or subverted the purpose of statutes were unenforceable. The court also referred to ***Pottie v Kotze***,[8] where Fagan J stated that –

> [t]he usual reason for holding a prohibited act to be invalid is … the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent.

9.1.6 In ***AB v JB***,[9] the ambit of the prohibition in section 2 was narrowed as the court found that disputes arising from a settlement agreement which had been made an order of court would become arbitrable by falling outside the restriction in section 2(a) of the existing Arbitration Act. The settlement agreement in that case concerned the value of the respondent's claim against her husband to share in the accrual. The SCA held that the appellant's claim was based on delict and was not incidental to a matrimonial clause since the order had brought finality to the *lis* between the parties; the *lis* became *res judicata* (literally, "a matter judged"). Consequently, there cannot be any issue relating to the marriage still outstanding. Of interest is the fact that the court did not refer to the ***Ressell*** case, nor did it consider the position of children.

9.1.7 It would seem, therefore, that, to the extent that family arbitration or a family arbitration award falls within the ambit of section 2, it would be unenforceable as being contrary to public policy. Section 31 of the Arbitration Act[10] provides that, on the application of a party, an arbitral

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6 ***Cool Ideas 1186 CC v Hubbard ao*** 2014 (4) SA 474 (CC).

7 The Constitution and its values provide, in the most compelling fashion, a framework to determine the scope and parameters of public policy (***GF v SH*** 2011 (3) SA 25 (NGP) at [16]). Public policy is therefore firmly rooted in our Constitution and the fundamental values it enshrines, which include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racism and non-sexism (***Brisley v Drostky*** 2002 (4) SA 1 (SCA) at [95]). However, in matters that relate to rights and obligations (in the context of family law) different considerations, distinguishable from those applying in the world of commercial contracts, may well warrant consideration *(**GF v SH*** 2011 (3) SA 25 (NGP) at [18]). These considerations include the values of equality and non-discrimination as well as the advancement of the best interests of the child (***GF v SH*** 2011 (3) SA 25 (NGP) at [20]). Public policy is not static, however, and can evolve over time.

8 ***Pottie v Kotze*** 1954 (3) SA 719 (A) at 726H-727A.

9 ***AB v JB*** 2016 (5) SA 210 (SCA).

10 Section 31 of the Arbitration Act reads as follows:

"**Award may be made an order of court**

31.(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.

(2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.

award may be made an order of court. This is a condition for court enforcement of the award, but the section is, unfortunately, silent as to the grounds on which the order may be refused. Assuming that the award concerns an arbitrable dispute relating to a child, the court could still decline to enforce the award on the basis that its contents are contrary to public policy.

9.1.8 Neither the ***AB v JB*** case nor the ***Hubbard*** case can therefore currently be viewed as conclusive or as justification (as has been proposed on occasion) for conducting family arbitrations, especially where children's rights or interests are affected, in contravention of the prohibition in section 2.

9.1.9 It needs to be considered whether legislative provision should be made for arbitration in family matters.

9.2 Proposals for the development of family arbitration

a) SALRC report on domestic arbitration: Clause 5 of proposed Arbitration Bill

9.2.1 In 2001, the SALRC recommended in its report[11] that the Arbitration Act be amended to permit arbitration in matrimonial property disputes which do not affect the interests of the spouses' children. The Commission further proposed that the "status" provision be replaced with a new test to the effect that matters which parties cannot dispose of by agreement are not arbitrable.[12]

9.2.2 In determining the scope of the proposed new exception, it was argued that awards or settlements regarding matrimonial property when there were children involved needed to be

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(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect."

11 SALRC ***Report*** 2001 ***at*** parr. 3.28-3.30.

12 Clause 5 of the proposed draft Bill reads as follows:

"**5.** (1) Arbitration is not permissible in respect of any matrimonial cause or any matter incidental to any such cause, except for a property dispute not affecting the rights or interests of any minor child of the marriage.
(2) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter which the parties are entitled to dispose of by agreement may be determined by arbitration unless –

(a) such a dispute is not capable of determination by arbitration under any law of the Republic; or
(b) the arbitration agreement is contrary to public policy of the Republic.

(3) Arbitration is not to be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement."

subject to a degree of court control on the merits. The court should exercise its power after considering a report by the Office of the Family Advocate. On review, the test should therefore be "Is the award in the best interests of the minor child?", but such unrestricted power of review on the merits is something that would be unacceptable in terms of arbitration law. The principal form of challenge to an arbitration award is a review on essentially jurisdictional and procedural grounds, rather than an appeal in relation to the findings of fact or law.[13] See section 33 of the Arbitration Act.[14]

9.2.3 The SALRC acknowledged that its proposal (on its own) might be difficult to implement in practice.[15] When a marriage is dissolved and children are involved, disputes about matrimonial property rights either will indeed affect the rights of the children, or could be presented in a way that makes it at least appear to be so.

9.2.4 Statistically, arbitration in terms of the exception in matrimonial cases would be limited to childless couples or couples whose children have attained majority. The term "matrimonial cause" was furthermore dated in that it should at least include civil unions. Thirdly, the proposal assumed that the duelling parents of the affected children at some stage were married to each other.

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13 See Butler D "The need to revise the prohibition on the arbitrability of matrimonial disputes in South African arbitration law: Possible solutions", paper read at the FAMAC Conference Cape Town 26 September 2018 (hereafter referred to as "Butler FAMAC Conference") at 4-5, where he further explains that arbitration may be regarded as a two-stage process, in which the first stage deals with the arbitration proceedings and the second stage results in an award. A party that is dissatisfied with the award will usually be aggrieved by the result of the second stage. However, the grounds on which an award may be set aside are primarily directed at the procedure adopted by the arbitral tribunal in the first stage. The objector's complaint must be directed at the method, not the result.

14 Section 33 of the Arbitration Act, 1965 reads as follows:

"**33. Setting aside of award**

(1) Where—

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

(2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the grounds of corruption, such application shall be made within six weeks after the discovery of the corruption and in any case not later than three years after the date on which the award was so published.

(3) The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

(4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court."

15 See par. 9.2.5.

9.2.5 On 12 August 2013, the SALRC, together with the Department of Justice and Constitutional Development (DOJCD), hosted a meeting of experts to discuss, inter alia, the updating of the proposed Domestic Arbitration Bill, developed by the SALRC in 2001.

9.2.6 During the meeting, Mr Charles Cohen, an attorney, raised the question of whether the preclusion of matrimonial issues from arbitration in South Africa is justifiable. He followed up his oral submission with a written submission, dated 3 September 2013, strongly advocating the use of arbitration in family law disputes.[16]

9.2.7 In response to the submission, the SALRC decided to move the family arbitration question from Project 94 to Project 100D, to be investigated as part of the family dispute resolution investigation. It was argued that the proposals received would have to be considered in a full-scale investigation which could not be accommodated in the process of merely updating the existing clauses of the 2001 draft Domestic Arbitration Bill.

9.2.8 The opinion was also expressed that the proposals had to be incorporated in specialised legislation (for example, a Family Dispute Resolution Bill) rather than in the Arbitration Act. The reason was that private arbitration as regulated in the Arbitration Act is regarded as inherently unsuitable for family matters. The underlying reason for the review of the 1965 Arbitration Act was that the courts' statutory powers of assistance and supervision during the arbitration process needed to be curtailed in order to bring the Act into line with international practice. The inclusion of family arbitration when children are involved (which could only be non-binding in nature) in the Arbitration Act would represent a movement in the opposite direction.

b) SALRC Project 100D investigation

9.2.9 The updated Domestic Arbitration Bill submitted to the DOJCD for consideration in 2014 accordingly confirmed the position as set out in clause 5 of the 2001 draft Bill, but family arbitration was included as a topic to be discussed in SALRC Issue Paper 31, Project 100D,[17] which dealt with all forms of family dispute resolution.

9.2.10 The SALRC Issue Paper was distributed in February 2016 and discussed at a two-day conference in Pretoria on 5 and 6 April 2016. Extensive written comments on family arbitration

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16 See also De Jong M "Arbitration of Family Separation Issues – A Useful Adjunct to Mediation and the Court Process" 2014 17 ***PER/PEJL*** 2356 (hereafter referred to as "De Jong ***PER/PEJL***") for support for the use of arbitration in family law disputes.

17 SALRC Issue Paper 31 at 200.

were received, including submissions from Family Law Arbitration Forum of South Africa (FLAFSA) representatives, via the Law Society of South Africa (LSSA) and the Cape Law Society.

9.2.11 In its substantive submission to the SALRC, FLAFSA proposed that section 2 of the Arbitration Act 42 of 1965 (the Arbitration Act) should be amended to permit arbitration in family law matters. The submission also included the address of Ms Abro (FLAFSA representative) to the LSSA annual general meeting in 2016. It is important to note that family disputes *involving children* did not form part of the proposal.[18]

9.2.12 On 16 February 2017, a meeting of experts hosted by the SALRC Project 100D Advisory Committee was held in Cape Town and was attended by, inter alia, the FLAFSA representatives.[19] FLAFSA indicated that the inclusion of children in family arbitration proceedings would be the first prize, but that they would be satisfied if family arbitration were allowed, attending to the position of children at a later stage.[20]

9.2.13 However, a FLAFSA proposal for the amendment of section 2 of the Arbitration Act was also submitted to the Deputy Minister of the DOJCD (the Deputy Minister) in a parallel process. A FLAFSA representative[21] explained that the FLAFSA rules had originally been drafted to exclude children,[22] but that, as a result of developments in England and Scotland, they included proposals for family arbitration when children are involved in their submission to the Deputy Minister.

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18 In the address to the LSSA AGM in 2016, Ms Abro (FLAFSA representative) stated the following (at 14):
"At this stage, as I said, we have decided that '*discretion being the better part of valour*' and because the Courts are the Upper Guardians of minor children and are fairly conservative in their approach, it would behove us to deal only with the financial aspects to start with, which would include maintenance for children, but, we would not deal with the best interests of the children, or status issues [at] the commencement stages of Family Arbitration."

19 The following problems encountered in developing family arbitration legislation were discussed:
a) Arbitration as a non-adversarial process
b) Cost and time frames of arbitration
c) Disputes relating to children
d) Status of award and jurisdiction of court
e) Choice of law
f) Determining standards: Training of family arbitrators
g) The status of the FLAFSA rules
h) Regulation of family arbitration

20 Ms Zenobia du Toit at the Cape Town meeting of experts.

21 Ms Zenobia du Toit at the Cape Town meeting of experts.

22 Rule 1.1 of the FLAFSA rules reads as follows:
"The family law arbitration scheme ('the scheme') is a scheme under which financial or property disputes with a family background may be resolved by arbitration."

9.2.14 FLAFSA further proposed that rules in line with the rules developed by FLAFSA be promulgated under the Arbitration Act to govern the arbitration of matters relating to family law.

9.2.15 The effect of the FLAFSA proposal submitted to the Deputy Minister was to substitute a restriction on the arbitration of matters falling within the ambit of certain specified sections of the Children's Act for the general prohibition on the arbitrability of matrimonial causes and matters incidental to such causes. Matters relating to financial and property disputes with a family background and maintenance, as well as all matters concerned with the best interest of children, would therefore be arbitrable.

9.2.16 The proposal proceeded on the basis that the ordinary review standards relating to an arbitral award would generally apply to an award concerning the financial and property rights of children. The award could, therefore, only be set aside on the basis of the exhaustive list of four grounds contained in section 33 of the Arbitration Act. Our courts have repeatedly held that these grounds should be narrowly construed.

9.2.17 In their submission to the SALRC, FLAFSA argued that there is huge public support for family arbitration. However, the respondents to the SALRC Issue Paper 31 who commented on the family arbitration questions did not bear out this claim. In response to the question whether arbitration of family matters should be allowed, the following opposing views were expressed in written submissions:

a) Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD, stated that arbitration is not desirable. The disadvantages for such a drastic method of ADR outweigh the advantages. The court should have the final say on all matters relating to family law and not an arbitrator. If arbitration is regarded to be an option, only property and spousal maintenance should be arbitrable.
b) The Office of the Family Advocate submitted that there is not sufficient research to determine whether children's issues can be appropriately dealt with by arbitration. Should a decision be made that matters concerning children should also be dealt with by arbitration, then proper provision should be made for the role of the Family Advocate.
c) Dr Amanda Boniface, University of Johannesburg, indicated that it is unclear how arbitrators would be better qualified than magistrates and judges. Mediation offers benefits that arbitration does not, such as balancing the power between the parties. A mediated agreement can also be made an order of court or incorporated into a parenting plan, where both the Family Advocate and the Court can check the agreement to ensure that the best interests of the child have been duly considered. It

should also be borne in mind that the High Court remains the upper guardian of minor children and this function cannot be usurped by or delegated to an arbitrator.

d) Prof. CMA Nicholson (Dean of Law, UFS, attorney, notary public) opined that there are some very real concerns relating to the proposal to use arbitration in family dispute resolution. This process involves many pitfalls that have not yet been overcome in the commercial sphere. One should also caution against importing these deficiencies into the far more sensitive arena of family dispute resolution. There is considerable authority to support the view that arbitration is becoming increasingly formalistic (legalised), that it is often more expensive than litigation and that parties to the arbitration run the risk that their matter will be determined on the basis of an error of fact or law which they will not later be entitled to challenge in a court of law. It appears that the desire to move away from the courts to arbitration is prompted by a desire to have family dispute matters heard by specialists in family law. Would these specialists be legal practitioners? If so, why not simply advocate for the specialist training of selected judges who would be better equipped to make such determinations? It is a gross generalisation to argue that judges do not care about family law matters; there are, in fact, a considerable number of judges who have invested earnestly in family law and family-related matters. It appears that, as a consequence of the introduction of arbitration into this sphere, the creation of a new market to train the arbitrators would occur and a new potential source of income for those who undergo the training would develop. Ultimately, however, the question remains as to what the real benefit would be that will be reaped by parties to family disputes and their children.

e) Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division, stated that there should be a blanket exclusion of matters incidental to matrimonial causes.

9.2.18 The FLAFSA representatives, however, indicated that all matters arising from divorce or family breakdown should be arbitrable and noted that a great deal of work in developing arbitration in family law has already been done by some of the members of the law societies.[23]

9.2.19 The FLAFSA proposal also has to be understood against the background of the proposed FLAFSA Arbitration Rules. The status of the Rules and the question whether the Rules, or some of the Rules, should be incorporated in legislation should therefore be determined.

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[23] Ms Sandra van Staden and the LSSA/Cape Law Society, through Ms Zenobia du Toit.

9.2.20 The Arbitration Act does not make provision for the promulgation by the Minister or the Rules Board of regulations or rules under the Act. Furthermore, sections 2 and 6 of the Rules Board for Courts of Law Act 107 of 1985 vest the Rules Board with the power to make rules *for courts,* not for alternative dispute resolution processes*.* Finally, any rules made would constitute subordinate legislation. The rules can only deal with procedure and not with substantive law and as a result cannot create rights or liabilities which otherwise would not have existed.

9.2.21 Furthermore, the FLAFSA Arbitration Rules have been influenced by English and Scottish models that provide for arbitration in family law disputes regarding financial matters. Unlike South Africa, neither the English Arbitration Act, 1996, nor the Arbitration (Scotland) Act, 2010, attempts to define which matters are arbitrable, but section 81(1)(a) of the English statute[24] and section 30 of the Scottish statute[25] make it clear that neither statute purports to limit the restrictions on arbitrability in other legislation.

9.3 Exposition of the problem: Should arbitration be available for the resolution of disputes in family matters in South Africa, especially when children are involved?

9.3.1 Attitudes towards arbitration in family disputes inevitably depend on attitudes towards personal autonomy and private ordering in family law.[26]

9.3.2 During the consultation process commentators indicated that only five per cent of family disputes end up as defended cases in court. It was also explained that the costs involved in an opposed divorce case in the High Court would be approximately R3 million. This amount could be lowered to perhaps less than R1 million (therefore, by a third) if the matter was arbitrated.[27]

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[24] Section 81 of the English Arbitration Act, 1996, reads as follows:
"81 Saving for certain matters governed by common law.

(1) Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to—

(a) matters which are not capable of settlement by arbitration;

(b) the effect of an oral arbitration agreement; or

(c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy.

(2) Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award."

[25] Section 30 of the Arbitration (Scotland) Act, 2010, reads as follows:
"30 Arbitrability of disputes

Nothing in this Act makes any dispute capable of being arbitrated if, because of its subject-matter, it would not otherwise be capable of being arbitrated."

[26] Kennett W "It's arbitration, but not as we know it: Reflections on family law dispute resolution" 016 30 ***International Journal of Law, Policy and the Family*** 1 (hereafter referred to as "Kennett") at 5.

[27] Ms Zenobia du Toit at the SALRC meeting of experts in Cape Town.

9.3.3 Developments worldwide indicate that arbitration of matrimonial property disputes has become a more acceptable practice.[28] However, when children are involved, the state retains a strong interest, irrespective of the nature of the adult relationships.[29]

9.3.4 Academic discussions emphasise the fact that the child is a *de facto* third party to the arbitration agreement, and draw conclusions from this for the role of arbitration.[30] Even a dispute regarding the maintenance payable by a father for a child in the care of the mother arguably involves three parties.[31]

9.3.5 Accordingly, the ultimate award would not affect only the parties to the agreement. Private arbitration and the tribunal's jurisdiction are based on consent. The tribunal's award will bind only the parties to the arbitration agreement who were involved in the arbitration. The tribunal has no power to join a party in an arbitration without the consent of that party and all other parties in the arbitration. The interests of the child are not necessarily identical to those of the parent responsible for the care for the child.[32]

9.3.6 If a child is a beneficiary of a trust with several other beneficiaries and the founder, who may perhaps be the child's grandfather, wishes to amend the trust agreement because of changes to legislation that affect the taxation of trusts, the situation becomes much more complicated. Some beneficiaries and the founder could benefit from the amendment, whereas others could be adversely affected. There may be a conflict of interests for those trustees who are also beneficiaries. An arbitration clause in the trust agreement may require the dispute to be referred to arbitration, but all affected parties would have to be parties to the arbitration in order to be bound by the award. This problem could possibly be addressed by empowering the

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28 De Jong in ***PER/PEJL*** at 2392 refers to the reluctance of our High Court to interfere with parental responsibilities and rights. She reaons that if parties are legally permitted to agree to a substantive resolution of a care and contact dispute, why can they not agree to a process to resolve the same care and contact dispute?

29 Kennett at 4.

30 Kennett at 14.

31 Prof. David Butler in written submission to the SALRC subsequent to the SALRC meeting of experts in Cape Town.

32 Ibid.

arbitrator to direct that the arbitration be discontinued so that the dispute can be resolved by the court. This anomalous result seems contrary to the objectives of FLAFSA.[33]

9.3.7 Family arbitration, if made available, will most probably only be used by a small section of society. Another form of ADR that is being considered in the family dispute resolution investigation is parenting coordination. The question could be asked whether both forms of alternative dispute resolution should be supported. [34]

9.3.8 In attempting to determine whether arbitration should be available in respect of matrimonial disputes in South Africa, it is important, at the outset, to determine what the basis of this discussion should be. Should the arbitration option effectively take individuals out of litigation, or only out of other forms of ADR?[35] It therefore needs to be determined whether one should evaluate family arbitration by contrasting it with a final court hearing, or, alternatively, with one or more other forms of private ordering.[36]

9.3.9 Supporters of family arbitration have also indicated that mediation and arbitration should not be mutually exclusive.[37] On the other hand, the success of mediation as a method of dispute resolution has been identified as a counterpoint to the apparently limited understanding of arbitration in Germany and Australia.[38]

9.3.10 The SALRC is currently investigating the possibility of mandatory family mediation. It has been argued that, ultimately, the strength of arbitration as a competitor in the market for family

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33 Ibid.

34 See the discussion on parenting coordination below.

35 Ferguson L "Arbitration in financial dispute resolution: The final step to reconstructing the default(s) and exception(s)?" 2012 35 ***Journal of Social Welfare and Family Law*** 115 (hereafter referred to as "Ferguson") at 117.

36 SALRC Issue Paper 31 at par. 3.9.9.

37 Ms Zenobia du Toit at Cape Town Conference.

38 Kennett at 10. In Australia, for example, arbitration was introduced in family law matters, together with mediation, as additional methods of alternative dispute resolution by the Courts (Mediation and Arbitration) Act 1991, which inserted new provisions into the Family Law Act 1975. This scheme never became a practical reality. In 2000, further amendments were made to the Family Law Act to provide for consensual private arbitration as an option for resolving matrimonial property and financial disputes. However, voluntary arbitration under the Family Law Act has not been embraced as a mainstream dispute resolution mechanism by litigants, the legal profession and the courts, and it appears that qualified arbitrators have to date had little work. The Family Law Council of Australia has consequently been asked to look into changes to court processes or other changes that would promote voluntary arbitration in family law property proceedings.

dispute resolution services has more to do with the merits or demerits of other alternative methods of dispute resolution than with the alleged advantages of arbitration itself.[39]

9.3.11 In terms of the mandatory mediation framework proposed in this Discussion Paper,[40] any family dispute will be referred to mediation first and only if mediation proves to be unsuccessful, will arbitration be available. The mediator will not be allowed to act as arbitrator.

9.3.12 With regard to the trends in foreign jurisdictions, two main approaches are evident:[41]

a) Australia and some states in the USA limit the use of arbitration to property and spousal maintenance matters, while excluding most or all children's issues.

b) England, Scotland, Canadian states (except Quebec) and other states in the USA make provision for the referral of all matters incidental to divorce or family breakdown, including children's issues, to arbitration.

9.3.13 Note, however, the legislative safeguards, when dealing with children. It would seem that, even if it were possible to arbitrate all matters incidental to family breakdown, including those concerning children, it would not be possible to exclude the upper guardianship[42] of the courts over children.

9.3.14 Specific matters that need further consideration, therefore, include the following:

a) The court's judicial authority as upper guardian of children;

b) if family arbitration was proposed, what safeguards should be included to protect children;

c) the law that should be applied; and

d) arbitrator accreditation, training and practice supervision standards.

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39 Kennett at 11.

40 See Chapter 1 above.

41 De Jong ***PER/PEJL*** at 2391. See further discussion in SALRC Issue Paper 31 at par. 3.9.8.

42 Referred to as *parens patriae* in the United Kingdom and some other jurisdictions.

9.4 Matters to be considered[43]

a) The court's judicial authority as upper guardian of children

9.4.1 It is clear that debates about whether disputes in respect of children should be arbitrable turn on public policy arguments as well as the pertinent question of how far arbitration deprives the state of its role as upper guardian of children, that is, the power of the state to intervene in the case of an abusive or neglectful parent.[44]

9.4.2 Parents have due-process rights to make decisions about their children.[45]

9.4.3 As stated in ***Lufuno Mphaphuli & Associates (Pty) Ltd) v Andrews***,[46] parties may, when a dispute arises, exercise the choice not to proceed before a court, but rather agree to have their dispute settled by an arbitrator. This case did not deal with family arbitration, however, and the upper guardianship of the court was not considered.[47]

9.4.4 The High Court has the judicial power or authority, in principle, to make, rescind, vary and suspend any order pertaining to guardianship, care, contact and maintenance.[48] This power

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43 See full discussion on family arbitration, including its advantages and disadvantages, in SALRC Issue Paper 31 at par. 3.9-3.9.46 under the following headings:

a) Avoidance of adversarial proceedings
b) Avoidance of delays and the rigours of the court process
c) Reduction of costs
d) Preservation of privacy
e) Procedural and evidentiary flexibility
f) Choice of mediator or arbitrator who reflects the values of the disputants and is available throughout the whole process
g Public interest: overloaded court system
h) Party autonomy
i) Choice of law to be applied

44 Kennett at 14.

45 Montiel JT "Is parenting authority a usurpation of judicial authority? Harmonizing authority for, benefits of, and limitations on this legal-psychological hybrid" 2014 7(2) ***Tennessee Journal of Law and Policy*** 364 (hereafter referred to as "Montiel") at 368; ***Van der Merwe v Bruwer ao*** Western Cape High Court Case No 12624/18 21 December 2018 at [74].

46 ***Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*** 2009 (4) SA 529 (CC).

47 Section 2 of the Arbitration Act, 1965.

48 Boezaart T "The position of minor and dependent children of divorcing and divorced spouses or civil union partners" in Heaton J ed ***The law of divorce and dissolution of life partnerships in South Africa*** Juta & Co Cape Town 2014 at 221.

is based on its common-law jurisdiction as upper guardian of children[49] and on its statutory jurisdiction, where applicable.

9.4.5 According to Foxcroft J in ***Kotze NO v Santam Insurance Ltd***[50] –

> [i]t has always been clear that the Supreme Court exercises inherent jurisdiction as the upper guardian of all minors, but it is interesting to note that the notion of the Court's upper guardianship dates from the period of the Frankish empire – fifth to ninth century AD – when minors, widows and other unfortunates (*personae miserabiles*) might petition the king for relief. Tired of dealing with such requests himself, the king delegated the task to his chancellor and through him the Court, to which the present day Supreme Court regards itself as the successor. The grouping of such persons together seems obvious, since they are all persons who either through lack of capacity or by reason of inexperience are unable to perform juristic acts.

9.4.6 Earlier decisions of courts in South Africa illustrate that a court, as upper guardian of a minor, had the judicial power in exceptional cases to interfere with the parental authority (which included the right to custody), which "exceptions must be few and must rest on clear grounds and the grounds must be found in considerations of danger to the life, health or morals of the child".[51]

9.4.7 As long ago as 1947, in ***Bam v Bhabha***,[52] Centlivres JA took the view that the best interests of the child were paramount (the three grounds for interference were not exclusive). ***S v L***[53] contains a discussion of the history of the courts' powers as upper guardian of minors and the extent to which the courts were willing to apply the common-law dictum through the years.[54] In ***Townsend-Turner ao v Morrow***[55] it was held that the judicial powers of the Supreme Court, as upper guardian of minor children, were not unlimited: the court was not entitled to interfere with a decision made by the guardian of the child merely because it disagreed with that decision.

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49 Referred to as *parens patriae* in the United Kingdom.

50 ***Kotze NO v Santam Insurance Ltd*** 1994 1 SA 237 (C) at 244F-H.

51 ***Calitz v Calitz*** 1939 AD 56 at 64.

52 ***Bam v Bhabha*** 1947 (4) SA 798 (A).

53 ***S v L*** 1992(3) SA 713 (ECD) at 720-721.

54 The court made a distinction between questions of custody, on the one hand, and interference with the day-to-day parental power and control, on the other hand. The court would not have the power to interfere with the day-to-day decisions of the custodian parent.

55 ***Townsend-Turner ao v Morrow*** 2004 (2) SA 32 (C).

9.4.8 However, if necessary, the court would be able to override the parents' wishes. In ***Hay v B ao***,[56] Jajbhay J had to balance a child's right to life against the parent's religious beliefs, which prohibited blood transfusions.[57] The learned judge held, with reference to the constitutional principle that the child's best interests are of paramount importance, that –

> [t]he High Court is the upper guardian of all minors and, where it is in the best interests of such minor to receive medical treatment, an order that the minor receive such treatment is appropriate notwithstanding the refusal by the minor's parents to consent to such treatment.

9.4.9 The judge in a later case, ***TC v SC***,[58] stated[59] that Jajbhay J's approach in ***Hay*** demonstrates that a High Court may permissibly resort to its inherent jurisdiction as the upper guardian of minor children in order to fulfil its duty to protect the constitutional rights of children.[60]

9.4.10 The Children's Act has extended the High Court's common-law capacity by granting High Courts, regional courts and children's courts jurisdiction to terminate, suspend, extend or restrict parental responsibilities and rights (section 28(1) read with section 1(4)). The maintenance court may also vary or rescind an order of maintenance with respect to a child in terms of the Maintenance Act.[61] In any event, by bestowing exclusive jurisdiction on the High Courts and Divorce Courts (as they then were), section 45(3)*(g)* of the Children's Act[62] excludes private arbitration in disputes when a child has an interest in property as contemplated in the Act.

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56 ***Hay v B ao*** 2003 (3) SA 492 (WLD).

57 At par. [43].

58 ***TC v SC*** 2018 (4) SA 530 (WCC).

59 At par. [45].

60 Section 28(2) of the Constitution.

61 Ibid.

62 Section 45(3) (g) of the Children's Act, 2005 reads as follows:
"**Matters children's court may adjudicate**
45. (1)-(2)…
(3) Pending the establishment of family courts by an Act of Parliament, the High Courts and Divorce Courts have exclusive jurisdiction over the following matters contemplated in this Act:
(a)- (f)
(g) the safeguarding of a child's interest in property; and
(h)
(4) …"

9.4.11 As stated above, the child could also be deemed to be a third party to a family arbitration, so it should be noted that the High Court may also assist minors in litigation. A minor may litigate without assistance, for example, to apply for the appointment of a *curator ad litem*, if the court allows the minor to litigate unassisted, or when unassisted proceedings are allowed by statute.[63] See section 14 of the Children's Act, which provides as follows:

> **Access to court**
> **14**. Every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of the court.

"Court" in this context does not include an arbitral tribunal.

9.4.12 The question also arises as to who can agree to arbitration on behalf of a child, particularly if the guardian is a party to the dispute in another capacity and a conflict of interests exists.

9.4.13 Van Heerden[64] states as follows:

> Being more extensive, the statutory powers of the courts – especially those under the Matrimonial Affairs Act[65] and the Divorce Act[66] and the Children's Act, in terms of which jurisdiction was conferred on the High Court to assign "… access rights (to) or custody or guardianship" to fathers of children born out of wedlock. – have virtually superseded the common law ones, particularly as regards legitimate children.

9.4.14 Despite legislation to this effect and the rules of the various courts (Uniform Rules of Court and the Magistrates' Court Rules), the High Court retains its jurisdiction to hear or entertain any claim or to make any order that it is entitled to entertain or make in terms of the common law. This power is referred to as the inherent jurisdiction of the High Court and it distinguishes the higher courts from the lower courts, which are creatures of statute and are bound by the provisions of the empowering legislation.[67]

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63 Catto A "Jurisdiction, procedure and costs" Chapter 12 in Heaton J ed ***The law of divorce and dissolution of life partnerships in South Africa*** Juta & Co Cape Town 2014 (hereafter referred to as "Catto Chapter 12") at 499 with references. See also section 28(1)*(h)* of the Constitution, sections 10, 14, 54, 55 and 279 of the Children's Act 38 of 2005, and section 6(4) of the Divorce Act 70 of 1979. For a full discussion of the representation of children and these sections, see SALRC Issue Paper 31 at 2.2 (Hearing the voice of the child).

64 Van Heerden B, Chapter 18 in Van Heerden *et al.* (ed) ***Boberg's Law of Persons and the Family*** Juta & Co 1999 at 499.

65 Matrimonial Affairs Act 37 of 1953.

66 Divorce Act 70 of 1979.

67 Catto Chapter 12 at 498. See sections 45 and 42 of the Children's Act, which read as follows:
"**Matters children's court may adjudicate**
45.(1)-(3) …

9.4.15 As stated above, the upper guardianship of the court over children implies that a court has the power of review on the merits of the case when this would be in the best interest of the child, something that is not possible in terms of the current Arbitration Act.[68] The courts have asserted their jurisdiction as upper guardian of children to be the ultimate decision-maker in all disputes involving children.

b) If family arbitration were proposed, what safeguards should be included to protect children?

9.4.16 In terms of section 33 of the Arbitration Act, arbitral awards in commercial arbitration are, as a general rule, final. The picture would change if arbitration was extended to family law disputes.

9.4.17 Although the law varies from one jurisdiction to another, it is common for arbitration proceedings relating to the distribution of property and financial arrangements on separation or divorce to proceed under a country's general legislation (with its limited grounds for review) regulating arbitration. However, special considerations apply in cases involving child support payments and other arrangements in respect of children. A significant number of jurisdictions accept the possibility of the arbitration of arrangements in respect of children being subject to review, but the threshold considerations calling for review and the extent of review differ.[69]

9.4.18 Canadian courts have been reluctant to relegate their *parens patriae*[70] jurisdiction to arbitrators, although some Canadian courts may stay court proceedings pending compliance with arbitration agreements, even in matters of child support.[71] On the question of certainty and finality, the following summary depicts the situation in Canada:[72]

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(4) Nothing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children."

"**Children's courts and presiding officers**
42.(1) For the purposes of this Act, every magistrate's court, as defined in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), shall be a children's court and shall have jurisdiction on any matter arising from the application of this Act for the area of its jurisdiction.
(2)-(10) …"

68 See discussion in par. 9.2.2 above.

69 See discussion in par. 9.3.12 and further above.

70 Upper guardianship.

71 Morris C "Arbitration of family law disputes in British Columbia" Paper prepared for the Ministry of Attorney General of British Columbia 7 July 2004 at 21.

- Division of property: almost always final and binding, with limited rights of review and appeal.
- Spousal support: almost always final and binding, with limited rights of review and appeal.
- Child support: sometimes final and binding, with review rights and sometimes *de novo* review, and limited rights of appeal.
- Access and visitation: sometimes final and binding, with rights of review and sometimes *de novo* review.
- Custody: rarely final and binding.

9.4.19 In the United Kingdom, the arbitral award is enforceable with the leave of the court. It is binding, subject to possible review or appeal. Since the jurisdiction of the court cannot be ousted, it may be argued that the court will not be bound to make an order which mirrors the award. However, it does seem unlikely that a judge would exercise his judicial discretion in a way that departs from an award.[73]

9.4.20 Singer sets out the legal relationship between arbitration "awards" and the surrounding family law context, and notes that "[i]t is beyond dispute that the jurisdiction of the court may not be ousted." Similarly, Howell explains that only the court has the jurisdiction to make a final financial remedy order dismissing claims. Accordingly, only the court can provide finality; therefore, on entering into arbitration, the parties must specifically agree to make an application for a consent order in the terms of the award. The basis for this technical position lies in the Arbitration Act, 1996. Ahmed and Calderwood Norton explain that "…most family law matters cannot be resolved through arbitration … because the Act preserves certain matters to be

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72 SALRC Issue Paper 31 at par. 3.9.40.

73 Scott T QC "Family arbitration: An introduction" ***Family Law Week*** 5 December 2011 access at http://www.familylawweek.co.uk/site.aspx?i=ed90447. See ***AI v MT*** 2013 EWHC 100 (Fam) par. 31, where the judge stated that –

> the rule in ***Hyman*** prevents the arbitration award being binding, although it has been suggested by its proponents that an award should amount to a "magnetic factor" in any subsequent analysis of the issue by a court. In the eloquent words of Sir Peter Singer (at [2012] Fam Law 1503), "*an arbitral award founded on the parties' clear agreement … to be bound by the award should be treated as a lodestone (more than just a yardstick) pointing the path to court approval*".

See also De Jong ***PER/PELJ*** at 2372, where reference is made to the fact that parties agreed at the outset to be bound by the agreement, and to the change brought about in English law by the decision in ***Radmacher (formerly Granatino) v Granatino*** 2010 UKSC 42 at 78, where it was held that the rule in England that pre- and post-nuptial agreements are contractually void has become obsolete and that the court should give effect to a nuptial agreement which is freely entered into by parties, unless it would not be fair to hold the parties to their agreement in the circumstances prevailing. The need to recognise the parties' autonomy and the manner in which they would like to regulate their financial affairs was subsequently underlined in ***V v V*** 2011 EWHC 3230 (Fam) par. 36.

governed by the common law. Moreover, the jurisdiction of civil family courts cannot be ousted by contractual agreement."[74]

9.4.21 The following options for review of arbitral awards involving arrangements in respect of children can be identified:[75]

a) Any challenge leads to a de novo hearing supported by evidence.

b) A challenge must be based on *prima facie* evidence that the award is not in the best interests of the child(ren).

c) A challenge must be based on *prima facie* evidence that the award is harmful to the child(ren).

9.4.22 In the last-mentioned two instances the court may –

a) conduct a *de novo* hearing;

b) review the findings of the arbitrator if there is a reasoned award; or

c) review the transcribed evidence, if any; and there is –

(i) a legal requirement to provide a reasoned award or transcript, at least in cases involving child arrangements; or

(ii) no legal requirement to provide such a reasoned award or transcript.

9.4.23 One example of proposed legislation providing for the court's jurisdiction to vacate an arbitration award when children are involved can be found in section 123 of the American Association of Matrimonial Lawyers Model Act of 2005.[76]

9.4.24 An example in South Africa can be found in the SALRC Islamic Marriages and Related Matters Report,[77] which made provision for family arbitration.[78]

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74 Ferguson at 128 with reference to Ahmed F & Calderwood Norton J 2012. "Religious tribunals, religious freedom, and consent for vulnerable women" .2012 24 ***Child and Family Law Quarterly***, 363-88; Singer P "Arbitration in family financial proceedings: The IFLA Scheme: Part 2" 2012 42 ***Family Law***, 1496-1504; and Howell G "Financial remedy cases: Piecing together the jigsaw" 2012 ***Family Law Week***, 20 April access at http://www.familylawweek.co.uk/site.aspx?i=ed97230..

75 Kennett at 18.

76 Section 123 of the American Association of Matrimonial Lawyers (AAML) Model Act of 2005 states:
"(a) Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:
…
(7) the court determines that the award for child support or child custody is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to vacate the arbitrator's award;"

77 SALRC ***Islamic Marriages and Related Matters Report*** Project 59, July 2003.

78 "**MUSLIM MARRIAGES BILL ... OF 20...**

c) Law to be applied

9.4.25 The FLAFSA submission makes provision for the law of South Africa to be applied.[79] This is in accordance with the position in, for example, the following jurisdictions:

a) In Canada concerns about sharia arbitration led to the amendment of the Ontario Arbitration Act, 1991, to impose an obligation on the arbitral tribunal to apply "the substantive law of Ontario, unless the parties expressly designate the substantive law of another Canadian jurisdiction, in which case that substantive law shall be applied, and to stipulate that the decision of a third party in a procedure where another law was applied would not be enforceable". A primary concern was to avoid an obligation to enforce arbitration awards in which Islamic laws were applied, although the legislation has a much wider scope than that.

b) Although there is no statutory regulation of the matter, the sensitivity of family law issues, and the fact that English law applies in family cases over which English

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Arbitration (Tahkīm)

14.(1) Notwithstanding anything to the contrary contained in the Arbitration Act, 1965 (Act 42 of 1965), or any other law, the parties to a *Muslim marriage* may agree to refer a *dispute* arising during the subsistence of such marriage or otherwise arising from such marriage to an arbitrator, to be resolved through arbitration.

(2) Subject to subsection (4), the provisions of the Arbitration Act, 1965, shall apply to an arbitration conducted in terms of this section.

(3) The arbitrator shall ensure that—

(a) the consent of the parties to a *Muslim marriage* to have a *dispute* resolved through arbitration constitutes informed consent; and

(b) any other parties who may have an interest in the outcome of the arbitration are notified of such arbitration.

(4) No arbitration award affecting the welfare of minor children or the status of any person shall come into effect unless it is confirmed by the High Court upon application to such *court* and upon notice to all parties who have an interest in the outcome of the arbitration.

(5) In considering an application for the confirmation of an arbitration award, the *court* must be satisfied that the award is in the best interests of all minor children and to this end the *court* may—

(a) confirm the award;

(b) declare the whole or any part of the award to be void;

(c) substitute the award for another award which the *court* deems fit;

(d) vary the award on appropriate terms; or

(e) remit the matter to the arbitrator with appropriate directions.

(6) Nothing in subsection (5) shall be construed as limiting the *court's* jurisdiction under any law to review an arbitration award insofar as it relates to a property dispute which does not affect the rights or interests of minor children."

79 This position was confirmed at the SALRC meeting of experts in Cape Town, where Ms Zenobia du Toit indicated that although religious marriages may be included, sharia leaders will not be covered since they have their own laws.

courts can exercise jurisdiction, prompted the IFLA to include a specific provision in its Arbitration Rules. According to Article 3 –

> [t]he arbitrator will decide the substance of the dispute only in accordance with the law of England and Wales. The arbitrator may have regard to, and admit evidence of, the law of another country insofar as, and in the same way as, a Mr Justice exercising the jurisdiction of the High Court would do so.

9.4.26 South Africa may have to consider its position carefully. The status of Muslim marriages has been a challenge since 1996. The possibility of disputes relating to the consequences of religious marriages that have to be resolved by arbitration in accordance with religious law should perhaps be taken into account.

9.4.27 In his submission on SALRC Issue Paper 31, Mr Charles Mendelow, an attorney from Johannesburg, referred to and included a United Kingdom case which deals with a non-binding arbitration pertaining to children, ***In the Matter of RAI and MI (Children)***,[80] where the arbitration was carried out by rabbinical authorities (the Beth Din) and the order made final by consent. The court stated that the parties' devout beliefs had been respected. The outcome was in keeping with English law but was still achieved by a process rooted in the Jewish culture, to which the families belonged.

d) Arbitrator accreditation standards and professional practice

9.4.28 The question to be discussed is whether specific accreditation standards and requirements for appointment should be included in legislation.

9.4.29 It is important to note that in terms of the Arbitration Act, 1965, the parties may choose the arbitrator, but no specific provision is made for statutory accreditation standards for arbitrators. Should this example be followed with respect to family arbitration, it could have the practical effect that the proposed FLAFSA Arbitration Rules will be a sector or industry matter.

9.4.30 It also appears that arbitration, albeit in a non-binding form, is already in use or is being advocated in certain family law matters in South Africa. Domestic disputes in the family have traditionally been overseen by traditional authorities practising a unique form of dispute resolution. In addition, section 70(1) of the Children's Act permits the children's court to set up a family group conference with the parties involved and other members of a child's family in order

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80 ***In the Matter of RAI and MI (Children)*** 2013 EWHC 100 (Fam).

to find solutions to any problem involving the child. In terms of section 70(2)(c), the children's court must consider the report on the conference when the matter is heard.

9.4.31 It should also be noted that sharia law, which will play a more prominent role if the draft Muslim Marriages Bill[81] is enacted, encourages arbitration before resorting to a decision by Islamic authorities, specifically with regard to divorce.[82]

9.4.32 The position in other jurisdictions is as follows:

a) In England, the Institute of Family Law Arbitrators (IFLA) has set up a panel of arbitrators who are experienced family law professionals, are members of the Chartered Institute of Arbitrators and have received specific training in arbitrating family disputes.[83] Only specialist family legal practitioners may act as arbitrators. If the parties do not agree to nominate a particular arbitrator from the panel, the IFLA will appoint a sole arbitrator from the panel whom it considers appropriate, having regard to the nature of the dispute, any expression by the parties of a preferred geographical location, area of experience or expertise of the arbitrator, and any other relevant circumstances.[84] In terms of Article 3 of the Rules, an arbitrator is obliged to decide the substance of the dispute in accordance with the law of England and Wales only.[85]

b) In Australia, arbitration under the Act is always consensual – the parties may agree to submit a dispute to arbitration or the court may refer a dispute to arbitration with the consent of the parties.[86] According to regulation 67B under the Family Law Act, an arbitrator must be a legal practitioner who either is accredited as a family law specialist or has practised as a legal practitioner for at least five years with a minimum of 25% of the practitioner's work done during the five years relating to family law matters. In addition, an arbitrator must have completed specialist arbitration training conducted by a tertiary institution or professional

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81 See above at fn 74.

82 De Jong ***PER/PELJ*** at 2363.

83 Article 4.2 of the Rules.

84 Article 4.3 of the Rules.

85 De Jong ***PER/PELJ*** at 2371.

86 Sections 13E and 13F of the Family Law Act, 1975.

association of arbitrators and his or her name has to be included in a list of practitioners maintained by the Law Council of Australia.[8788]

c) Family law arbitration in the United States of America is mostly voluntary and the process is usually initiated by the parties' signing of an agreement to arbitrate. After filing with the court the agreement to arbitrate, the parties have to designate an arbitrator. Most family law arbitrations involve a single impartial arbitrator. In this regard, section 111 of the Model Act[89] provides that if the parties to an agreement to arbitrate agree on a method of appointing an arbitrator, that method must be adhered to. If, however, the agreed-upon method fails and/or the parties cannot agree on an arbitrator, a court may, on application by a party, appoint an arbitrator. Although the Model Act does not require an arbitrator to have specific qualifications in order to be appointed, the statutes of some states list qualifications arbitrators must meet if the court has to appoint an arbitrator because the parties cannot agree on one.[90] It appears that in some states the arbitrators appointed by the court have to be family law specialists with sufficient experience (and sometimes with training in domestic violence issues), while in other states arbitrators may also be other professionals licensed and experienced in the subject matter of a specific dispute.[91]

d) Because of the decision-making role of an arbitrator, family law arbitrators have to meet high training and practice standards. Since 1 January 2014, all family law arbitrators in British Columbia, for example, have to meet new minimum training and practice standards as set out in the regulations under the Family Law Act, 2011.[92] They have to be a lawyer, a psychologist or a social worker by profession, have at least ten years' experience in a family-related field, and

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87 This list is currently maintained by the Australian Institute of Family Law Arbitrators and Mediators (AIFLAM)..

88 De Jong ***PER/PELJ*** at 2377.

89 American Association of Matrimonial Lawyers (AAML) **Model Act** 2005.

90 See for example section 45(c) of Chapter 50; section 3 entitled "Family Law Arbitration Act" of the North Carolina General Statutes.

91 De Jong at 2381 and the references made there.

92 Reg 347/2012 s 5 to the Family Law Act 2011 (British Columbia).

undergo specified training in arbitration, family law, decision-making, skills development and family violence.[93]

e) In India, even laywomen from the local community may act as arbitrators.[94]

9.4.33 In some jurisdictions, the office of family arbitrator is reserved for experienced legal practitioners who specialise in family law and have undergone specific training in arbitrating family disputes. In addition, they are usually required to be members of a supervisory or regulating body which keeps a list of all accredited arbitrators. In other jurisdictions, it appears that family arbitrators may also be other professionals licensed and experienced in the subject matter of a particular dispute, including psychologists and social workers.

9.4.34 Restricting family arbitrators to legal practitioners may result in increasing the complexity and formality of the arbitration process, because an advocate, attorney or retired judge who acts as an arbitrator might resort to the customary tools of adversarial litigation and so transform divorce arbitration into a privately instituted court proceeding.[95] Furthermore, involving only legal practitioners in arbitration could limit the time and costs that may be saved by the arbitration process. This restriction would also exclude the possibility of the arbitrator's having specialist non-legal experience that the parties may require.

9.4.35 It has been argued, therefore, that arbitrators need not necessarily be limited to experienced family law practitioners – although they would certainly be best qualified to deal with the arbitration of all issues arising from divorce or family breakdown from start to finish and in a holistic manner. If parties want to refer only one or more specific issues – such as care and contact arrangements, the valuation of properties or business assets – to arbitration, the arbitrator could be someone with specialist technical knowledge in the area of the particular dispute, such as a psychologist, valuator or a remuneration expert, or even a lay third party who is respected by the parties, such as a religious leader or an elder from the community.

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93 De Jong ***PER/PELJ*** at 2387.

94 De Jong ***PER/PELJ*** 2395 with reference to Bhatla N and Rajan A "Women in Domestic Violence" 2004 ***New Agenda*** 66-71.

95 Carbonneau TE "A Consideration of Alternatives to Divorce Litigation" 1986 ***University of Illinois Law Review*** 1163 as referred to in De Jong ***PER/PELJ*** at 2387.

9.4.36 Nonetheless, the quality of the designated arbitrator is critical to the viability of the process and anyone who serves as an arbitrator should have received specific training in arbitration.[96]

9.5 Regulation of family arbitration

9.5.1 If South Africa enacted family law arbitration, it would be important to determine whether this unique form of arbitration should be regulated by the existing Arbitration Act, in a separate statute or by rules in terms of the Arbitration Act.[97]

9.5.2 In response to the question[98] in SALRC Issue Paper 31 as to whether family law arbitration should be regulated by the existing Arbitration Act or by a separate statute with specialised rules formulated for family matters, three different responses were received:

a) Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD, stated that it would be advisable to have all methods of ADR in **one piece of legislation.**
b) The Office of the Family Advocate submitted that a **separate statute with specialised rules for family law matters** should be developed or, alternatively, that the existing Arbitration Act should be amended to include family law matters, which would require separate regulations pertinent to the matter. Factors pertaining to child participation, cultural issues, etc. should be considered for this purpose
c) The Cape Law Society (Mss Sandra van Staden and Zenobia du Toit) indicated that family law arbitration should be regulated by the **existing Arbitration Act but with separate, specialised rules and regulations** for family matters.[99]

9.5.3 It appears from the position in other jurisdictions that general commercial-law arbitration statutes (for example in the United States) are often ill-suited to resolving the unique issues that arise in family law disputes involving children, spousal maintenance and division of property. In the province of Ontario in Canada, rules relating to the form of the arbitration and the process for entering into the agreement are dealt with in two Acts. This is also the position in England,

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96 De Jong ***PER/PELJ*** at 2395.

97 De Jong ***PER/PELJ*** at 2398.

98 Question 82.

99 See, however, the further email submission of Ms Du Toit in November 2018 indicating her support for a separate statute.

where the IFLA Scheme is governed by general arbitration legislation and the Family Arbitration Rules. Academics in South Africa have also indicated their support for separate legislation dealing with family arbitration, especially where children are involved.[100]

9.5.4 In order to cater for the special nature of family law disputes, the special policy considerations that need to be applied and specifically the revised standard of review, separate family law arbitration legislation may be necessary.[101] The following proposals may be considered:

a) Arbitration of matrimonial property and financial disputes when no children are directly involved, in terms of the Arbitration Act, 1965.

b) Section 2 of the Arbitration Act could be revised as follows:

   (i) Any family dispute affecting the rights or interests of a child should be excluded from the ambit of the Arbitration Act.

   (iI) Reference to the term "status" in section 2 of the Arbitration Act should be removed and replaced with the test set out in clause 5(2) of the updated Domestic Arbitration Bill. This would also bring the section into line with the International Arbitration Act (section 7)[102] and would promote harmonisation of the statutes.

c) In accordance with similar developments worldwide, arbitration of all matters incidental to divorce or family breakdown, including children's issues, could be provided for in separate legislation, subject to –

   i) an appropriate form of review or appeal; and

   ii) provision for legal counsel for children and the parties concerned being considered.

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100 De Jong ***PER/PELJ*** at 2398; Butler FAMAC Conference at 7.

101 De Jong 2399; Butler FAMAC Conference at 8. See, however, Butler's criticism at 8 of the position in the United Kingdom, where the awards or certain portions of the awards need to be incorporated in court orders as if the award was a settlement agreement reached by the parties, as opposed to an award imposed by an arbitrator.

102 Section 7 of the International Arbitration Act 15 of 2017 reads as follows:

"**7**.(1) For the purposes of this Chapter, any international commercial dispute which the parties have agreed to submit to arbitration under the arbitration agreement and which relates to a matter which the parties are entitled to dispose of by agreement may be determined by arbitration, unless—

(a) such a dispute is not capable of determination by arbitration under any law of the Republic; or

(b) the arbitration agreement is contrary to the public policy of the Republic.

(2) Arbitration may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement."

d) Other questions to be determined include the law that should apply to family arbitration. Who should act as arbitrators? Should family arbitration processes be privately or statutorily regulated?

e) An arbitrator's award regarding care of and contact with children should also be submitted to the Office of the Family Advocate so that it can be monitored in the same way as settlement agreements or parenting plans are.

f) Despite a court's powers to hear the matter *de novo*, the court's role should nonetheless be to give effect to an arbitrator's award if the court considers it to be just and equitable. As is the case in England, an award should serve as a lodestone that points the way to court approval. Furthermore, to reduce ill-founded applications for a hearing *de novo*, there could perhaps be some cost implications for an applicant who is not successful in improving his or her position on review.

g) The distinction between non-binding arbitration and parenting coordination should be determined and a decision should be taken as to whether both forms of ADR should be supported, and if so, how.

h) Once agreement has been reached on the nature of the arbitration legislation, an in-depth study should be made to determine the consequential amendments[103] that would be necessary to the legislation affected by the proposed amendment.

9.5.5 Finally, it is concluded that although family arbitration will not have universal appeal, it should be encouraged and its awards should be enforceable for those who choose this private alternative dispute settlement mechanism to resolve their family disputes.

9.6 Conclusion: Proposed draft legislation

9.6.1 The proposed draft legislation for inclusion in a Family Dispute Resolution Act could be worded as follows:

HAPTER 6
FAMILY ARBITRATION[104]

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103 That is, in addition to the amendment of section 2 of the Arbitration Act, 1965.

104 The following definitions contained in the Family Dispute Resolution Bill, enclosed as Annexure B below, are specifically relevant to this section:

"arbitration tribunal" means the arbitrator or arbitrators acting as such under an arbitration agreement;
"dispute resolution process" includes family mediation, family arbitration, collaborative dispute resolution and parenting coordination;
"family dispute resolution professional" means any of the following:
(a) a government employee tasked with dealing with family law disputes and includes a family advocate, social worker, social service practitioner, court official, police officer and a Legal Aid South Africa employee;
(b) a legal practitioner advising a party in relation to a family law dispute;
(c) a mediator conducting a mediation in relation to a family law dispute;

Parties may refer family dispute to arbitration

34. *The parties to a family law dispute affecting the rights or interests of a child may, subject to sections 13 and 17 above, agree, as prescribed, to refer the dispute to an arbitration tribunal to be resolved through arbitration in terms of this* ***urt may refer matter***

35.*(1) A court presiding over a family law dispute that affects the rights and interests of a child may, with the consent of all the parties to the proceedings, make an order referring the proceedings, or any part thereof, or any matter arising therefrom, to an arbitration tribunal for arbitration in terms of this Act.*

(2) If the court makes an order in terms of subsection (1), it may, if necessary, adjourn the proceedings and may make such additional order as it deems appropriate to facilitate the effective conduct of the arbitration.

Additional duties of family arbitration tribunal

36.*(1) The arbitration tribunal presiding over a family law dispute that affects the rights and interests of a child must ensure—*

(a) compliance with sections 13 and 17 of this Act;

(b) that the consent of the parties to have the dispute resolved through arbitration constitutes informed consent;

(c) that the child's voice is heard and that legal representation is available if required; and

(d) that any other parties who may have an interest in the outcome of the arbitration are notified of that outcome.

(2) The arbitration tribunal is precluded from making his, her or their services available to the parties in terms of subsection (1)(a) to facilitate the mediation as a certified mediator.

Confirmation of the family arbitration award

(d) a collaborative legal practitioner;
(e) a parenting coordinator;
(f) an arbitrator conducting an arbitration in relation to a family law dispute; and
(g) a person providing family dispute resolution services within a class of prescribed persons;

"proceedings" means any court litigation, settlement or alternative dispute resolution processes and includes the provision of legal advice;

37.*(1) No arbitration award affecting the rights or interests of a child may come into effect unless it has been confirmed by the High Court on application to that court and on notice to all parties who have an interest in the outcome of the arbitration.*

(2) Application in terms of this section must be made within 30 days after delivery of the award to the applicant.

(3) A court may—

(a) confirm the award;

(b) declare the whole or any part of the award void;

(c) substitute another award the court deems appropriate for the award;

(d) vary the award on appropriate terms; or

(e) remit the matter to the arbitration tribunal with appropriate directions.

(4) The court must, on application by a party, confirm the award, except when grounds are raised—

(a) as set out in section 33 of the Arbitration Act, 1965 (Act No. 42 of 1965); or

(b) that the award is not in the best interests of all children concerned,

in which case the court must proceed to hear and determine all the issues concerned.

Best interests of the child

38.*(1) In considering an application contemplated in section 37 for the confirmation of an arbitration award, the court must be satisfied that the award is in the best interests of all children concerned, and to this end the court—*

(a) may, in such circumstances as may be prescribed in terms of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), cause an enquiry as contemplated in that Act to be instituted by a family advocate in whose area of jurisdiction that court is with regard to the welfare of any minor or dependent child affected by the proceedings in question, whereupon the provisions of that Act, with the amendments required by the context, will apply ;

(b) must, if an enquiry is instituted by the family advocate in terms of section 4[105] of the Mediation in Certain Divorce Matters Act, 1987,[106] consider the report and recommendations contemplated in section 4(1) of that Act;

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105 Section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 reads as follows:

"**4. Powers and duties of Family Advocates**

(1) The Family Advocate shall—

(*a*) after the institution of a divorce action; or

(*b*) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act No. 70 of 1979),

if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him by the court.

(c) must, if a report or recommendations by a family advocate, a social worker or other suitably qualified person have been ordered in terms of section 29(5) of the Children's Act, 2005[107], consider the report and recommendations.

Requirements

39. *An arbitration tribunal who conducts a family arbitration in terms of this Chapter must comply with the prescribed requirements.*

Court's jurisdiction to review arbitration award

40. *Nothing in section 37 must be construed as affecting the court's jurisdiction in terms of any law to review an arbitration award in so far as it relates to a family law dispute that does not affect the rights or interests of a child.*

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(2) A Family Advocate may—
(*a*) after the institution of a divorce action; or
(*b*) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979,
if he deems it in the interest of any minor or dependent child of a marriage concerned, apply to the court concerned for an order authorizing him to institute an enquiry contemplated in subsection (1).
(3) Any Family Advocate may, if he deems it in the interest of any minor or dependent child of a marriage concerned, and shall, if so requested by a court, appear at the trial of any divorce action or the hearing of any application referred to in subsections (1)(*b*) and (2)(*b*) and may adduce any available evidence relevant to the action or application and cross-examine witnesses giving evidence there at."

106 The application of the Mediation in Certain Divorce Matters Act has been extended to proceedings concerning customary marriages (section 8 of the Recognition of Customary Marriages 120 of 1998), civil unions (section 13 of the Civil Union Act 17 of 2006), domestic violence (section 5 of the Domestic Violence Act 116 of 1998) and maintenance (section 10(1A) of the Maintenance Act 99 of 1998).

107 Section 29(1)(5) (a) of the Children's Act 38 of 2005 reads as follows:
"**Court proceedings**
29. (1)-(4) …
(5) The court may for the purposes of a hearing order that—
(a) a report and recommendations of a family advocate, a social worker or other suitably qualified person must be submitted to the court;
(b)-(d) …
(6)-(7)"

Application of Arbitration Act to special laws[108]

41. *The provisions of the Arbitration Act, 1965, with the amendments required by the context, must apply to an arbitration conducted in terms of this Chapter in accordance with section 40 of that Act.*[109]

SCHEDULE

LAWS AMENDED BY SECTION 55

No. and year	***Short title***	***Extent of repeal or amendment***
Act 42 of 1965	*Arbitration Act*	*The following section is hereby substituted for section 2 of the Act:* ***Matters not subject to arbitration*** ***2.****(1) Arbitration is not permissible in terms of this Act in respect of any family dispute affecting the rights or interests of a child, or any matter incidental to any such dispute.* *(2) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter the parties are entitled to dispose of by agreement may be determined by arbitration unless—* *(a) such a dispute is not capable of determination by arbitration under any other law of the Republic; or* *(b) the arbitration agreement is contrary to public policy of the Republic.* *(3) Arbitration may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement.*

108 This section implies that the FLAFSA Arbitration Rules will be a sector/industry matter.Alternative option 1 would be to include in the Family Dispute Resolution Act those sections of the Arbitration Act (duplicated, with the necessary changes) that should be applicable. Alternative option 2 would be to incorporate the FLAFSA Arbitration Rules in the format of Regulations in terms of the legislation.

109 Section 40 of the Arbitration Act, 1965, reads as follows:

"**Application of this Act to arbitrations under special laws**

40. This Act shall apply to every arbitration under any law passed before or after the commencement of this Act, as if the arbitration were pursuant to an arbitration agreement and as if that other law were an arbitration agreement: Provided that if that other law is an Act of Parliament, this Act shall not apply to any such arbitration in so far as this Act is excluded by or is inconsistent with that other law or is inconsistent with the regulations or procedure authorized or recognized by that other law."

No. and year	*Short title*	*Extent of repeal or amendment*
		(4) For purposes of this section— ***"family law dispute"*** *means a dispute, or alleged dispute, in which one party maintains a particular point of view or claim or contention regarding the parties' respective responsibilities, interests and rights towards or with respect to any member of the family to which both parties belong, and the other party maintains a contrary or different one;*

PART F: PARENTING COORDINATION

Chapter 10: Parenting coordination (facilitation or case management)

10.1 Introduction

a) Exposition of the problem

10.1.1 It is to be expected that, after divorce or after separation, parents will not always be able to come to an agreement about issues that require joint decision-making, resulting in disputes, some of which – such as a decision regarding contact during a specific weekend – require almost immediate resolution.[1]

10.1.2 Ideally, a parenting plan should specify in detail the terms governing the post-divorce relationship, such as the contact schedule, so as to avoid opportunities for frequent conflict, but even the most detailed parenting plan cannot foresee every situation that may arise. Furthermore, children's age, interests and activities change over time, and parents may remarry and relocate. A parenting plan that appeared to foresee and address every opportunity for conflict may later fall short.[2]

10.1.3 A parenting coordinator may be able to step in and assist the parties in such a situation.

10.1.4 This chapter will identify core elements of parenting coordination and explore its possible formalisation in legislation.

b) Terminology, definition and purpose

10.1.5 In the USA, the Association of Family and Conciliation Courts (AFCC) observed that a parenting coordinator may be termed a "special master" in California, a "med-arbiter" in

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1 Martalas A “Dispute resolution in South Africa: Parenting coordination keeps families out of court” 2016 4(3) ***International Family Law, Policy and Practice*** 23 (hereafter referred to as “Martalas 2016”) at 25.

2 Montiel at 394-395.

Colorado, a "wiseperson" in New Mexico, and a "custody commissioner" in Hawaii.[3] This difference in nomenclature was identified as a problem. Inconsistent nomenclature presents a risk when complaints are made to professional boards or civil lawsuits are instituted against the parenting coordinator, presumably because the inconsistency causes parties to misunderstand the role of the parenting coordinator.[4] The AFCC Parenting Coordination Study Group has therefore recommended the general use of the term "parenting coordinator".[5]

10.1.6 In South Africa, a similar problem has been identified. “Facilitation” is the alternative term for parenting coordination and is used most often in the Western Cape, whereas parenting coordination is sometimes referred to as “case management” in Gauteng. For the sake of uniformity[6] the term “parenting coordination” will be used as the starting point in the text, but where appropriate the terms “facilitation”, “case management” and “parenting coordination” will be used interchangeably.

10.1.7 Parenting coordination has been defined[7] as –

> a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children’s needs, and with the prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract.

10.1.8 Note also parr. [35][8] and [37][9] of ***TC v SC*** and par. [3][10] of the ***Van der Merwe v Bruwer*** judgment[11] for variations of this definition. These definitions were not strictly applied in these cases, however.

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3 AFCC Implementation Issues as referred to by Montiel at 369 fn. 8.

4 Kirkland K & Kirkland KE “Risk management and aspirational ethics for parenting coordinators” 3 ***Journal of child custody*** 23, 30-31 (2008) as referred to in Montiel 369 at fn. 8.

5 AFCC Implementation Issues as referred to by Montiel at 369 fn. 8.

6 See ***TC v SC*** 2018 (4) SA 530 (WCC) (hereafter referred to as “***TC v SC***”) at par. [34]; De Jong M “Suggested safeguards and limitations for effective and permissible parenting coordination (facilitation or case management) in South Africa” 2015 18(2) ***PER/PELJ*** 150 (hereafter referred to as “De Jong 2015 ***PER/PELJ***”) at 160.

7 Association of Family and Conciliation Courts (AFCC) ***Guidelines for parenting coordination*** 2005 (hereafter referred to as “AFCC ***Guidelines 2005***”) at 2; see also Association of Family and Conciliation Courts (AFCC) ***Guidelines for parenting coordination*** 2019 (hereafter referred to as “AFCC ***Guidelines 2019***”) at 2.

8 Par. [35] of the ***TC v SC*** judgment reads as follows:

10.1.9 It will be possible to agree on a suitable definition for parenting coordination in South Africa only once the various elements of this process or service have been unpacked. Matters that may need consideration are the following:

a) The basis for the appointment of the parenting coordinator;
b) training norms and standards of parenting coordinators;
c) the scope of the authority of the parenting coordinator once appointed; and
d) meaningful court review.

10.1.10 In the interim, the underlying, primary purpose of parenting coordination could be described as a service to parties to a family conflict that will assist them to reduce the negative effects of divorce and family separation on their children, and to protect and sustain safe, healthy, and meaningful relationships between each parent and his or her child or children.[12]

10.1.11 A study on the effectiveness of parenting coordination found that, after the appointment of parenting coordinators in high-conflict cases, there was a "near 25-fold" decrease in court actions or applications in those cases.[13] Psychologist and parenting coordinator Terry Johnston, Ph.D., analysed 166 cases over a two-year period. In the year before the appointment of a parenting coordinator, those 166 cases resulted in 993 court appearances between them, an average of six court appearances per case. In contrast, in the

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> 35. Parenting coordination is a non-adversarial dispute resolution service provided by mental health professionals or family law lawyers who assist high conflict parents in divorce situations to resolve child-related disputes in an expeditious and child-focused manner, in order to minimise parental conflict with its associated risks for children …

9 Par. [37] refers to the AFCC definition as stated in par. 9.1.7 above.

10 Par. [3] reads as follows:

> [3] In *The Law of Divorce and Dissolution of Life Partnerships in South Africa*, the role of a facilitator, or parenting coordinator, is described as follows:
>
> > Parenting coordination (or facilitation as it is currently known in the Western Cape and case management as it is currently known in Gauteng) is a child-focused ADR process in which a mental health professional or legal professional with mediation training and experience assists high-conflict parties in implementing parenting plans and resolving pre- and post-divorce parenting disputes in an immediate non-adversarial, court-sanctioned, private forum.

11 ***Van der Merwe v Bruwer ao*** Western Cape High Court Case No 12624/18 (Judgment delivered on 21 December 2018), hereafter referred to as "***Van der Merwe v Bruwer****".*

12 De Jong 2015 ***PER/PELJ*** at 188.

13 Montiel at 399, fn. 89, with reference to AFCC ***Implementation Issues*** (citing Johnston T "Cost effectiveness of special master use" Unpublished report, 1994).

year after appointment, those cases had resulted in only thirty-seven court appearances between them, an average of 0,2 court appearances per case.[14]

10.1.12 A more recent study showed a reduction of approximately seventy-five per cent of child-related court filings after parenting coordination was implemented.[15]

c) Parenting coordination: Mediation, non-binding arbitration or a *sui generis* process?

10.1.13 Parenting coordination contains aspects of both mediation and arbitration, with a dose of education or counselling added as well,[16] which means that parenting coordination as such cannot be equated with either mediation or arbitration. Parenting coordination does not "fit" within the parameters of familiar ADR processes.[17]

10.1.14 In Canada, a hybrid model has developed that allows the parenting coordinator both to mediate and arbitrate. In Ontario,[18] the two parts of the process are regulated by the respective rules of the two separate processes.[19] Each province in Canada, except Quebec, allows the parties to a family law dispute to go to arbitration under their provincial Arbitration Acts. The parenting coordinator may, therefore, attempt to mediate any parenting issues in terms of mediation legislation, and if mediation fails, the parenting coordinator may arbitrate in

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14 Montiel 2014 at 399 with reference to Elizabeth Kruse "ADR, technology, and new court rules - Family law trends for the twenty-first century" (2008) 21 ***Journal of the American Academy of Matrimonial Lawyers*** 207 at 217 (citing Johnston's study as evidence that parenting coordination is an effective tool for reducing repeat litigation among parents). See, however, Australian Law Reform Commission ***Family law for the future – An inquiry into the family law system*** Final Report 10 April 2019 at 341 and further, where the option of parenting coordination has been considered but not incorporated in the recommendations. Provision has been made for parties (and their children if appropriate) involved in contested proceedings to meet with a Family Consultant to have their orders explained to them and that the courts must consider whether to make an order requiring the parties to see a Family Consultant for the purposes of receiving post-order case management or directing a party to attend a post-separation parenting program.

15 Henry WJ, Fieldstone L & Bohac K "Parenting coordination and court relitigation: A case study" 2009 47(4) ***Family Court Review*** 682 at 682-83 (stating that family courts and associated professionals spend approximately 90 percent of their time on about 10 percent of parents); Montiel at 400.

16 AFCC ***Guidelines*** 2019 at 2.

17 Montiel 2014 at 377.

18 See, however, the position in British Columbia where the Family Law Act and Family Law Regulations has been making provision for a sui generis process since 2012 (B.C. REG.347/2012).

19 Fidler BJ & Epstein P "Parenting coordination in Canada: An overview of legal and practice issues" 2008 (5) ***Journal of Child Custody*** 53.

order to resolve the parenting dispute. The arbitration aspect of the process does not constitute an improper delegation of the court's authority, since the parties have to agree to submit to arbitration of their parenting issues.[20]

10.1.15 At the Cape Town meeting of experts it was argued[21] that if the law is amended to accommodate family arbitration in the Arbitration Act,[22] parenting coordination will be a clear case of "med-arb", and one would not want the "arb-part" regulated by the Arbitration Act.

10.1.16 A dispute resolution process that combines mediation and arbitration was criticised, however.[23] So-called med-arb practitioners usually see an opportunity to offer a process that combines the best of both mediation and arbitration by guaranteeing a final resolution ("finality") but incorporates informal opportunities for settlement ("flexibility"). The "finality" of arbitration is used as the stick to promote good behaviour in mediation, while the "flexibility" of informal mediated discussions promotes efficiency and cost-saving. At the same time, it has been noted that despite efforts to provide flexibility and choice to prospective arbitrants, the key principles of both mediation and arbitration may be compromised by med-arb. As currently practised, med-arb cannot satisfy the core values of mediator neutrality, party self-determination and confidentiality, nor are the promise of arbitrator impartiality, due-process right to equal treatment and confrontation, and enforceability of the arbitral award likely to be achieved. Also, it has been argued that although med-arb promises to combine the best of both mediation and arbitration, it does not remain faithful to the core values of their respective processes. It has further been suggested that the med-arb format as an integrated unit should be abandoned and different neutrals employed in order to gain the benefits of flexibility and finality, all without compromising the core values essential to the integrity and successful implementation of each process.[24]

10.1.17 The counter-argument is that the mediation element in parenting coordination and the arbitration element in parenting coordination cannot, and should not, be equated with the

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20 AFCC ***Guidelines*** 2005 at 25.

21 Prof. David Butler.

22 See the discussion in this regard above.

23 Pappas BA "Med-arb and the legalization of alternative dispute resolution" 2015 20 ***Harvard Negotiation Law Review*** 157 (hereafter referred to as "Pappas") at 159.

24 Pappas at 159-160.

definitions of family mediation and family arbitration, respectively. Statutory schemes, such as those for mediation, arbitration and childcare evaluations, have specific and mutually exclusive requirements and cannot be readily merged to create the parenting coordination model.[25]

10.1.18 An argument has been made that parenting coordination should be regarded as a *sui generis* process.[26] The idea would be that the whole is greater than the sum of its parts.[27] Parenting coordination could, therefore, be described as a "legal-psychological hybrid".[28]

10.1.19 In so far as its mediation element is concerned, the nature of this hybrid could be described as follows:

a) It differs from conventional family mediation in that conventional mediation is generally confidential, whereas mediation conducted as part of parenting coordination is not.[29] Parenting coordination also involves much more intensive case management than does mediation.

b) The idea that the same person may act as a mediator at the beginning of the process and then take over a role comparable to that of an arbitrator when the mediation has been unsuccessful, would also be unacceptable in conventional mediation and arbitration processes.[30]

c) Furthermore, qualifications that are needed to be a parenting coordinator differ from qualifications required for other roles, such as mediator or arbitrator.[31]

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25 Montiel 2014 at 379. See also Shear LE "In Search of statutory authority for parenting coordination orders in California: Using a grass-roots, hybrid model without an enabling statute" (2008) 5 ***Journal of Child Custody*** 88 at 91 note 16 as referred to in Montiel at 371 fn. 27.

26 See par. [35] of ***TC v SC*** above, which reads as follows:

> [35]It is a *sui generis* process which requires legal, psychological and conflict resolution skills, and combines assessment, education, case management, conflict management and decision-making functions.

27 Aristotle.

28 Montiel at 364, 367 and 370 with reference to Kirkland K & Sullivan MJ "Parenting coordination (PC) practice: A survey of experienced professionals" 2008 46 ***Family Court Review*** 622 at 633 and Sullivan MJ "Ethical, legal, and professional practice issues involved in acting as a psychologist parent coordinator in child custody cases" 2004 42 ***Family Court Review*** 576.

29 Montiel 2014 at 382.

30 See the discussion of family mediation and family arbitration above.

31 Montiel 2014 at 380.

d) Since time would be of the essence during a parenting coordination process, the mediation part of the process may be of shorter duration with less formality involved than in a conventional mediation.

e) At the meeting of experts in Cape Town,[32] it was noted[33] that empirical research shows that 85% of disputes are resolved during the mediation part of parenting coordination, but this statistic should perhaps be considered in the light of the fact that parenting coordination is not restricted to high-conflict parties in the Western Cape.[34] Family mediation seems to be ineffective for the most chronically conflicted co-parents.[35] Such parties are unwilling to compromise and are inclined to triangulate their children into their conflict.[36]

10.1.20 In so far as the arbitration element is concerned, the following points should be noted:

a) The difference between the arbitration part of parenting coordination and ordinary arbitration is not so clear. This question was also discussed in SALRC Issue Paper 31.[37] It was relevant at the time because decision-making by the parenting coordinator relates to a matter incidental to a matrimonial cause and it was argued that if parenting coordination amounted to arbitration, the process itself may be contrary to section 2 of the Arbitration Act, 1965.[38] Since the Family Dispute Resolution Bill, however, now makes provision for family arbitration, which will be unenforceable without court approval where children are

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32 16 February 2017.

33 Dr Astrid Martalas.

34 Dr Astrid Martalas recounted at the Cape Town Conference that, as part of her PhD studies, she compared court files of the Western Cape High Court for the period 2008 to 2013 and found that facilitation as an ADR mechanism has grown in the Western Cape from around 35% of all divorces involving minor children issued in the Western Cape High Court in 2008 to between 68% and 70% in 2012 and 2013.

35 See discussion below of high-conflict parties.

36 De Jong 2015 ***PER/PELJ*** at 154 with reference to Belcher-Timme *et al.* 2013 ***Family Court Review*** 651; Fieldstone *et al.* 2012 ***Family Court Review*** 441 and Fieldstone *et al.* 2011 ***Family Court Review*** 808.

37 At par. 3.13.5 and further.

38 Section 2(a) of the **Arbitration Act** 42 of 1965 reads as follows:

2. Matters not subject to arbitration

A reference to arbitration shall not be permissible in respect of—

(a) any matrimonial cause or any matter incidental to any such cause; or

(b) any matter relating to status.

concerned, and the parenting coordination award may be reviewed rather than appealed in some instances,[39] the nature of the distinction between the arbitration element of parenting coordination and family arbitration itself does not seem to be relevant.

b) FAMAC[40] stated that parenting coordinators, as understood in the decision-making orders concerned, act as experts and not as arbitrators:

(i) The parenting coordinator is not required to afford the parties a hearing before issuing a directive – his or her directive is based on his or her own experience and expertise, research, discussions with fellow-professionals, meetings with all parties concerned and the assistance of a co-parenting coordinator, if there is one.

(ii) Contrary to arbitration, the directive is not final and binding in the same sense that an arbitration award is – the directive is binding on the parties until set aside by a court, if that happens.

It was, however, noted that paragraph 1.5 of the FAMAC model clause[41] is important when considering the underlying principles of the parenting coordination concept.[42] It states that the parenting coordinator is not appointed as psychotherapist, counsellor or legal representative for the children or either of the parties. The parties have the right to consult appropriate persons as and when necessary. The paragraph makes it clear that when the parenting coordinator has to issue a directive, he or she does so based on his or her professional opinion and may not act in a quasi-judicial capacity nor as an arbitrator. It is not clear,

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39 See discussion below.

40 O'Leary JA "A critical reflection on mediation and facilitation practice" Paper read at the Miller du Toit Cloete Family Law Conference Cape Town May 2009.

41 The FAMAC model clause reads as follows:

> 1.5 The parent coordinator shall, when required to issue directives, do so based on his/her professional opinion and shall not act in a quasi-judicial capacity nor shall he/she act as an arbitrator. The parent coordinator is not appointed as psychotherapist, counsellor or legal representative for the children or either of the parties. The parties record that they are aware of their right to consult appropriate professionals in these fields as and when necessary.

42 A new draft FAMAC clause 1.18 has been developed and will replace clause 1.5. It reads as follows:

> 1.18 The PC's services involve elements of mediation, expert opinion and counselling, but do not purely fall into any of these categories. The PC is not appointed as a psychotherapist, counsellor or attorney for the children or the parents. No psychotherapist/patient or attorney/client relationship is created by this appointment or otherwise exists between the PC and any of the parents of the children.

though, what "profession" it is that would inform the "professional opinion" of the "expert" referred to above.

10.1.21 In ***Van der Merwe v Bruwer***[43] the informal nature of the parenting coordination process conducted by the social worker was criticised. Paragraph 4.3 of the parties' facilitation agreement records that –

> [t]he facilitator shall, when required to issue directives, do so based on his/her professional opinion and shall not act in a quasi-judicial capacity nor shall he/she act as an arbitrator.

However, the Mr Justice found that by following this informal process, where no hearing was held, the parenting coordinator failed to ensure that there was a fair process. See further discussion below in paragraph 10.3.

10.1.22 Finally, it could be argued that the *sui generis* nature of parenting coordination may have the effect that parties will have to comply with the precondition of mandatory confidential mediation in certain circumstances and as set out below in this document before a parenting coordinator can be appointed.

10.2 Current legal position in South Africa with respect to parenting coordination

a) No specific provision for parenting coordination in legislation

10.2.1 The notion of a "parenting coordinator" or "case manager" derives from the practice of the courts and is not a term used in legislation.[44] There is currently no statute or court rule governing the appointment of parenting coordinators.[45] Appointments of parenting coordinators

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43 ***Van der Merwe v Bruwer*** supra at parr. [21], [34], [85] and [106].

44 ***H v H*** (GSJ) (unreported case no 2012/06274) 12 September 2012 at par. [7].

45 ***TC v SC*** at par. [39]; ***Van der Merwe v Bruwer*** at par. [49]. See, however, regulation 4 of the Labour Relations Regulations, promulgated pursuant to section 208 of the Labour Relations Act 66 of 1995 as referred to in ***Van der Merwe v Bruwer*** at par. [50], where the powers and duties of a facilitator in the labour context are prescribed. It is of interest that regulation 4(3) employs a catch-all phrase and provides as follows:

> (3) By agreement between the parties, the facilitator may perform any other function.

without statutory or rule-based authority are particularly vulnerable to challenges,[46] especially where the court's authority is based on statute (as opposed to the common-law authority as upper guardian of children). See the difference between sections 42[47] and 45[48] of the Children's Act in this regard.

b) Indirect support for parenting coordination in legislation?

10.2.2 The question has been posed whether the Constitution and the Children's Act indirectly create opportunities that may provide a basis for parenting coordination. Different views have been noted in this regard, and are discussed below:

(i) Provisions in the Constitution and the Children's Act with regard to best interests of the child

10.2.3 It has been argued[49] that the inherent power of the High Court as upper guardian of all children to ensure the best interests of children, read with section 28(2) of the Constitution[50] and section 9 of the Children's Act,[51] could sustain the concept of facilitation.[52]

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46 Montiel 2014 at 364.

47 "**Children's courts and presiding officers**
42.(1) For the purposes of this Act, every magistrate's court, as defined in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), shall be a children's court and shall have jurisdiction on any matter arising from the application of this Act for the area of its jurisdiction.
(2)-(10) …"

48 "**Matters children's court may adjudicate**
45. (1)-(3)…
(4) Nothing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children."

49 De Jong 2015 ***PER/PELJ*** at 162.

50 Section 28(2) of the Constitution reads as follows:
"**Children**
28.(1) …
(2) A child's best interests are of paramount importance in every matter concerning the child.
(3) …"

51 Section 9 of the Children's Act reads as follows:
"**Best interest of child paramount**
9. In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

52 See, however, the full discussion below in par. 10.2.37 on the effect of section 165 of the Constitution on the position where the appointment of the parenting coordinator is not based on the agreement of the parties.

10.2.4 The best interests of the child could be determined with reference to section 2(d),[53] section 6(2)(a),[54] section 6(4)[55] and section 7(1)(n)[56] of the Children's Act, but it should be noted that section 7(1)(n) was considered, and rejected, in a Gauteng South case.[57]

(ii) Section 23(1) of the Children's Act

10.2.5 It was also argued[58] that section 23(1) of the Children's Act,[59] especially subsection (1)(b), provides for a non-parent to be invested with the right to take "care" of the child, and that

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53 Section 2(d) of the Children's Act provides as follows:
"**Objects of the Act**
2. The objects of this Act are—
(a)-(c) …
(d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
(*e)-(i)* …"

54 Section 6(2)(a) of the Children's Act provides as follows:

"General principles
6.(1) …
(2) All proceedings, actions or decisions in a matter concerning a child must—
(a) respect, protect and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
(b)-(f) …
(3)-(5)"

55 Section 6(4) of the Children's Act provides as follows:

"**General principles**
6. (1)-(3) …
(4) In any matter concerning a child—
(a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and
(b) a delay in any action or decision to be taken must be avoided as far as possible."

56 Section 7(1)(n) reads as follows:

"**Best interests of the child**
7. (1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely—
(a)-(m) …
(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.
(2) …"

57 ***H v H (*GSJ)** (unreported case no 2012/06274), 12 September 2012.

58 Goldstein E "Facilitation – Did ***Hummel v Hummel*** do children any favours?" Presentation made at Clarks Attorneys 1st Annual Johannesburg Family Law Conference 2-3 October 2014 (hereafter referred to as "Goldstein").

59 Section 23 of the Children's Act reads as follows:

section 1 of the Act defines "care" very widely – wide enough to include the decisions a "case manager" may be called on to make.

10.2.6 Section 23(2)(e) furthermore gives the court very wide powers to consider the suitability of the appointment of a "case manager" and the desirability of such an appointment.

10.2.7 Section 23(4) provides that the appointment of a so-called "third parent" does not affect the parental responsibilities and rights of a parent invested with such rights.

10.2.8 However, a case manager's appointment does affect these rights. Section 30(3) and (4) of the Children's Act[60] provides that a co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights to another co-holder or any other person, but may, by agreement, allow another co-holder or person to exercise any or all of those responsibilities on his or her behalf. Such an agreement does not divest a co-holder of his or her

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"**Assignment of contact and care to interested person by order of court**
23. (1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary—
(a) contact with the child; or
(b) care of the child.
(2) When considering an application contemplated in subsection (l), the court must take into account—
(a) the best interests of the child;
(b) the relationship between the applicant and the child, and any other relevant person and the child;
(c) the degree of commitment that the applicant has shown towards the child;
(d) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and
(e) any other fact that should, in the opinion of the court, be taken into account.
(3) If in the course of the court proceedings it is brought to the attention of the court that an application for the adoption of the child has been made by another applicant, the court—
(a) must request a family advocate, social worker or psychologist to furnish it with a report and recommendations as to what is in the best interests of the child; and
(b) may suspend the first-mentioned application on any conditions it may determine.
(4) The granting of care or contact to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child."

60 Section 30 of the Children's Act reads as follows:
"Co-holders of parental responsibilities and rights
30.(1) More than one person may hold parental responsibilities and rights in respect of the same child.
(2) When more than one person holds the same parental responsibilities and rights in respect of a child, each of the co-holders may act without the consent of the other co-holder or holders when exercising those responsibilities and rights, except where this Act, any other law or an order of court provides otherwise.
(3) A co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights to another co-holder or any other person, but may by agreement with that other co-holder or person allow the other co-holder or person to exercise any or all of those responsibilities and rights on his or her behalf.
(4) An agreement in terms of subsection (3) does not divest a co-holder of his or her parental responsibilities and rights and that co-holder remains competent and liable to exercise those responsibilities and rights."

parental responsibilities and rights, though, and that co-holder remains competent and liable to exercise those responsibilities and rights.[61]

10.2.9 This section therefore does not provide a basis for a third person to make binding decisions for the co-holders against their wishes.

(iii) Section 28 of the Children's Act

10.2.10 Section 28 of the Children's Act[62] may provide a solution to this problem, since section 28(1) allows the suspension, termination, extension or circumscription of the parents' responsibilities and rights and, significantly, subsection (2) specifically provides that an application in terms of section 28 may be combined with one in terms of section 23. Together these sections are wide enough to encompass the court's power to appoint a third person with decision-making powers *in loco parentis*,[63] but such a decision will not be taken lightly.

10.2.11 The court may also resort to the common law to achieve an appropriate outcome. Such examples are, however, likely to be rare. If the conduct of parents reaches a point where the power to make decisions cannot safely be left to them, one or both are at risk of a court's

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61 See also the discussion of section 30(3) of the Children's Act in parr. [73] to [76] of ***Van der Merwe v Bruwer***.

62 Section 28 of the Children's Act, 2005, reads as follows:
"**Termination, extension, suspension or restriction of parental responsibilities and rights**
28. (1) A person referred to in subsection (3) may apply to the High Court, a divorce court in a divorce matter or a children's court for an order—
(a) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or
(b) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.
(2) An application in terms of subsection (1) may be combined with an application in terms of section 23 for the assignment of contact and care in respect of the child to the applicant in terms of that section.
(3) An application for an order referred to in subsection (1) may be brought—
(a) by a co-holder of parental responsibilities and rights in respect of the child;
(*b)* by any other person having a sufficient interest in the care, protection, well-being or development of the child;
(c) by the child, acting with leave of the court;
(d) in the child's interest by any other person, acting with leave of the court; or
(e) by a family advocate or the representative of any interested organ of state.
(4) When considering such application the court must take into account—
(a) the best interests of the child;
(b) the relationship between the child and the person whose parental responsibilities and rights are being challenged;
(c) the degree of commitment that the person has shown towards the child; and
(d) any other fact that should, in the opinion of the court, be taken into account."

63 Goldstein supra.

taking away that power and conferring it on another person. This would only happen in exceptional circumstances, as was stated above with respect to section 28.[64]

10.2.12 See also the discussion below on the High Court's inherent jurisdiction in this regard.

(iv) Section 33(5) of the Children's Act

10.2.13 There does not seem to be general consensus as regards the interpretation of section 33(5) of the Children's Act.

10.2.14 In a judgment of the Gauteng South Court in ***H v H***,[65] the idea that a "case manager" may find his or her "inspiration" in section 33(5) of the Children's Act was investigated. Section 33(5) provides for an obligation on parties entering into a parenting plan to seek the assistance of a family advocate, social worker or psychologist; or, alternatively, to engage in mediation through a social worker or other suitably qualified person.[66] In ***H v H*** it was found, however, that the scope of intervention in terms of section 33(5) is to render assistance to the parents, not to make decisions for them.[67]

10.2.15 In a judgment of the Western Cape High Court, Gangen AJ, in CM v NG,68 ordered that a parenting coordinator be appointed after the separation of same-sex partners to assist them with joint decision-making and drafting a parenting plan in respect of their child. The court provided for a FAMAC-appointed parenting coordinator if the parties could not agree on one, and ordered that the parenting coordinator's costs be shared equally between the parties, unless directed otherwise by the parenting coordinator. All disputes between the parties concerning the child's best interests were to be referred to the parenting coordinator in writing

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64 ***H v H*** at par. [14].

65 Mr Justice Sutherland in ***H v H*** at par. [7].

66 Section 33(5) of the Children's Act reads as follows:

"(5) In preparing a parenting plan as contemplated in subsection *(2)* the parties must seek-
(a) the assistance of a family advocate, social worker or psychologist; or
(b) mediation through a social worker or other suitably qualified person."

67 ***H v H*** at par. [8]. Support for this opinion can be found in ***Van der Merwe v Bruwer*** at parr. [54] and [71]–[73].

68 ***CM v NG*** 2012 (4) SA 452 (WCC).

and the parenting coordinator's decisions were to be binding on the parties in the absence of a court order to the contrary. In a further decision of the Pretoria High Court, Centre for Child Law v NN and NS,69 the court ordered the appointment of a parenting coordinator, the powers of whom included the development of a parenting plan and the resolution through a "facilitation process" of any conflicts that may arise and, should that process fail, the parenting coordinator was empowered to issue directives which would be binding on the parties until a court directs otherwise or until the parties jointly agree otherwise.70

10.2.16 In ***TC v SC***, the court discussed and criticised the ***H v H*** case,[71] but did not refer to ***CM v NG*** or the ***Centre for Child Law*** case. The court in ***TC v SC*** was of the view that the proper function of parenting coordination is not to assist the parents to reach agreement on the terms of a parenting plan, but to assist the parents to implement the terms of a parenting plan agreed on. On a proper understanding of the nature of parenting coordination, therefore, section 33 would not be applicable at all.[72] The court stated that it does not follow that because the contents of a parenting plan have to be agreed and not imposed on parents, it necessarily means that the court cannot, in appropriate cases, appoint a parenting coordinator with limited decision-making powers to assist the parties to implement the terms of an agreed parenting plan that has been made an order of court.[73]

(v) Extra-judicial assistants

10.2.17 When parties divorce or separate, persons other than the judge, the parents, their legal practitioners and the children frequently become involved in the process. For example, in the USA, the court may appoint a guardian *ad litem*, special master, custody evaluator or mediator.[74]

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69 ***Centre for Child Law v NN and NS*** (unreported case no 32053/2014), 16 November 2015.

70 See further discussion of this case in par. 10.2.56 below.

71 The court in ***TC v SC*** at [47] stated that the court in ***H v H*** conflated the role of the person referred to in section 33(5) of the Act, whose task it is to reach agreement on the terms of a parenting plan, with that of the parenting coordinator, whose proper task is to assist the parents to implement the terms of an agreed parenting pan.

72 ***TC v SC*** at par. [48].

73 ***TC v SC*** at par. [49].

74 Montiel at 368-369.

10.2.18 Such appointments might be upheld as allowed pursuant to the trial court's inherent authority to enforce its own orders and judgments.[75]

10.2.19 At the SALRC's workshop held in Cape Town on 16 February 2017, Mr Mendelow, a family law attorney, suggested that parenting coordination should be exercised on the basis that the parties undertake to abide by the recommendations of the parenting coordinator until their dispute is determined by the court. The parenting coordinator's directive would, therefore, constitute a recommendation.

10.2.20 The Children's Act makes provision for the appointment of neutral experts who may make recommendations to the court.[76]

10.2.21 However, in respect of the proper role and function of expert witnesses in disputes involving children and families, the Appeal Court has stated as follows:[77]

> An expert in the field of psychology or psychiatry who is asked to testify in a case of this nature, a case in which difficult emotional, intellectual and psychological problems arise within the family, must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he or she is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning and is accordingly to that extent in as good a position as the trial Court was.

c) Parenting coordination in terms of an agreement

10.2.22 It would seem that most court judgments in South Africa and in other jurisdictions where parenting coordination is exercised indicate that the appointment of a parenting coordinator in accordance with an agreement between the parties will be lawful,[78] but there is no

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75 Montiel at 389.

76 Section 62 of the Children's Act, 2005, provides that a children's court may order an investigation to establish the circumstances of the child, the parents of the child, and other relevant persons. Section 50 of the Children's Act, 2005, provides that a children's court may, before it decides a matter, order any person to carry out an investigation that may assist the court in deciding the matter and to furnish the court with a report and recommendation thereon.

77 ***Stock v Stock*** 1981 (3) SA 1280 (A) at parr. 1296E-F.

78 Especially when regulated in legislation.

consensus on this matter.[79] The agreement would, however, only be valid between the parties and not against third parties, if not confirmed by the court or family advocate (parenting plan).

10.2.23 Section 2 of the Constitution[80] provides that any law or conduct inconsistent with the Constitution is invalid.[81]

10.2.24 The two sections of the Constitution that are of particular relevance to determine the lawfulness of a parenting coordinators' appointment in terms of an agreement are section 165,[82] and section 34.[83] Section 165 provides that the judicial authority of the Republic is vested in the courts and section 34 provides that a party has the right to a fair hearing before a court.

10.2.25 In ***MEC for Health, Gauteng v Lushaba***,[84] the Constitutional Court held that the judicial authority of the Republic is vested in the court and that a court may not authorise a third party to exercise a judicial power.[85]

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79 ***H v H*** at par. [10]; ***TC v SC***. See, however, ***Van der Merwe v Bruwer***, in which the court set aside a directive made in accordance with an agreement between the parties and confirmed in a court order, for other reasons.

80 Section 2 of the Constitution, 1996, reads as follows:
"**Supremacy of the Constitution**
2. The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

81 See also the reference to section 2 in ***Van der Mewer v Bruwer*** at par. [82].

82 Section 165 of the Constitution reads as follows:
"**Judicial authority**
165. (1) The judicial authority of the Republic is vested in the courts.
(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts."

83 Section 34 of the Constitution is important in this regard.[83] It provides as follows:
"**Access to courts**
34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

84 ***MEC for Health, Gauteng v Lushaba*** 2017 (1) SA 106 (CC) at par. [13].

85 As referred to in ***Van der Merwe v Bruwer*** at parr. [80]-[81].

10.2.26 In ***Van Rooyen v S (General Council of the Bar of South Africa Intervening)***,[86] the Constitutional court further stated, with reference to section 165(2), that institutional judicial independence itself is a constitutional principle and norm that goes beyond and lies outside the Bill of Rights and is not subject to limitation.

10.2.27 In ***Lufuno Mphaphuli & Associates (Pty) Ltd) v Andrews***,[87] the relevance of the Constitution (and more specifically section 34) to the terms of private arbitration agreements was discussed. The court held, *inter alia*, as follows:

> [196] Private arbitration is widely used both domestically and internationally. Most jurisdictions in the world permit private arbitration of disputes and also provide for the enforcement of arbitration awards by the ordinary courts. …
> [197] … it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes.

10.2.28 It is important to note that no reference was made in ***Lufuno*** to the possibility that section 165 of the Constitution could be applicable and could be interpreted to the effect that a private arbitrator would be unlawfully exercising a judicial power during the arbitration.

10.2.29 The reason seems to be that the court regarded private arbitration as an alternative process, voluntarily elected by parties who do not wish to make use of the judicial process of the court. The court stated as follows:

> [195] … Private arbitration is a process built on consent in that parties agree that their disputes will be settled by an arbitrator. It was aptly described by Smalberger ADP in ***Total Support Management (Pty) Ltd ao v Diversified Health Systems (SA)(Pty) Ltd ao***[88] as follows:
>
> > The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement.[89]
>
> [216] If we understand section 34 not to be directly applicable to private arbitration, the effect of a person choosing private arbitration for the resolution of a dispute is not that they have waived their rights under section 34. They have instead chosen not to exercise their right under section 34. …

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86 ***Van Rooyen v S (General Council of the Bar of South Africa Intervening)*** 2002 (5) SA (CC).

87 ***Lufuno Mphaphuli & Associates (Pty) Ltd) v Andrews*** 2009 (4) SA 529 (CC).

88 Smalberger ADP in ***Total Support Management (Pty) Ltd ao v Diversified Health Systems (SA)(Pty) Ltd ao*** 2002 (4) SA 661 (SCA).

89 At par. [25].

> [217] Despite the choice not to proceed before a court or statutory tribunal, the arbitration proceedings will still be regulated by law and, as I shall discuss in a moment, by the Constitution. Those proceedings, however, will differ from proceedings before a court, statutory tribunal or forum. The first difference is that the process must be consensual – no party may be compelled into private arbitration. The second is that the proceedings need not be in public at all. The third is that the identity of the arbitrator and the manner of the proceedings will ordinarily be determined by agreement between the parties. The party who opts for arbitration will have chosen these consequences.
>
> [219] The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters.
>
> [220] However, as with other contracts, should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution, the arbitration agreement will be null and void to that extent (and whether any valid provisions remain will depend on the question of severability). In determining whether a provision is contra bonos mores, the spirit, purport and objects of the Bill of Rights will be of importance. …

10.2.30 The principles set out above with respect to private arbitration could also apply to parenting coordination.[90] Parties, therefore, should have the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, but if they agree to have their dispute decided by way of parenting coordination (a different, alternative process), this decision should be respected and supported by the courts. However, if the agreement is *contra bonos mores*, it would not stand.

10.2.31 Neither the court in ***H v H*** nor the court in ***TC v SC*** specifically considered sections 34 or 165 of the Constitution. However, in ***H v H*** the court indicated that giving decision-making authority, that is usually reserved for the courts, to a parenting coordinator in terms of an agreement, would amount to "a self-imposed restraint, not an exercise of judicial power".[91] In ***TC v SC***, the court, by setting different standards in each case, made a distinction between instances where the parties agreed to the appointment of the coordinator and instances where they did not. In both instances the appointment was allowed, however.

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90 See also the underlying principles set out in Chapter 5 above with respect to family mediation, which also applies.

91 ***H v H*** at par. [10.1].

10.2.32 In ***Van der Merwe v Bruwer***, even though there was an agreement between the parties to appoint the facilitator (a parenting plan in place), a court order elevating the parenting plan and a facilitation agreement giving effect to the parenting plan and court order, the court set aside a directive that had been made in accordance with this agreement between the parties. The court found that even if it can be found that the parenting coordinator derived her authority from a parenting plan that was elevated to the status of a court order, the terms of the court order, in so far as it purports to delegate judicial authority to her, were inconsistent with section 165 of the Constitution, invalid and unenforceable.[92]

10.2.33 It is interesting to note that the respective positions in different states in the United States of America and in Canada regarding parenting coordination differ considerably. According to the AFCC Guidelines,[93] a parenting coordinator in the USA serves by parent stipulation or formal order of the court, whereas the Canadian constitutional framework does not permit judges to delegate to third parties any judicial or quasi-judicial functions. In essence, this means that it is not possible for a judge to order the parties to attend parenting coordination sessions and work with a parenting coordinator under any circumstances. This would be considered an improper delegation. The process is always based on consent. It is common for parties to have the parenting coordinator agreement incorporated into a court order. Courts do not regard this as improper delegation by a court, but as a recognition that the parties are thereby agreeing to arbitrate their parenting issues, which forms a submission to arbitration under the various provincial arbitration Acts.[94]

10.2.34 Some jurisdictions further limit the instances in which a parenting coordinator may have decision-making authority by requiring that the parties specifically consent to the parenting coordinator's decision-making authority, a step further than consent to the appointment.[95]

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92 Par. [92].

93 AFCC ***Guidelines*** 2005 at 9.

94 AFCC ***Guidelines*** 2005 Appendix C: Parenting Coordinators and the Canadian Experience at 25. AFCC ***Guidelines*** 2019 at 13 states that a parenting coordinator may either be authorised to make decisions, or may only be permitted to make recommendations, depending on the legal position in the particular jurisdiction.

95 Montiel 2014 at 374 and 431.

10.2.35 A practice has evolved in the Western Cape, where divorcing parents, acting on the recommendations of their legal or mental health advisers, agree to the appointment of a parenting coordinator, who is tasked with mediating parenting disputes between the parties and, when mediation has not been successful, empowered to give directives that are binding until set aside by the court on review.[96] The agreement to appoint a parenting coordinator is usually embodied in a consent paper or parenting plan,[97] which is made an order of Court when the divorce is granted. An agreement to appoint a parenting coordinator may also be embodied in an interim parenting arrangement, which is made an order of court during Rule 43 proceedings for interim relief *pendente lite*.[98] After separation, cohabitants also have to agree on a parenting plan before seeking the intervention of the court in any family dispute involving children.

10.2.36 As has been explained above in the discussion of family arbitration, the position of the court as upper guardian of children should also be considered,[99] even when the appointment has been based on an agreement between the parties. Specific considerations concerning the scope of the parenting coordinator's authority should be considered in this regard. As is clear from the ***Lufuno*** case, it may be possible – even if the appointment of the

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96 ***TC v SC*** at par. [39].

97 Sections 33 and 34 of the Children's Act read as follows (our emphasis):
"**Contents of parenting plans**
33.(1) The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.
(2) If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.
(3-(4) …
(5) In preparing a parenting plan as Contemplated in subsection (2) the parties must seek—
(a) the assistance of a family advocate, social worker or psychologist; or
(b) mediation through a social worker or other suitably qualified person.
"**Formalities**
34.(1) A parenting plan—
(a) must be in writing and signed by the parties to the agreement; and
(b) subject to subsection (2), may be registered with a family advocate or made an order of court.
(2)-(3)…
(4) A parenting plan registered with a family advocate may be amended or terminated by the family advocate on application by the co-holders of parental responsibilities and rights who are parties to the plan.
(5) A parenting plan that was made an order of court may be amended or terminated only by an order of court on application—
(a) by the co-holders of parental responsibilities and rights who are parties to the plan;
(b) by the child, acting with leave of the court; or
(c) in the child's interest, by any other person acting with leave of the court.
(6) …"

98 In ***TC v SC*** at par. [39].

99 See par 9.4(a) above.

parenting coordinator is not considered to be an unlawful delegation of judicial authority – that the parenting coordination agreement may be contrary to public policy and therefore *contra bonos mores*. See the discussion below. Note should also be taken of ***Van der Merwe v Bruwer***,[100] in which it was found that when parents transfer their parental responsibilities and rights to a third party in contravention of section 30(3) of the Children's Act,[101] such a defect could not be cured even if sanctioned by a court order.[102]

d) Parenting coordination in terms of a court delegation, without consent of the parties

10.2.37 The situation where parenting coordination is not taking place in accordance with an agreement between the parties should also be considered. The question would be whether a court may delegate to a third party such as a legal practitioner, psychologist or social worker, who has not been appointed in the same manner as a member of the judiciary, its judicial decision-making authority to determine a fit and proper parent's parental responsibilities and rights with respect to a child.[103]

10.2.38 Currently, there is no statutory provision in South Africa that allows such a delegation. The lower courts are, therefore, not able to make such an order.

10.2.39 It has been argued[104] that the inherent authority of the High Court as upper guardian of all children to ensure the best interests of children, read with section 28(2) of the Constitution

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100 Par. [76].

101 Section 30(3) of the Children's Act reads as follows:
"**Co-holders of parental responsibilities and rights**
30.(1)-(2)…
(3) A co-holder of parental responsibilities and rights may not surrender those responsibilities and rights to another co-holder or any other person, but may by agreement with the other co-holder or person allow the other co-holder or person to exercise any or all of those responsibilities and rights on his or her behalf.
(4) …"

102 Should parenting coordination be regulated in legislation, the consequential amendment of section 30(3) of the Children's Act may have to be considered in order to ensure clarity.

103 Montiel 2014 at 368.

104 De Jong 2015 ***PER/PELJ*** at 162; ***TC v SC***.

(which obliges courts to apply the standard that the child's best interest is of paramount importance),[105] could sustain the concept of parenting coordination.[106]

10.2.40 In ***TC v SC***, counsel for the father contended that the court, as upper guardian of minor children, may make any such order as may be required and in such detail as may be necessary in order to regulate the care and contact arrangements in the best interests of minor children. She contended that the appointment of the facilitators in this case was necessary to avoid on-going conflict and litigation between the parties about parenting issues, which were detrimental to the well-being of the children.[107]

10.2.41 It should be noted that if legislation is introduced to regulate parenting coordination, the question whether the inherent common-law authority of the High Court as upper guardian could sustain the concept of parenting coordination would become irrelevant since the court would base its jurisdiction on the Act. However, it remains necessary to determine whether the legislation proposed to be introduced will withstand constitutional scrutiny.

10.2.42 Before answering the question whether a court may delegate its decision-making authority (judicial authority) to a third party, one should first determine the nature of this authority.

(i) The judicial authority of a court to interfere in the parental responsibilities and rights of parents

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105 Section 38 of the Constitution has also been mentioned in this regard, as it addresses the need for a court to craft a remedy for every right the Constitution confers.

106 The best interests of the child could be determined with reference to the following sections in the Children's Act, 2005: section 2(d), section 6(2)(a), section 6(4)(a) and section 7(1)(n). It should, however, be noted that section 7(1)(n) was considered in a Gauteng South case in this regard, but rejected. See also the discussion above in par 10.2.4. Section 7(1)(n) reads as follows:
"**Best interests of the child**
7.(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely—
(a)-(m) ...
(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.
(2) …"

107 At par. [24].

10.2.43 Section 165 of the Constitution provides that the judicial authority of the Republic is vested in the courts. Section 34 of the Constitution provides that a party has the right to a fair hearing before a court.

10.2.44 In Australia “judicial power”, in general, has been described as follows:[108]

> …the words “judicial power” mean the power which every sovereign authority must of necessity have to decide controversies between its subjects … whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to approval or not) is called upon to take action.

10.2.45 In the Australian case of ***Brandy v Human Rights and Equal Opportunity Commission ao***,[109] the High Court said that some of the elements of judicial power are –

- giving a binding and authoritative decision;
- determining existing rights and duties according to law; and
- ability to take action so as to enforce that decision.

10.2.46 In the USA, it has been stated that the term “judicial power of courts” is generally understood to be the power to hear and determine controversies between adverse parties and questions in litigation. Non-delegable judicial powers include the authority to hear and determine justiciable controversies, the authority to enforce a valid judgment, and the power necessary to "protect the fundamental integrity of the judicial branch".[110] However, core judicial functions "do not include functions that are generally designed to ‘assist’ courts, such as conducting fact finding hearings, holding pre-trial conferences, and making recommendations to judges".[111]

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[108] Griffith CJ in ***Huddart Parker & Co Pty Ltd v Moorehead*** (1909) 8 CLR 330 at 357, as referred to in Family Law Council ***The answer from the oracle: Arbitrating family law property and financial matters*** Discussion Paper May 2007 (hereafter referred to as “Family Law Council”) at 50.

[109] ***Brandy v Human Rights and Equal Opportunity Commission ao*** (1995) 183 CLR 245.

[110] ***In re Adoption of E.H***., 103 P.3d 177, 182 n.7 (Utah Ct. App. 2004) (quoting Ohms, 881 P.2d at 181-82 at n.6); see also ***Morrow v Corbin***, 62 S.W.2d 641 at 645 n.17 as referred to in Montiel at 375.

[111] ***State v. Thomas***, 961 P.2d 299, 302 (Utah 1998) (quoting Ohms, 881 P.2d at 851 n.17).

10.2.47 In South Africa, judicial authority is defined as the power to resolve disputes through determining what the law is and how it should be applied to a specific dispute. Judicial authority is exercised by the judicial bodies of the state which are generally known as the courts.[112]

10.2.48 In terms of South African law, parents have due-process rights to make decisions about their children.[113]

10.2.49 However, in certain instances the state may "permissibly invade the otherwise high walls of the family in the best interest of the children".[114] One such instance will be when the parents are unable to agree as to what is the best interest of the child.[115]

10.2.50 The High Court, in principle, has the judicial power or authority to make, rescind, vary and suspend any order pertaining to guardianship, care, contact and maintenance.[116] This power is based on its common-law jurisdiction as upper guardian of children[117] and on its statutory jurisdiction, where applicable.[118]

10.2.51 In the family arbitration discussion above it was noted that earlier decisions of the courts in South Africa illustrate that a court, as upper guardian of a minor, could only overrule parents' wishes in exceptional cases. These "exceptions had to be few and had to rest on clear grounds, and the grounds had to be found in considerations of danger to the life, health or morals of the child". This position has changed to the extent that the court may now exercise its judicial authority in all cases where the best interests of a child so requires. Section 28(2) of the Constitution states that a child's best interests are of paramount importance in every matter concerning the child. However, the authority of the court is not unlimited.[119]

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112 Bekink B ***Principles of South African constitutional law*** 2ed Lexis Nexis Cape Town 2016 at 469.

113 Montiel at 368; ***Van der Merwe v Bruwer*** at [74].

114 Montiel at 368.

115 ***Coetzee v Meintjies*** 1976 (1) SA 257 (T).

116 Boezaart Chapter 6 at 221.

117 Referred to as *parens patriae* in the United Kingdom.

118 See the discussion of the upper guardianship of the High Court in Chapter 9 above.

119 Par. 9.4(a) in Chapter 9 above.

(ii) Extent to which a court may delegate to a third party its judicial authority to interfere in the parental responsibilities and rights of parents

10.2.52 There is no consensus in South Africa in respect of the question whether a third party should have the authority to interfere in the parental rights and responsibilities of parents without the parties' prior consent when such interference would be in the best interest of the child.[120]

10.2.53 The appointment of a parenting coordinator by the court (as opposed to an appointment by agreement between the parents) has been challenged in court. The court in ***H v H***[121] refused an opposed application for the appointment of a parenting coordinator empowered to make decisions binding on both parents and stated that it does not have the jurisdictional competence to appoint a third party to make decisions about parenting for a pair of parents who are holders of parental responsibilities and rights in terms of sections 30 and 31 of the Children's Act 38 of 2005.[122] The appointment of a decision-maker to break deadlocks would be an impermissible delegation of the court's powers.[123] In instances where case managers were appointed by agreement between the parties and this appointment was included in the divorce order, Sutherland J was of the view that that was a "self-imposed restraint" and not an exercise of judicial power.[124]

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120 See in this regard the case of ***H v H*** (SGJ) unreported case No. 06274/2012 of 10 September 2012 contrasted with ***Schneider NO ao v AA ao*** 2010 (5) SA 203 (WCC) and ***CM v NG*** 2012 (4) SA 452 (WCC). See also ***TC v SC*** and ***Van der Merwe v Bruwer***.

121 ***H v H***.

122 ***H v H*** at par. [13] and [6]. In this case, a case manager (parent coordinator) was previously appointed by the divorce court, with the consent of both parties, to assist the parties in concluding a parenting plan. Despite the case manager's intervention, the parties did not conclude a parenting plan and a clash of opinion about an appropriate nursery school for the child gave rise to the father's application for a new parenting coordinator, against the wishes of the mother.

123 Section 165(1) of the Constitution provides that judicial authority vests in the courts. It reads as follows:
"**Judicial authority**
165.(1) The judicial authority of the Republic is vested in the courts.
(2)-(6) …"

The court did not, however, specifically refer to section 165.

124 Martalas 2016 at 27.

10.2.54 In ***Wright v Wright***, an unreported case heard in the Western Cape High Court in 2014[125] that involved parents whose post-divorce relationship was extremely acrimonious, the court held that it could not order the parents to refer their disputes to facilitation against their will, since it was not a practical alternative.[126]

10.2.55 On the other hand, in ***Schneider NO ao v AA ao***[127] Davis J ordered that any dispute with regard to the payment of medical expenses for the children or with regard to contact between them and their deceased father's family should be referred to a FAMAC-appointed parenting coordinator, who would be entitled to facilitate these disputes and make rulings that were binding on the parties, unless the rulings were varied by a competent court or by the parenting coordinator following a separate review. The court further ordered that the parenting coordinator's costs should be shared equally between the parties unless the contrary was directed by the parenting coordinator. The parenting coordinator was also given the authority to vary his or her rulings and to make decisions on how the parenting coordinator's costs were to be apportioned between the parties.

10.2.56 In another judgment of the Western Cape High Court, Gangen AJ, in ***CM v NG***,[128] ordered that a parenting coordinator be appointed after the separation of same-sex partners to assist them with joint decision-making and drafting a parenting plan in respect of their child. The court provided for a FAMAC-appointed parenting coordinator when the parties could not agree on one and ordered that the parenting coordinator's costs be shared equally between the parties unless directed otherwise by the parenting coordinator. All disputes between the parties concerning the child's best interests were to be referred to the parenting coordinator in writing and the parenting coordinator's decisions were to be binding on the parties in the absence of a court order to the contrary.

10.2.57 A recent decision of the Pretoria High Court, ***Centre for Child Law v NN and NS***,[129] involved two babies born on the same day in 2010 who were given to the wrong mothers. The

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125 ***Wright v Wright*** Case No 20370/2014.

126 At par. [19].

127 ***Schneider NO ao v AA ao*** 2010 (5) SA 203 (WCC).

128 ***CM v NG*** 2012 (4) SA 452 (WCC).

129 ***Centre for Child Law v NN and NS*** (unreported case no 32053/2014), 16 November 2015.

court ruled in November 2015 that the children would remain in the care of the families who had raised them and that their biological parents were allowed reasonable contact. The court furthermore ordered the appointment of a parenting coordinator to manage the exercise of the contact. In addition, the powers of the parenting coordinator included the development of a parenting plan and the resolution of any conflicts that may arise through a "facilitation process" and, should that process fail, the parenting coordinator was empowered to issue directives which would be binding on the parties until a court directs otherwise or until the parties jointly agree otherwise.

10.2.58 It has been argued[130] that, since no reference had been made in the previous three court cases to an agreement between the parties with regard to the appointment of a parenting coordinator, it would appear that all three supported the appointment of a parenting coordinator by the court, in contrast with the judgment in the ***H v H*** case. It should be noted, though, that these appointments were not challenged in any of the cases and were therefore not interrogated in any detail, as compared to the exposition provided in ***H v H***. It is also possible that, at least in the first-mentioned two cases, the agreement between the parties would have formed part of the settlement agreement at divorce, or it could have been an informal arrangement. [131]

10.2.59 In ***TC v SC***, the judge discussed both the ***H v H*** and the ***Wright*** cases.[132] The judge stated that although the decision in ***Wright*** might, at first blush, be construed as support for the statement of principle laid down in ***H v H***, it seems to her that a closer examination of Van Staden AJ's reasoning in ***Wright*** shows that the decision was based not on principle but on expedience: the court declined to appoint a parenting coordinator because the resistant attitude of the parties meant that parenting coordination was unlikely to work.

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130 Martalas 2016 at 30.

131 In ***TC v SC*** at par. [40] the court states, with reference to ***Schneider NO ao v Aspelling ao*** 2010 (5) SA 203 (WCC), ***MM v AV*** (unreported WCC decision in case number 2901/2010) [2011] ZAWCHC 425 (16 November 2011), and ***CM v NG*** 2012 (4) SA 452 (WCC), as follows:

> Since this Court has historically appointed PC's by agreement between the parties, or at least in circumstances where its power to appoint a PC was not pertinently challenged by one of the parties, the question of whether or not the appointment of a PC constitutes an unlawful delegation of judicial authority has not arisen for determination in this division.

132 At parr. [41]–[42].

10.2.60 The judge further opined that the judgment in ***H v H*** is susceptible to the criticism that the court lacked an understanding of the proper function of parenting coordination, since it regarded the case manager as "a creature of statute invented to facilitate the achievement of the aims of section 33; i.e. the formulation of a plan and to promote agreement on the provisions of such plan".[133] In so doing it conflated the role of the person referred to in section 33(5) of the Act,[134] whose task is to assist the parents to reach agreement on the terms of a parenting plan, with that of the parenting coordinator, whose proper task is to assist the parents to implement the terms of an agreed parenting plan.[135] It does not follow that, because the contents of a parenting plan have to be agreed and cannot be imposed on parents, it necessarily means that the court cannot, in appropriate cases, appoint a parenting coordinator with limited decision-making powers to assist the parties in implementing the terms of an agreed parenting plan which has been made an order of court.[136] Furthermore, the wide statement in ***H v H*** that "the appointment of a decision-maker to break deadlocks is a delegation of the court's power, itself an impermissible act" [137] needs to be qualified. While the decision-making authority which the court was asked to confer on the parenting coordinator in ***H v H*** was so broad in scope as to be impermissible, it is possible, by means of appropriate limitations on the scope of the parenting coordinator's authority, to craft a role for the parenting coordinator which does not constitute an unlawful delegation of judicial decision-making authority, but permits the parties (and indeed the curt)[138] to benefit from the services of a parenting coordinator. The appointment of and powers conferred on a parenting coordinator may and should be limited in a number of essential respects in order to avoid an impermissible delegation of judicial authority.[139]

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133 ***H v H*** *(*supra*)* par. 8.

134 Section 33(5) of the Children's Act provides as follows:
"(5) In preparing a parenting plan as contemplated in subsection (2) the parties must seek—
(a) the assistance of a family advocate, social worker or psychologist; or
(b) mediation through a social worker or other suitably qualified person."

135 ***TC v SC*** at par. [47].

136 ***TC v SC*** at par. [49].

137 ***H v H*** *(supra)* par. 13.

138 Parenting coordinators can fulfil a useful purpose in the administration of justice by conserving judicial resources which would otherwise be taken up by high-conflict parents who are frequent litigators concerning post-divorce disputes.

139 ***TC v SC*** at par. [50].

10.2.61 The court in ***TC v SC*** summarized its views regarding the appointment of a parenting coordinator in accordance with its inherent jurisdiction as upper guardian of children as follows:[140]

(a) The court may appoint a parenting coordinator with the consent of both parties, provided that –

(i) there is already an agreed parenting plan in existence, whether interim or final, which has been made an order of court;
(ii) the role of the parenting coordinator is expressly limited to supervising the implementation of and compliance with the court order;
(iii) any decision-making powers conferred on the parenting coordinator is confined to ancillary rulings which are necessary to implement the court order, but which do not alter the substance of the court order or involve a permanent change to any of the rights and obligations defined in the court order;
(iv) all rulings or directives of the parenting coordinator are subject to judicial oversight in the form of an appeal in the wide sense described in ***Tickly ao v Johannes NO ao,***[141] i.e. "complete re-hearing of, and fresh determination of the merits of the matter with or without additional evidence or information".

(b) The court may appoint a parenting coordinator without the consent of both parties, provided that the Court is satisfied not only that the conditions listed in (a)(i) to (iv) above are met, but also that –

(i) the welfare of the child is at risk from exposure to chronic parental conflict based on evidence of the parents' inability or unwillingness to co-parent peacefully;
(ii) mediation has been attempted and was unsuccessful, or is inappropriate in the particular case;
(iii) the person proposed for appointment as the parenting coordinator is suitably qualified and experienced to fulfil the role of parenting coordinator;
(iv) the fees charged by the proposed parenting coordinator are fair and reasonable in the light of his or her qualifications and experience, that the parents can afford to pay for the services of the parenting coordinator, and that at least one of the parents agrees to pay for the services of the parenting coordinator.

10.2.62 In ***Van der Merwe v Bruwer*** there was agreement between the parties (parenting plan) to appoint the facilitator, a court order elevating the parenting plan, and a facilitation agreement giving effect to the parenting plan and court order by appointing the specific parenting coordinator. Nevertheless, the judge found that the primary judge who had made the original order did not have the authority to grant the facilitator the power to act as a judicial

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140 ***TC v SC*** at par. [71].

141 ***Tickly ao v Johannes NO ao*** 1963 (2) SA 588 (T) at parr. 590G – 591A.

officer and exercise judicial authority[142] and that that part of the order is therefore unenforceable.[143]

10.2.63 In motivating its stance, the court referred with approval to the ***H v H*** case where it states[144] –

> … the appointment of a decision maker to break deadlocks is a delegation of the court's power; itself an impermissible act.[145]

10.2.64 The court further considered the position of ***TC v SC***,[146] where the court held that –

> … it is possible, by means of appropriate limitations on the scope of the parenting coordinator's authority, to craft a role for the parenting coordinator which does not constitute an unlawful delegation of judicial decision-making authority, but permits the parties (and indeed the court) to benefit from the services of a parenting coordinator,[147]

and criticised the fact that the court did not deal with the provisions of section 165 of the Constitution.[148] The court, in ***Van der Merwe***, therefore did not consider whether possible limitations on the scope of the parenting coordinator's authority may constitute a lawful delegation of judicial decision-making authority.[149]

10.2.65 Section 165 should be read with section 34 (as discussed above) to the effect that the parents have the right to have any family dispute that can be resolved by the application of law decided in a fair public hearing before a court.

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142 See parr. [63]–[70] of ***Van der Merwe v Bruwer*** for references to court cases in the USA in which the courts found that judicial duties, judicial powers, judicial functions and final-decision-making authority may not be delegated. However, it would not be improper to delegate judicial authority if the case manager did not have decision-making authority. If the parenting coordinator's authority were limited to assisting the parties in resolving their disputes by issuing recommendations to the parties, it would have been permissible as a way to further the court's capacity to decide cases by encouraging resolution of the parties' disputes by the parties themselves.

143 ***Van der Merwe*** at par. [61].

144 ***Van der Merwe*** at par. [73].

145 ***H v H*** at par. [13].

146 ***Van der Merwe*** at par. [77].

147 ***TC v SC*** at par. [50].

148 See discussion of section 156 above. See also ***MEC for Health, Gauteng, v Lushaba*** 2017 (1) SA 106 (CC) at par. [13] as referred to in ***Van der Merwe*** in parr. [80]-82].

149 See also ***MEC for Health, Gauteng, v Lushaba*** 2017 (1) SA 106 (CC).

10.2.66 In considering the exposition of the court cases above, it becomes clear that the courts are currently not providing the necessary guidance on this issue.

10.2.67 In SALRC Issue Paper 31 the question was posed[150] whether facilitation would be an inappropriate delegation of the judicial function, a denial of due process and an impediment to court access.

10.2.68 Most respondents indicated that this ought not to be the case, depending on the powers conferred on the parenting coordinator and on whether the Parenting Coordinator Guidelines would be in place.[151] They further argued as follows:

a) The main objective of appointing a parenting coordinator is to provide an alternative to costly and time-consuming litigation when a separation agreement or a parenting plan is in place.[152]
b) The parenting coordinator's authority does not infringe on parental responsibilities and rights but rather ensures that the exercise of those responsibilities and rights does not impede the making and implementation of decisions that are in the best interests of the minor child.[153]
c) The parenting coordinator's authority to issue binding directives is qualified solely by a court's power to intervene by granting an order, after having been approached by one of the parties or the minor child or any other interested party, with the court's leave, in terms of section 34(5) of the Children's Act, to set aside the directive because it is not in the minor child's best interests.[154]
d) The role of a parenting coordinator is not to make independent decisions regarding major aspects of the minor child's upbringing, but to ensure that the parents resolve their disputes in the manner that best serves the interests of their child.[155]

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150 SALRC Issue Paper 31, Question 91.

151 Dr Astrid Martalas; Mr Craig Schneider; Task Force on the Practice of Parenting Coordination in South Africa; FAMAC.

152 Mr Craig Schneider.

153 Mr Craig Schneider.

154 Mr Craig Schneider; Task Force on the Practice of Parenting Coordination in South Africa.

155 Mr Craig Schneider.

10.2.69 Some respondents cautioned that parenting coordination could be an impediment to court access. They stated as follows:

a) The concerns raised in the ***Hummel*** judgment should be considered.[156]

b) It should only be used in extreme cases.[157]

c) Careful consideration should be given to any impact before implementation.[158]

10.2.70 In response to the question in SALRC Issue Paper 31[159] as to whether a judge should be able to appoint a parenting coordinator without the parents' consent, some respondents indicated their agreement,[160] whereas others disagreed.[161]

(iii) Inherent jurisdiction of court to regulate its own process

10.2.71 The court in ***TC v SC***[162] stated that, where necessary, a court may, in terms of section 173 read with section 39(2) of the Constitution, develop and extend the common law relating to its inherent jurisdiction as upper guardian in order to respect, protect, promote and fulfil the fundamental rights of children.

10.2.72 In ***TC v SC***[163] it was further noted that parenting coordinators can fulfil a useful purpose in the administration of justice by conserving judicial resources which would otherwise be taken up by high-conflict parents who are frequent litigators concerning post-divorce disputes. The court further states[164] that the High Court in South Africa, by virtue of the provisions of section 173 of the Constitution, likewise enjoys inherent authority to ensure that its

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156 Office of the Family Advocate.

157 Cape Law Society (Ms Zenobia du Toit).

158 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

159 Question 98.

160 Dr Astrid Martalas; Mr Craig Schneider; Task Force on the Practice of Parenting Coordination in South Africa.

161 Cape Law Society (Ms Zenobia du Toit); Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

162 At par. [45].

163 At fn 26 on page 24.

164 Par. [56].

orders are carried out. It is well established that the High Court has inherent jurisdiction to enforce its orders by committal to prison for contempt of court.[165]

10.2.73 Section 173 of Constitution provides as follows:

> **Inherent power**
> 173. The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

10.2.74 It has therefore been argued hat a parenting coordinator may be appointed pursuant to the trial court's inherent authority to enforce its own orders and judgments.[166]

10.2.75 However, in ***Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis ao***[167] the court sounds a general note of caution with regard to the exercise of the court's inherent power to regulate procedure. Such inherent power would not be exercised as a matter of course. The Rules are there to regulate the practice and procedure of the court in general terms, and strong grounds would have to be advanced to persuade the court to act outside the powers provided for specifically in the Rules. Its inherent power, in other words, is something that would be exercised sparingly: the court would only come to the assistance of an applicant outside the provisions of the Rules if the court was satisfied that justice would not be properly done unless relief was granted to the applicant.

10.2.76 This sentiment was also expressed in the USA, where the court stated that the inherent powers of the courts operate within certain boundaries. The power to issue an order should be done in aid of the court's ability to function as a court.[168]

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165 ***Bannatyne v Bannatyne*** 2003 (2) SA 363 (CC).

166 Montiel at 389.

167 ***Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis ao*** 1979(2) SA 457 (W) at 462H-463B approved in ***Oosthuizen v Road Accident Fund*** 2011 (6) SA 31 (SCA) and in ***S v Lawrence; S v Negal; S v Solberg*** 1997 (4) SA 1176 (CC).

168 ***William J Bower v Michelle A Bournay-Bower*** May 8 – Set 156 2014 Boston Supreme Judicial Court, SJC -11478 at 17.

10.3 Proposals for the development of legislation to regulate parenting coordination

10.3.1 Parenting coordination is a widespread practice in South Africa, but at present completely unregulated. It is clear from a discussion of the case law that there is great legal uncertainty in South Africa in this area. A parenting coordinator can make decisions that seriously affect the lives of children, but since it involves an unregulated area of the law, the parenting coordinator does not have to be trained.[169]

10.3.2 The relevant question put in SALRC Issue Paper 31 was whether parenting coordination should be included as an ADR method approved by legislation.[170]

10.3.3 The SALRC received an extensive submission from the Task Force on Parenting Coordination in South Africa,[171] which included a document, "Guidelines on the Practice of Parenting Coordination in South Africa",[172] which aims to provide the basis for the practice of parenting coordination.[173] It indicated that while the courts are ordering parents to appoint parenting coordinators and to cooperate with them, there is no uniform approach to the role and responsibilities of the parenting coordinator.

10.3.4 Many individual comments were also received. Some respondents agreed that the use of parenting coordination was a necessary step.[174] It was explained[175] that parenting coordination should be regulated in legislation, in order to –

- define the role, powers and responsibilities of the parenting coordinator;

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169 Dr Astrid Martalas at the meeting of experts in Cape Town.

170 SALRC Issue Paper 31, Question 90.

171 The Task Force was mandated by SAAM (South African Association of Mediators) to develop the Guidelines.

172 Task Force on the Practice of Parenting Coordination in South Africa ***Guidelines on the Practice of Parenting Coordination in South Africa*** 28 June 2016 (hereafter referred to as Parenting Coordination Guidelines, 2016) access at http://www.famac.co.za/parenting-ccoordination .

173 Task Force on the Practice of Parenting Coordination in South Africa in response to SALRC Issue Paper 31.

174 Dr Astrid Martalas; Mr Craig Schneider; Task Force on the Practice of Parenting Coordination in South Africa.

175 Task Force on the Practice of Parenting Coordination in South Africa.

- provide uniformity nationally and between the various courts with regard to facilitation/parenting coordination; and
- assist with reducing ongoing litigation between parents in keeping with section 7(1)(n) of the Children's Act 38 of 2005.

10.3.5 It was further stated that regulating facilitation or parenting coordination in legislation would provide, it is hoped, some protection for the professional people fulfilling this role. The number of professional people available to fulfil the role of parenting coordinator is dwindling as a result of the highly acrimonious nature of the work. Quite often a parenting coordinator is appointed only when the relationship between the parties is highly acrimonious and affects the children negatively. Consequently and because of the possible dissatisfaction that one of the parties experiences from time to time, the professionals are at "high risk" for having complaints laid against them.

10.3.6 Other respondents were of the view that parenting coordination should not be legislated.[176] The following arguments were advanced:

a) The facilitation model can be included as a subsection of the other ADR processes as a further option. Such a process should furthermore not be client-centred but should be child-focused. The Office of the Family Advocate could be of benefit. The role of the attorneys should be strictly regulated to save time and cost.[177]

b) It is very difficult to facilitate or direct in these disputes:[178]

   (i) Practical experience has shown that parenting coordinators are sometimes not properly qualified to give directives, and that such directives may have negative consequences which are to the detriment of children. The parenting coordinator should be someone of great experience, and preferably a legal practitioner, as the outcome of facilitation should be as close as possible to an eventual court order. The legal practitioner may call in expert advice from a mental health expert, if required.

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176 Office of the Family Advocate; Cape Law Society (Ms Zenobia du Toit); Ms Karen Botha; Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD; LSSA.

177 Office of the Family Advocate.

178 Cape Law Society (Ms Zenobia du Toit); LSSA comments.

(ii) In practice, facilitation has developed into something of a litigious adversarial process that has proven to be very costly. Often both parties have legal practitioners advising them on the side while the facilitation process is going on and they have to pay the fees of the parenting coordinator in addition.

(iii) The process has caused some concern among practitioners and has in certain circumstances had extended and damaging effects. It has also caused friction between parties, particularly where the same person is both the mediator and the parenting coordinator. Some instances of bias in such cases have occurred.

(iv) It is extremely difficult to remove a parenting coordinator, even if he or she has not behaved administratively in the manner he or she should have. It is very costly to launch a court application to remove a parenting coordinator. Therefore, utmost care and caution should be exercised in appointing a parenting coordinator.

(v) Facilitation in such situations should only take place in the most exceptional cases and not as a matter of course. That is not to say that facilitation does not work in certain matters, but it should be restricted to the extreme cases.

c) A person outside of the family should not have the power to make decisions on the family's behalf.[179]

d) There are currently quite a number of ADR processes. To introduce even more might be counterproductive and confusing, and the question is how parenting coordination in essence will differ from the processes already available.[180]

10.3.7 Finally, one respondent[181] indicated that, if considered an option, facilitation should be well regulated, preferably with judicial oversight.

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179 Ms Karen Botha.

180 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD.

181 Ms Jakkie Wessels, Regional Court President: Limpopo Regional Division.

10.4 Matters to be considered

a) Appointment of the parenting coordinator

(i) Basis for appointment of parenting coordinator

10.4.1 As discussed above, the current basis of a parenting coordinator's appointment has been either –

- a parenting plan or settlement agreement between the parties;
- a parenting plan or settlement agreement between the parties that has been made an order of court; or
- a court order in the absence of agreement.

10.4.2 In South Africa there is no agreement yet in the courts in respect of this issue.[182] At the Cape Town meeting of experts it was noted[183] that the appointment of the parenting coordinator should be done by court order, because then the parenting coordinator would have more authority in the eyes of the parties. If the appointment is made by agreement only and the parties do not agree with the determination, they simply would not follow the directive.

10.4.3 It has been stated, in general, that to determine whether a parenting coordinator's appointment would amount to an improper delegation of judicial authority, one would have to consider the authority for the appointment of parenting coordinators in the given jurisdiction and the terms governing the specific appointment.[184]

10.4.4 As discussed above, the sections of the Constitution that are of particular relevance to determine the lawfulness of a parenting coordinator's appointment in terms of an agreement are section 165[185] and section 34.[186] Section 165 provides that the judicial authority of the Republic

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182 See the discussion above.

183 Dr Lynette Roux.

184 Montiel 2014 at 365.

185 Section 165 of the Constitution reads as follows:
"Judicial authority
165.(1) The judicial authority of the Republic is vested in the courts.

is vested in the courts and section 34 states that a party has the right to a fair hearing before a court. Section 28(2) of the Constitution is important as well, since it states that a child's best interests are of paramount importance in every matter concerning the child.

10.4.5 In the ***Lufuno*** case the constitutionality of private arbitration in view of section 34 was discussed. The principles with respect to private arbitration could, however, also apply to other forms of alternative dispute resolution, including parenting coordination.[187] Parties have the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, but if they agree to have their dispute decided by way of parenting coordination (a different, alternative process), this decision should be respected and supported by the courts. In such circumstances section 165 will be irrelevant, unless the agreement is *contra bonos mores*, in which case the agreement would not stand.

10.4.6 The voluntary nature of the choice of the parties to make use of an alternative process and the fact that the nature of the proceedings will be determined by agreement are the factors determining the constitutionality of the appointment of the alternative dispute resolution professional. See also the discussion of the scope of authority of the parenting coordinator below.[188]

10.4.7 The Commission, therefore, proposes that a parenting coordinator may be appointed pursuant to a parenting coordination agreement,[189] provided that –

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(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts."

186 Section 34 of the Constitution is important in this regard. It reads as follows:
"Access to courts
34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

187 See also the principles set out in Chapter 5 above with respect to family mediation, which also apply.

188 Par. 10.4(c) at 323.

189 Provision has not been made for the mandatory appointment of a parenting coordinator against the wishes of the parties because the constitutionality of such a provision has not yet been established beyond doubt and the practicality of the option is also open to question. Whether parenting coordination is voluntary or

(aa) an agreed parenting plan or court order is in existence with respect to parenting arrangements, contact with a child or prescribed matters;

(bb) the role of the parenting coordinator is expressly limited to supervising the implementation of and compliance with the parenting plan or court order;

(cc) any decision-making powers conferred on the parenting coordinator is confined to ancillary rulings that are necessary to implement the parenting plan or court order, but do not alter the substance of the parenting plan or court order or involve a permanent change to any of the rights and obligations defined in the parenting plan or court order;

(dd) a short-term, emerging and time-sensitive dispute or situation arises;

(ee) all rulings or directives of the parenting coordinator are subject to judicial review on limited grounds;

(ff) the person proposed for appointment as the parenting coordinator is suitably qualified and experienced to fulfil the role of parenting coordinator; and

(gg) the fees charged by the proposed parenting coordinator are fair and reasonable in the light of his or her qualifications and experience, that the parents can afford to pay for the services of the parenting coordinator, and that at least one of the parents agrees to pay for the services of the parenting coordinator.

(ii) High-conflict cases

10.4.8 The question has been posed whether parenting coordination should be available with respect to high-conflict cases only.

10.4.9 When one considers the various definitions of parenting coordination as set out above, it would seem as though this is indeed the case, but practical experience in South Africa indicates a contrary position. In some divisions of the High Court, a parenting coordinator is appointed as a matter of course in divorce matters in which children are involved.[190]

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mandatory will further have an effect on all aspects of the process, such as for example the review standard and the other limitations recommended in the court cases which support mandatory appointment. Firm conclusions on this issue will therefore be a matter for further discussion during the SALRC consultation process.

190 Facilitation appointments are commonly made in consent papers which are made orders of court in the Western Cape Division of the High Court. The typical clause provides for the appointment of a parent

10.4.10 Family dynamics are complex. In ***TC v SC*** a “high-conflict” parent is described as a type of person who manifests all-or-nothing thinking, inflexibility, unwillingness to compromise, and a tendency to accuse and blame.[191]

10.4.11 A "high-conflict case" under the Oklahoma Parenting Coordinator Act[192] is defined as any action for the dissolution of marriage, legal separation, paternity or guardianship in which minor children are involved and the parties demonstrate a pattern of ongoing litigation, anger and distrust, verbal abuse, physical aggression or threats of physical aggression, difficulty in communicating about and cooperating in the care of their children, or conditions that, in the discretion of the court, warrant the appointment of a parenting coordinator.[193]

10.4.12 Domestic violence cases inevitably involve imbalances of power, and issues of control and coercion.[194] Such cases might perhaps not be suitable for parenting coordination. A parenting coordinator should routinely screen prospective cases for domestic violence and decline to accept such cases if he or she does not have specialised expertise and procedures to manage effectively domestic violence issues. See section 6 of the Family Dispute Resolution Bill enclosed as Annexure B in this regard.

10.4.13 In ***TC v SC***, the court states that, while it does appear as if the parties in the case fall into the category of “high-conflict” parents, it may have to do with the fact that the divorce litigation is still underway, so emotions are running high and the parties have not yet had an opportunity to settle into their new reality. It may be that the parties would be able to resolve

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coordinator to resolve post-divorce disputes. The parent coordinator is generally required to be a psychologist, mediator, retired judge, lawyer or social worker with at least three years’ experience. The clause usually provides for the parent coordinator to be appointed by agreement between the parties, and if the parties cannot reach agreement on identifying a parent coordinator, provision is made for the parent coordinator to be appointed by the chairperson for the time being of a mediation association active in the area of the Family Mediators Association of the Cape (FAMAC). See also De Jong M “Is parenting coordination arbitration?” 2013 ***De Rebus*** (hereafter “De Jong 2013 ***De Rebus***”) 38 and John O’Leary “A critical reflection on mediation and facilitation practice” Miller du Toit Cloete Family Law Conference May 2009.

191 At par. [3].

192 Okla. Stat. Ann. tit. §43-120.2(2).

193 Montiel at 413.

194 De Jong 2013 ***De Rebus*** at 38. See also the discussion on family violence in Chapter 2.

ongoing parenting conflicts through mediation once the divorce has been finalised and a court order put in place with regard to residence and contact arrangements. Unless both parents consent to the appointment of a parenting coordinator, parenting coordination should only be imposed as a measure of last resort after mediation had been attempted but had failed, or would not appropriate because of special circumstances, such as domestic violence.[195]

10.4.14 It has been argued that facilitation (parenting coordination) should not be overused. A parenting coordinator should be appointed only if the parties have clearly demonstrated a long-term inability or unwillingness to make parenting decisions on their own; to comply with parenting agreements and orders; to reduce their child-related conflicts; and to protect their children from the effect of that conflict.[196]

10.4.15 A question posed[197] in SALRC Issue Paper 31 was whether there are certain disputes that are more amenable to facilitation than others. The following responses were received:

(aa) Trivial disputes that would clog the court are amenable to facilitation, specifically maintenance matters and changes in contact and care arrangements.[198] The matters that are simpler and not law-related are more amenable to facilitation.[199]

(bb) The amenability of disputes is mostly dependent on the parents' positions, psychological maturity and any possible psychological challenges in the parents' functioning, rather than the specific nature of a particular dispute.[200]

(cc) Certainly, disputes relating to purely financial matters would be more amenable to facilitation. Children's issues may be facilitated but there would most probably have to be input from an expert. In particular, if the parenting coordinator is a legal practitioner, expert recommendations and advice may have to be obtained. Facilitation should be distinguished from arbitration, and such issues should rather be arbitrated.[201]

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195 ***TC v SC*** at par. [65.3].

196 De Jong 2013 ***De Rebus*** at 38.

197 SALRC Issue Paper Question 95.

198 Dr Astrid Martalas; Mr Craig Schneider.

199 Mr Craig Schneider.

200 Task Force on the Practice of Parenting Coordination in South Africa.

201 Ms Zenobia du Toit; LSSA.

10.4.16 The court, in ***TC v SC***, for the first time introduced the requirement in South Africa that high conflict should be a requirement for the appointment of a parenting coordinator under specific circumstances. The court endorsed the AFCC definition of parenting coordination as referred to in paragraph [37],[202] which makes provision for the role of the parenting coordinator to assist high-conflict parents. However, this understanding of the concept is not evident in the summary set out later,[203] since it is not a general condition for appointment of the parenting coordinator.[204] It is only stated as a condition when the parties do not consent to the appointment.[205] Furthermore, the court sets a very high bar, because the level of conflict can only be determined after the divorce has been finalised and a court order put in place, and the parties have failed to mediate their disputes.

10.4.17 In considering this position, it should perhaps be asked whether parenting coordination is not actually better suited to ordinary quarrelling parties, as opposed to parties who are very conflicted. In terms of the concept of parenting coordination, parties may go to court if they do not agree with the parenting coordinator's directive. High-conflict parties will most probably do so. See also the ***H v H*** case above and especially the ***Wright*** case, in which the court found that the resistant attitude of the parties meant that parenting coordination was unlikely to work.

10.4.18 An option that does not require that the level of conflict between the parties be determined should be considered. In terms of this option parties would be able to appoint a parenting coordinator based only on agreement.

(iii) Choice of parenting coordinator

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202 See par. [51.1]. See also further confirmation of this view in parr. [35] and [36].

203 See par. [71].

204 In accordance with par. [71.1].

205 See par. [71.2].

10.4.19 A parenting coordinator is appointed by the parties jointly to facilitate mutual decision-making when joint decisions are required.[206] The parenting coordinator should be chosen from a list of parenting coordinators who comply with the necessary qualification standards.

10.4.20 In the event of the parenting coordinator being unable to continue as parenting coordinator, he or she must appoint a new parenting coordinator to take over the role. Alternatively, a replacement parenting coordinator can be appointed by the chairperson of a dispute resolution body, such as FAMAC (in the Western Cape).[207]

(iv) Standards and accreditation

10.4.21 At present there are no national accreditation requirements for parenting coordinators, but the role should fall to someone who is deemed to be suitably qualified by training, experience and education. It has been argued that facilitation should not be seen as one of the more familiar ADR processes, but rather as a legal-psychological hybrid.[208]

10.4.22 Since parenting coordination is a "legal-psychological hybrid", a parenting coordinator should have adequate training in both areas. The AFCC Task Force on Parenting Coordination requires a parenting coordinator to have "training and experience in family mediation" and that the parenting coordinator be certified as a mediator in his or her jurisdiction if certification is available. In addition, the parenting coordinator should be –

(aa) a licensed mental health professional, or

(bb) a legal professional in a sphere relating to families, or

(dd) a certified family mediator under the rules or laws of the jurisdiction concerned, with a master's degree in a mental health field.[209]

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206 Dr Elzabe Durr-Fitschen, at the Cape Town meeting of experts, stated that the parties do not understand the parenting coordination process when they are requested to appoint a specific coordinator, often claiming they did not know that the parenting coordinator clause was part of the original settlement agreement.

207 Schneider presentation at 11. See also Guideline 2.5 of the Parenting Coordination Guidelines, 2016.

208 De Jong 2015 ***PER/PELJ*** at 154 and references made in fn 23.

209 See also Guideline 1 of the Parenting Coordination Guidelines, 2016.

In the AFCC ***Guidelines*** 2019, it is stated, under the heading "D. Arbitration/Decision-making Training", that a parenting coordinator should have training in decision-making processes where this function of the parenting coordinator role is permissible by law.[210]

10.4.23 Furthermore, the parenting coordinator should have "extensive practical experience in the profession with high conflict or litigating parents" and "training in the parenting coordination process, family dynamics in separation and divorce, parenting coordination techniques, domestic violence and child maltreatment, and court specific parenting coordination procedures". Parenting coordination has been described as "practicing at the interface of the legal/psychological fields".[211]

10.4.24 In addition to ordinary mediation training, a parenting coordinator should preferably have specific training in the process of parenting coordination.[212]

10.4.25 In SALRC Issue Paper 31 the question was asked [213] what qualifies a person to make personal family and childrearing decisions on behalf of other people.

10.4.26 Respondents answered that training and experience qualify a person to take these decisions.[214] One commentator[215] indicated that the parenting coordinator should be a senior

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210 AFCC ***Guidelines*** 2019 at 4.

211 Montiel at 403-404.

212 • The various functions of the parent coordinator and how to switch between them;
• issues that are appropriate and inappropriate for parenting coordination;
• characteristics of individuals who are suited and those who are not suited to participate in the parenting coordination process;
• when to refer parties to child protection services;
• how to draft, monitor and modify parenting plans;
• appropriate techniques for handling high-conflict parents, child alienation and domestic violence issues;
• when and how to use outside experts effectively;
• when and how to interface with the court system;
• grievance procedures; and
• possible ethical dilemmas.

213 SALRC Issue Paper 31, Question 92.

214 Dr Astrid Martalas; Mr Craig Schneider; Task Force on the Practice of Parenting Coordination in South Africa.

215 Cape Law Society (Ms Zenobia du Toit).

legal practitioner who would be able to give directives as close as possible to those a court would give.

10.4.27 A number of stakeholders indicated that nothing qualifies a person to make personal family and childrearing decisions about other people. If disputes are not settled, the court must have the final say.[216]

10.4.28 It was also mentioned[217] that parenting coordination is often child-focused, and issues are referred to a mental health or legal professional to assess and make recommendations. However, mental-health experts have expressed their discomfort with a role where they have to step outside a mediating function into a facilitative and directive function, namely providing referrals for advice and recommendation. Two parenting coordinators from different disciplines working together may be a possibility.

(v) Timing of appointment

10.4.29 It has been asked whether a parenting coordinator should be appointed[218] –

(aa) immediately upon the commencement of a divorce proceeding; or

(bb) after a court has entered an interim order establishing arrangements for care and contact during the pendency of the divorce proceeding; or

(cc) after a parenting plan has been agreed to between the parties; or

(dd) only after a court has entered a judgment of divorce that includes a final care and contact determination and a parenting plan.

10.4.30 A further question relates to an application for modification of the previously entered parenting plan. Should a court immediately appoint a parenting coordinator or appoint a parenting coordinator after entering an interim order on the modification application, or appoint a parenting coordinator only after it has entered a judgment on the modification application?

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216 Mr Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD; Ms Karen Botha.

217 Schneider presentation at 9.

218 Montiel at 405-406 as revised for South African circumstances.

10.4.31 It is clear from the discussion of the South African case law that the courts are not in agreement as to the stage at which a parenting coordinator should be appointed.

10.4.32 The AFCC Task Force Guidelines indicate that parenting coordination is proper only when there already is a parenting plan or court-ordered custody and visitation arrangement in place. The Task Force defines parenting coordination as assisting "high conflict parents to implement their parenting plan ..."[219]. It describes the objective of parenting coordination as to "assist high-conflict parents to implement their parenting plan, to monitor compliance with the details of the plan, to resolve conflicts regarding their children and the parenting plan in a timely manner, and to protect and sustain safe, health and meaningful parent-child relationships".[220]

10.4.33 Some US states do allow appointment of a parenting coordinator prior to the court's entering an order.[221] For example, Florida allows the appointment of a parenting coordinator "where an order is sought or entered"[222] and allows the parenting coordinator to assist the parties in creating and implementing the parenting plan. Oregon also appears to allow appointment prior to entry of a court order by allowing a parenting coordinator to assist the parties in creating and implementing a parenting plan.[223] Arizona's rule is the same.[224] North Carolina only permits appointment before an order has been entered with the consent of the parties.[225]

10.4.34 An appointment after the parenting plan has been completed and made an order of court limits the role of the parenting coordinator to implementing the plan rather than drawing up the plan. It has been argued that this has a twofold benefit. First, if the parenting coordinator were allowed to make decisions regarding the content of the plan, it could be regarded as "an improper delegation of judicial authority" and as running counter to section 33(2), read together with section

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219 AFCC ***Guidelines*** 2005 at 165; AFCC ***Guidelines*** 2019 at 2.

220 Montiel at 406.

221 Montiel at 409.

222 FLA. STAT. ANN. §61-125.

223 OR. REV. STAT. ANN. §107.425(3)(a).

224 ARIZ. R. FAM. L. PROC. 74(G) (allowing appointment "prior to, simultaneously with, or after entry of a decree, judgment or custody or parenting time order") Amended.

225 N.C. GEN. STAT. ANN. §50-91 ("The court may appoint a parenting coordinator at any time during the proceedings of a child custody action involving minor children ... if all parties consent to the appointment.")

33(5), of the Children's Act, which requires parents to "seek agreement" or engage in "mediation" when preparing a parenting plan. Limiting the appointment to after the trial court has entered an order only, and so limiting the parenting coordinator's role to implementing the pre-existing court order, weakens arguments that parenting coordination is an improper delegation of judicial authority.[226]

10.4.35 The second benefit of appointing the parenting coordinator after the parenting plan has been finalised is that it prevents the parenting coordinator from fulfilling sequential or multiple roles, namely that of a traditional mediator in assisting parents to come to an agreement regarding a parenting plan and then fulfilling the entirely different role of the decision-making parenting coordinator. Parenting coordinators should therefore act as enforcers and implementers rather than as creators of the parenting plan.[227]

10.4.36 The court, in ***Centre for Child Law v NN and NS***,[228] appointed a parenting coordinator to assist the two sets of parents in developing a parenting plan. However, parenting plans include matters about which a parenting coordinator traditionally cannot give any directives, for instance care and guardianship, so it may be more appropriate to appoint a mediator to assist the parties in the development of a parenting plan. This would also be in compliance with the current provisions in the Children's Act.

10.4.37 In the ***TC v SC*** case, the underlying tenet the court used to distinguish the facts in this case from those of the ***H v H*** case, which forms the basis of the decision, is the view that parenting coordination should in all instances only be available when a parenting plan has been agreed to and incorporated in a court order. One should, however, consider the fact that in South Africa the Children's Act provides that parties <u>may</u> agree on a parenting plan[229] and <u>must seek</u> to agree[230] on the plan before they may seek the intervention of the court. Many parties, especially high-conflict parties, will, therefore, end up without a parenting plan and their disputes

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226 Martalas A "That which we call parenting coordination … or where is the baby?" Presentation made at the Miller du Toit Conference in Cape Town 2016 at 26 with reference to De Jong ***PER/PELJ*** 2015 at 167.

227 Ibid.

228 See discussion of the case in par. 10.2.57 above.

229 Section 33(1) of the Children's Act, 2005.

230 Section 33(2) of the Children's Act, 2005.

will have to be determined by the trial court.[231] Once they have divorced and the court has made an order dealing with the parental responsibilities and rights, one could ask why the parenting coordinator could not assist them to implement the order, in so far as small matters are concerned. Both courts agreed that a parenting coordinator should not be appointed to assist with the development of a parenting plan, but the question can be asked whether this should not be a factor to be considered when addressing the powers of the parenting coordinator and not as a condition for appointment.

10.4.38 The proposal for consideration is therefore that a parenting coordinator may be appointed, subject to the agreement of the parties, pursuant to a parenting plan or a court order that provides for the exercise of co-parents' parental responsibilities and rights.[232]

(vi) Payment

10.4.39 Some states in the United States make the ability to pay a statutory condition precedent to the appointment of a parenting coordinator.[233] However, the requirement that only children of parents with the ability to pay are to benefit from parenting coordination weakens the argument that part of the justification for a parenting coordinator's "intrusion" into the family is the state's obligation to ensure the best interest of children.[234] In ***TC v SC***, the court included the following requirement for the appointment of a parenting coordinator without the consent of both parties:

> 68.4 That the fees charged by the proposed PC [parenting coordinator] are fair and reasonable in the light of his or her qualifications and experience, that the parents can afford to pay for the services of the PC, and that at least one of the parents agrees to pay for the services of the PC. It goes without saying that a court should not impose a parenting coordinator on parties where they are not in a position to pay for services, where the parenting coordinator's proposed charges are unreasonable or where neither party is willing to pay for the services of the parenting coordinator.

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231 ***T v C*** at [72.2].

232 See also the responses from stakeholders to Question 99 in SALRC Issue Paper 31, to the effect that parenting coordinators should be appointed either prior to or after a court order has been made.

233 See, for example, OKLA. STAT. ANN. tit. 43, §120.5; N.C. GEN. STAT. ANN. §50-91(b).

234 Montiel at 411.

10.4.40 Where the parenting coordinator is appointed by agreement between the parties, the ability of the parties to pay for the services of the parenting coordinator need not necessarily be considered as a separate issue.

b) Scope of authority of parenting coordinator once appointed

(i) General: minor decisions

10.4.41 It has been said, in general, that parties, legal practitioners and the courts should be cautious about giving too much power to a parenting coordinator, especially if the person is not suitably qualified.[235]

10.4.42 In most jurisdictions in the USA and Canada, parenting coordinators are allowed to make decisions on minor issues only, such as temporary changes to the contact schedule which do not substantially alter the basic allocation of time-sharing between the parents, the transport and "handover" of the child between the two homes, the temporary care of a child by a person other than one of the parents, telephone and skype contact with the non-resident parent, a child's daily routine (including extramural activities) and routine medical care.[236]

10.4.43 The apparent triviality of the kinds of issue that parenting coordinators may be authorised to decide on should not cause one to lose sight of the importance of the parenting coordinator's function. Research has shown that high-conflict parents are more prone to arguing about day-to-day issues than major child-related decisions. It bears emphasis that ongoing parental conflict over minor – even petty – issues can have a major impact on the well-being of children post-divorce.[237]

10.4.44 The Idaho rule providing for parenting coordination lists matters in which a parenting coordinator may and may not make a decision. Idaho allows the parenting coordinator to make decisions only in so far as necessary to serve the best interest of the rule.

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235 De Jong 2013 ***De Rebus*** at 38.

236 ***TC V SC*** at [63] with reference to De Jong at 168.

237 ***TC v SC*** at [66].

10.4.45 The rule provides as follows:

> The Parenting Coordinator will make such decisions or recommendations as may be appropriate when the parties are unable to do so. The goal of the Parenting Coordinator should always be to empower the parents in developing and utilizing adaptive parenting skills so that they can resume the parenting and decision making role in regard to their own children. When it is not possible for the parents to agree, the Parenting Coordinator shall provide only the amount of direction and service required in order to serve the best interest of the child by minimizing the degree of conflict between the parties.[238]

10.4.46 Examples are provided "[b]y way of illustration and not limitation," of what matters a trial court may authorise a parenting coordinator to determine. A parenting coordinator in Idaho may be granted the authority to make decisions regarding[239] –

(aa) time, place, and manner of pickup and delivery of the children;

(bb) child care arrangements;

(cc) minor alterations in parenting schedule with respect to weeknight, weekend, or holiday visitation that do not substantially alter the basic time share allocation;

(dd) participation by significant others and relatives in visitation;

(ee) first and last dates for summer visitation;

(ff) schedule and conditions of telephone communication with the children;

(gg) manner and methods by which the parties may communicate with each other;

(hh) approval of out-of-state travel plans; and

(ii) any other issues submitted for immediate determination by agreement of the parties.

10.4.47 Furthermore, a parenting coordinator may not be authorised by a court order to make decisions on certain issues. On the following issues a parenting coordinator may make only recommendations to the court:[240]

(aa) which parent may authorise counselling or treatment for a child;

(bb) which parent may select a school;

(cc) supervision of visitation;

(dd) submission to a custody evaluation;

(ee) appointment of an attorney or guardian *ad litem* for a child; and

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238 IDAHO R. CIV. P. 16(i)(1).

239 IDAHO R. CIV. P. 16(i)(5)(B)

240 IDAHO R. CIV. P. 16(I)(5)(C).

(ff) financial matters, including child support, health insurance, allocation of dependency exemptions and other tax benefits, and liability for particular expenditures for a child.

10.4.48 Arizona's rule[241] of court allowing for a parenting coordinator appointment also limits the issues on which a parenting coordinator may make a decision, but that limitation is to exigent circumstances. Arizona's rule does not grant the parenting coordinator any decision-making authority outside of the following provision, which allows for decision-making in times of exigency:

> When a short-term, emerging, and time sensitive situation or dispute within the scope of authority of the parenting coordinator arises that requires an immediate decision for the welfare of the children and parties, a parenting coordinator may make a binding temporary decision.

10.4.49 Like Idaho's rule, this achieves some balance between granting enough decision-making authority for effectiveness but not so much as to constitute an improper delegation of judicial authority, in terms of the applicable law.[242]

10.4.50 In South Africa, the view held in ***TC v SC*** is that it is possible, by means of appropriate limitations on the scope of the parenting coordinator's authority, to craft a role for a parenting coordinator which does not constitute an unlawful delegation of judicial decision-making authority. This view was not confirmed in ***Van der Merwe v Bruwer***, though. See, however, the support of ***Van der Merwe v Bruwer*** for ***H v H***, where it stated that the appointment of a decision-maker to break deadlocks is a delegation of the court's power, itself an impermissible act.

10.4.51 In the Constitutional Court case of ***Executive Council of the Western Cape Legislature ao v President of the Republic of South Africa ao***, [243] Parliament's authority to delegate was discussed and the following was stated:

> … But if Parliament does not have the constitutional authority to delegate this power to the executive or to any other body, the reasonableness of the delegation or the absence

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241 ARIZ. R. FAM. L. P. 74(G). (Amended).

242 Montiel at 436.

243 ***The Executive Council of the Western Cape Legislature ao v The President of the Republic of South Africa ao*** 1995 (4) SA 877 (CC) at par. [64].

of objection is irrelevant. The only way in which Parliament can confer power on itself to act contrary to the Constitution is to amend the Constitution.

10.4.52 This principle could also be applicable to the courts. Whether the parenting coordinator takes a decision on a minor issue or on a major issue, the effect will be the same if both decisions can be described as an exercise of judicial authority. It is therefore important to determine whether these so-called “minor decisions” fall within the category of judicial authority, which cannot be delegated,[244] or disputes that can be resolved by the application of the law,[245] with respect to which a party has the right to a fair hearing in a court. However, judicial power is notoriously difficult to define[246] and it is just as difficult to define “minor decisions” as decisions that cannot be resolved by the application of the law.

10.4.53 In deciding whether an improper judicial delegation has occurred in different contexts, courts have focused on whether the action delegated involved a "judicial function" or the "ultimate decision-making authority", or involved merely ministerial matters or "details." See, for example, ***United States v. Peterson***,[247] (holding that the delegation of the details of court-ordered therapy, including choosing a provider and schedule, was permissible) and ***United States v. Grant***,[248] (holding that the trial judge did not delegate a judicial function by directing the jury to tell the reporter to go faster or slower as the jury listened to testimony read-backs).[249]

10.4.54 As stated above, it is possible to accommodate parenting coordination when the parties agree to use, through self-restraint, a process that is different to a court process, such as parenting coordination. No delegation of authority takes place and arguably no decision needs to be taken whether the decision is minor or major in kind.

10.4.55 Even when the *constitutionality* of parenting coordination is not a challenge, binding decisions by a third party could still be seen as an imposition on the court’s *common-law position as upper guardian* of children and therefore against public policy or *contra bonos*

244 Section 165 of the Constitution.

245 Section 34 of the Constitution.

246 Family Law Council at 50.

247 ***United States v Peterson***, 248 F.3d 79, 85 (2d Cir. 2001).

248 ***United States v Grant***, 52 F.3d 448, 451 (2d Cir. 1995).

249 Montiel at 394.

mores.[250] Whereas any legislation has to comply with the constitutional prescripts, the common-law powers of the court may be superseded by legislation, as has happened quite often in the past.

10.4.56 It is clear that it would be a wise decision to limit the issues on which the parenting coordinator may make a decision. Either the legislative body or the court that establishes the parenting coordination program should limit the issues, striking a balance between not allowing the parenting coordinator to make decisions that are overly invasive of the trial court's role as upper guardian, but are merely ancillary to the decision the trial court has already made, and allowing the parenting coordinator to make decisions on enough issues that his or her role is meaningful and provides the benefits that parenting coordination is intended to offer.[251]

10.4.57 The possible inclusion should be considered of the Arizona rule, discussed above, in terms of which parenting coordination is allowed when an urgent need or demand dictates it.

(ii) Authority to effect changes to provisions of court order or parenting plan

10.4.58 In a case heard in the Gauteng Local Division, Johannesburg, in 2016, ***LM v Goldstein NO ao***,[252] the parenting coordinators issued two directives which granted the father full parental responsibilities and rights and which first restricted and then completely suspended the mother's parental responsibilities and rights by allowing her only supervised contact and later no contact with her children. In delivering judgment, the court held that the mandate of the parenting coordinators extended to the mediation and investigation of joint parental responsibilities and rights and not to the suspension or termination of these responsibilities and rights. The court further held that the parenting coordinators had acted outside their mandate, since the suspension of parental responsibilities and rights could only take place in terms of a court order as provided for in section 28(1) of the Children's Act. The court therefore held that the suspension of the mother's responsibilities and rights by the parenting coordinators was a nullity and had to be set aside. The court thereupon tasked the Office of the Family Advocate

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250 It would seem as though the only lawful option foreseen by the court in the ***Van der Merwe*** case would be a decision of the parenting coordinator that is not binding.

251 Montiel at 437.

252 ***LM v Goldstein NO ao*** 2016 (1) SA 465 (GJ).

with an investigation into the contact and residence arrangements and into the effect of the suspension of the mother's parental responsibilities and rights on the well-being of the children concerned.[253]

10.4.59 In ***Scheepers v Scheepers***,[254] a case heard in the Eastern Cape High Court, the court held that the directive issued by the facilitator that the children should move their primary residence from that of the mother to that of the father exceeded the mandate of the facilitator.[255]

10.4.60 At the Cape Town meeting of experts, delegates disagreed as to whether parenting coordinators should be able to change provisions in a court order. Some delegates[256] argued that the parenting coordinator should only assist the parties with minor decisions and with the implementation of the order, while other delegates[257] stated that the reality is that the order is changed all the time. A third option[258] raised was that a court order may not be changed, but that one could have an approach that would make a flexible interpretation of the order e possible.

10.4.61 It has been noted that the parenting coordinator is not really free to take independent action that might strictly fall within the province of the judiciary; instead, he or she is bound by the terms of the order that the court has already entered and should assist the parties in their attempt to comply with the court order.[259]

(iii) Binding decisions and meaningful court review

10.4.62 If there were no need for the parenting coordinator to make binding decisions and if recommendations to the parties on any issue would have been sufficient, this discussion would

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253 Martalas 2016 at 28.

254 ***Scheepers v Scheepers*** High Court of South Africa Eastern Cape Division, Grahamstown, Case No.: 5449/2016.

255 Martalas 2016 at 28.

256 For example Prof. Madeleen de Jong.

257 For example Dr Astrid Martalas.

258 Mr Justice Deon van Zyl.

259 Montiel at 406.

be much less complicated. In reality, the purpose of parenting coordination is to assist parties who are unable to make a joint decision to do so (especially when time is of the essence).

10.4.63 The question to be answered, therefore, is what the standard for review of a parenting coordinator's decision should be. Should provision be made for a dissatisfied party to take the parenting coordinator's decision on judicial review (as is the position with ordinary private arbitration) or should a full-hearing *de novo* appeal be available?

10.4.64 If the parenting coordinator's decision is subject to a lengthy and tedious review process, one of the primary benefits of parenting coordination – expeditious resolution of conflict – is sacrificed. A legal and effective parenting coordination program must strike a balance between a review that is adequate but is not so burdensome as to render parenting coordination futile.[260]

10.4.65 Another consideration is whether the parenting coordinator's reviewable decision is immediately effective or is stayed until a prescribed time period for "appeal" to the trial court has expired or the trial court has reviewed the parenting coordinator's decision. It could be argued that, where a parenting coordinator's decision is immediately effective, it has the force and effect of a trial court order, even if only for a short time. In some circumstances, that "interim" decision could effectively be the final decision, for example, if a parenting coordinator makes a decision regarding an upcoming visitation weekend and that weekend comes and goes before the trial court review. [261]

10.4.66 One might argue that if a parenting coordinator's decision were binding pending appeal, but the matter about which the parents are in dispute passed during the pendency, the review of the parenting coordinator's decision would be a court decision that comes so late as to be meaningless. That argument is perhaps legitimate. But, as set out above, the same is true without the parenting coordination process; the parties may not be able to get before a judge before the matter in dispute passes. So with or without parenting coordination, a decision made by the trial court may be so late as to be meaningless. In contrast, with the parenting coordination process some decision is at least made by some neutral party in a manner that is

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260 Montiel at 419.

261 Montiel at 425.

sufficiently timely as to be meaningful. "Staying" the effectiveness of a parenting coordinator's decision until the parties can go before the court for approval undermines the role of the parenting coordinator, which is to facilitate expedient resolution of conflicts. The judicial-review component of the parenting coordination process is necessary to uphold the parenting coordination process. However, any decision by the parenting coordinator should be binding pending review in order to fulfil one of the primary purposes of parenting coordination, namely, to reach decisions in a timely manner to the benefit of the parents and their children.[262] Parties may perhaps also request an "expedited hearing" to review a parenting coordinator's decision.[263]

10.4.67 In ***TC v SC***, the court held that an essential limitation to avoid an impermissible delegation of judicial authority is that all rulings or directives of the parenting coordinator should be subject to judicial oversight in the form·of an appeal in the wide sense described in ***Tikly ao v Johannes NO ao***, that is, "complete re-hearing of, and fresh determination of the merits of the matter with or without additional evidence or information".

10.4.68 However, in ***Van der Merwe v Bruwer*** the court held that the initial delegation by a court of judicial authority to a non-judicial person cannot subsequently be cured by the same court when it reviews the decision of such non-judicial person.[264] The right of either party to approach the High Court in order to review the judicial authority exercised by the parenting coordinator does not cure the unconstitutional and fundamental defect of delegating judicial authority to a social worker contrary to section 165 of the Constitution. Once that delegation is impermissible and unauthorised, the very act of delegation of judicial authority is, and remains, unauthorised.[265]

10.4.69 It is important to note that where parties have voluntarily decided to make use of an alternative dispute resolution process (namely parenting coordination), instead of using a judicial court process, as explained above, section 165 of the Constitution is not relevant, since no delegation of judicial authority by the court has taken place. Consequently, as is the position

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262 Montiel at 430.

263 N.C. GEN. STAT. ANN. § 50-92.

264 Par. [100].

265 Par. [101].

regarding private arbitration, a judicial review process, rather than a *de novo* appeal hearing, will be acceptable. However, as was made clear in the discussion of family arbitration in Chapter 9 above, it is the fact that when children are involved in the family dispute a review on the merits of the case in family arbitration is necessary in order to ensure that the award is in the best interests of the child. The position of the court as upper guardian of children therefore still has to be taken into account.

10.4.70 However, family arbitration should be distinguished from parenting coordination. Whereas there is no restriction on the family law matters that are arbitrable in family arbitration, parenting coordination is only available in very limited circumstances, mostly with respect to small factual disputes. These situations or disputes are furthermore short-term, emerging and time-sensitive. It can therefore be argued that legislation that will have only a very limited effect on the upper guardianship of the court will be justifiable as being in the best interests of a child.

10.4.71 The aim with parenting coordination is to curtail the quarrelling of the parents about, objectively speaking, inconsequential (not for them, though) matters. If they know that even if they do go to court, the chances are slim that the directive would be overturned, they may think twice before doing so. However, if there is a chance of a full re-hearing of the dispute, parties may be more likely to take the chance. Very-high-conflict parties would most probably go to court anyway, but would not be able to disrupt the child's life by doing so, if the directive would not be easily overturned.

c) Fair process

10.4.72 In the ***Lufuno*** case, the Constitutional Court stated that fairness is one of the core values of our constitutional order: the requirement of fairness is imposed on administrative decision-makers by section 33, on courts by sections 34 and 35, in respect of labour practices by section 23, and in relation to discrimination by section 9 of the Constitution., Unless its terms expressly suggest otherwise, an arbitration agreement should therefore be interpreted on the assumption that the parties intended the arbitration proceedings to be conducted fairly. Indeed, it may well be that an arbitration agreement that provides expressly for a procedure that is unfair would be *contra bonos mores*.[266]

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

10.4.73 The court went on to say that what constitutes fairness in any proceedings would depend firmly on context. Lawyers, in particular, have a habit of equating fairness with the proceedings provided for in the Uniform Rules of Court. Were this approach to be adopted, the value of arbitration as a speedy and cost-effective process would be undermined. It is now well recognised in jurisdictions around the world that arbitrations may be conducted according to procedures determined by the parties. As such the proceedings may be adversarial or investigative and may dispense with pleadings, with oral evidence and even with oral argument.[267]

10.4.74 The Constitutional Court's statements are relevant to all alternative dispute resolution processes, including parenting coordination.

10.4.75 In ***Van der Merwe v Bruwer***, the court considered whether the directive stands to be set aside on the separate ground that the parenting coordinator failed to ensure that the parties were afforded a fair hearing. The court found that, on the facts of the case, the parenting coordinator failed to ensure a fair hearing. The reasons given were that the applicant in the case was not informed of the exact nature of the relief sought by the respondent; the applicant did not have insight into the relevant financial documents; the applicant did not have the opportunity to make representations to the parenting coordinator or address her on the relevant issues; no hearing was held and therefore parties could not present evidence or conduct cross examination; and the parenting coordinator was a social worker and not legally qualified.[268]

10.4.76 Parenting coordination is currently an unregulated, informal and non-adversarial process. It is important to note that parenting coordination is not a hearing as one would expect to find in court, so one has to determine exactly what would be regarded as fair process. The following principles could be considered:[269]

(aa) The parenting coordinator should be impartial.

(bb) Both parties should have an opportunity to state their case (generally in the presence of the other party). Even though the dispute(s) is/are sent to the

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267 ***Lufuno*** at par. [223].

268 At parr. [106]-[112].

269 Dr Astrid Martalas in a submission to the SALRC dated 10 January 2019 (hereafter referred to as "Martalas submission").

parenting coordinator in writing, parties discuss their dispute during the consultation and the parenting coordinator attempts to mediate a resolution.

(cc) Both parties should have an opportunity to challenge or question each other's statements or views and ask for proof or supporting information.

(dd) The process should be transparent: the parenting coordinator may take into account only information that has been made available to both parties. This applies to information made available by third parties as well (a child can also be a third party). In the event that a meeting is held with one party, the information provided by that party must be made available to the other party.

10.4.77 In addition to resolving disputes, the goals of parenting coordination include assisting parents with skills to resolve disputes without a parenting coordinator, understanding the negative effects of ongoing high conflict on their children, etc. The term "hearing" in relation to parenting coordination may be confusing and misleading and one should rather use a term like consultation (generally, one should refrain from using terminology applicable to a court). If, for instance, one were to apply the rules applicable in a trial to a "hearing" when conducting parenting coordination, the parties could perhaps conceivably have been better off if they had gone to court.[270]

10.5 Conclusion: Proposed draft legislation

10.5.1 A parenting coordination programme must achieve an appropriate balance between various legal matters, including the stage in litigation at which appointment of a parenting coordinator will be allowed; under what conditions appointment will be allowed; whether the parenting coordinator will have decision-making authority; the reviewability of the parenting coordinator's decisions; and the limitations on the parenting coordinator's decision-making authority.[271]

10.5.2 The parenting coordinator assists parents in implementing their parenting plan or court order by helping them to resolve their disputes in a timely manner, by educating parents about children's needs, and by making decisions within the scope of the parenting plan or court order.

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[270] Martalas submission.

[271] Montiel at 439.

In the event of the parties being unable to reach agreement with the assistance of the parenting coordinator, the parenting coordinator is entitled to issue a directive in respect of such issue, which will be binding upon the parties pending review by a court of competent jurisdiction.[272]

10.5.3 The proposed draft legislation for inclusion in a Family Dispute Resolution Act could be worded as follows:

CHAPTER 7

PARENTING COORDINATION[273]

Parenting coordinator

42. *A person meeting the requirements set out in section 43 who assists parents in resolving family disputes pursuant to section 45 may act as a parenting coordinator.*

Requirements

43.(*1) The requirements for appointment as a parenting coordinator must be prescribed by regulation.*

(2) The minimum requirements for a person to be appointed as a parenting coordinator include that such person must -

(a) be a licensed mental-health professional or licensed legal practitioner practising in a sphere associated with families;

(b) have training and experience in family mediation and be a certified family mediator in terms of the Mediation Act, 20XX; and

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272 Schneider presentation at 10.

273 The following definitions contained in the Family Dispute Resolution Bill, enclosed as Annexure B below, are specifically relevant to this Chapter:
"parenting coordinator" means a person who may act as a parenting coordinator under section 42;
"parenting coordination agreement" means an agreement in writing between the parties to use a parenting coordinator and includes such an agreement that has been included as a parenting coordination clause in a parenting plan or divorce order;
"parenting coordination service agreement" means an agreement in writing between the parties and the parenting coordinator, governing their working relationship and including information regarding fee payments, billing practices and retainers;
"parenting plan" means a plan that determines parental responsibilities and rights as regulated in Chapter 3 of the Children's Act, 2005 (Act No. 38 of 2005);

(c) have training and experience in family arbitration and meet the requirements set out in section 39.

(3) A parenting coordinator who is not a licensed legal practitioner must not, while performing actions within the scope of his or her duties as a parenting coordinator, be considered to be engaging in the unauthorised practice of law.

(4) A person serving as a parenting coordinator with respect to a family dispute in terms of this Act may not create a professional conflict by serving in sequential or multiple roles with respect to the same dispute.

When parenting coordinators may assist

44.*(1) A parenting coordinator may assist parties in resolving a family dispute when a child is involved and in accordance with a parenting coordination agreement—*

(a) if there is a parenting plan or court order in place with respect to parenting arrangements, contact with a child or other prescribed matters;

(b) for the purpose of implementing the parenting plan or the court order;

(c) if a short-term, emerging and time-sensitive situation or dispute arises; and

(d) if the consent on which the parenting coordination agreement of the parties is based, constitutes informed consent.

(2) A parenting coordination agreement may be entered into in anticipation of, or as a result of, the need to appoint a parenting coordinator.

Parenting coordination service agreement

45. *(1) The parenting coordinator can only assume his or her duties once a parenting coordination service agreement has been signed.*

(2) A parenting coordinator's authority to act terminates two years after the parenting coordination service agreement was signed, unless the parenting coordination service agreement or a court order specifies that the parenting coordinator's authority must terminate at an earlier date or on the occurrence of a specified earlier event.

(3) Despite subsection (2), a parenting coordination service agreement may be extended for no more than two years by a further parenting coordination service agreement or a court order.

(4) Despite subsection (2), a parenting coordination service agreement may be terminated at any time—

(a) by agreement between the parties or by a court order made on application by either of the parties;

(b) by the parenting coordinator, on giving notice to the parties and, if the parenting coordinator is acting in terms of an order, to the court.

Exclusive jurisdiction of the court

46. *The appointment of a parenting coordinator does not divest the court of its exclusive jurisdiction to determine fundamental issues of guardianship, care, contact and maintenance, and the authority to exercise management and control of the case.*

Assistance from parenting coordinators

47*.(1) A parenting coordinator may assist the parties—*

(a) by building consensus between the parties by—

(i) giving guidelines on how a parenting plan or court order will be implemented;

(ii) giving guidelines for communication between the parties;

(iii) identifying and creating strategies for resolving conflicts between the parties; and

(iv) providing information about resources available to the parties for purposes of improving communication or parenting skills;

(v) identifying disputed issues; and

(vi) developing methods of collaboration and parenting; and

(b) by issuing directives in accordance with subsection (2) with respect to—

(i) parenting arrangements;

(ii) contact with a child.

(2) For the purposes of subsection (1)(b), a parenting coordinator—

(a) may issue directives in respect of—

(i) a child's daily routine, including the child's schedule in relation to parenting time or contact with the child;

(ii) the education of a child, including in relation to the child's special needs;

(iii) the participation of a child in extracurricular activities and special events;

(iv) the temporary care of a child by a person other than—

(aa) the child's guardian; or

(bb) a person who has contact with the child in terms of an agreement or order;

(v) the provision of routine medical, dental or other health care to a child;

(vi) the discipline of a child;

(vii) the transport and exchange of a child for purposes of exercising parenting time or contact with the child;

(viii) parenting time or contact with a child during holidays and special occasions; and

(ix) any other matters, other than matters referred to in paragraph (b), that are agreed on by the parties and the parenting coordinator; and

(b) may not make directives in respect of—

(i) a change to the guardianship of a child;

(ii) a change to the allocation of parental responsibilities;

(iii) the giving of parenting time or contact with a child to a person who is not entitled to parenting time or contact with the child;

(iv) a substantial change to the parenting time or contact with a child;

(v) the relocation of a child;

(vi) the need for supervised visitation by either parent; or

(vii) the need for psychological or psychiatric treatment for either parent.

Directives by parenting coordinators

48.*(1) A parenting coordinator–*

(a) may issue directives with respect to matters referred to in section 47only, subject to any limitation or conditions set out in the regulations;

(b) may not issue a directive in respect of any matter excluded by the parenting coordination agreement, even if the matter is noted in section 47;

(c) may not issue a directive that would affect the division or possession of property or the apportionment of family debt;

(d) must consider the child's views if the child has reached such an age and level of maturity and development as to be able to participate; and

(e) may not modify the parenting plan or court order other than minor, temporary departures from the parenting plan or court order.

(2) In issuing a directive with respect to parenting arrangements or contact with a child, a parenting coordinator must consider the best interests of the child only, as set out in section 7 of the Children's Act.

(3) A parenting coordinator may issue a directive at any time.

(4) A parenting coordinator must provide reasons in writing for the directive.

(5) A parenting coordinator may issue an oral directive, but must reduce the directive to writing and sign it as soon as practicable after the oral directive was issued.

(6) Subject to section 49, a directive issued in accordance with the provisions of this Chapter—

(a) is binding on the parties, effective from the date the directive is issued or from such later date as may be specified by the parenting coordinator, and

(b) if filed with the court as prescribed, is enforceable under this Act as if it were an order of the court.

Changing or setting aside directives

49.*(1) Any party to a directive issued by a parenting coordinator may, within 10 days after the parenting coordinator issued the directive or within such other period of time as the court may direct, file with the court, and serve on the parenting coordinator and all other parties, an objection to the parenting coordinator's directive.*

(2) Responses to the objections must be filed with the court and served on the parenting coordinator and all other parties within 10 days after the objection was served.

(3) The court must review the objections to the directive and the responses submitted to the objections to the directive and after so reviewing the objections and responses may amend or set aside the directive, if it is satisfied that the parenting coordinator—

(a) acted outside his or her authority; or

(b) committed an error of law or an error of mixed law and fact.

(4) The directive of the parenting coordinator must remain in effect until the court gives an order.

(5) If the court sets aside a directive, it may make any order to resolve a dispute between the parties in relation to the subject matter of the directive.

(6) If the court does not set aside a directive, it may make any order to enforce compliance with the directive.

Parenting coordination process

50. *The parenting coordination process, as prescribed, must include the following:*

(a) An impartial parenting coordinator;

(b) meetings between the parenting coordinator and the parties, which need not follow any specific procedure and may be informal;

(c) an opportunity for each party to state his or her case in the presence of the other party;

(d) an opportunity for each party to challenge or question the other party's statements or views and ask for proof or supporting information; and

(e) a transparent process.

Information sharing for parenting coordination

51.*(1) A party must, for purposes of facilitating parenting coordination, provide the parenting coordinator with—*

(a) such information as the parenting coordinator may request in accordance with section 5, and

(b) authorisation to request and receive information in respect of a child or a party from a person who is not a party.

(2) No communication between the parties and the parenting coordinator may be confidential.

Removal of parenting coordinator

52*.(1) If the appointment of the parenting coordinator was made in accordance with a parenting coordination service agreement, the parties may agree to remove the parenting coordinator.*

(2) If the appointment of the parenting coordinator was made by the court with the consent of the parties, the court may remove the parenting coordinator at the request and with the consent of both parties.

Fees

53.(*1) No parenting coordinator may be appointed unless the court is satisfied that the parties have the means to pay the fees of the parenting coordinator.*

(2) The state may not assume any financial responsibility for payment of fees to the parenting coordinator, except that, in cases of hardship, the court may appoint, if it is feasible, a parenting coordinator to serve on a voluntary basis.

(3) The fees of the parenting coordinator must be shared between the parties proportionally and in accordance with child support guidelines: Provided that the court may allocate the fees between the parties differently upon a finding of good cause by the court or on good cause set out in the parenting coordinator's report.

PART G: DRAFT FAMILY DISPUTE RESOLUTION BILL

Chapter 11: A proposed draft Family Dispute Resolution Bill

11.1 In this, the second, document to be published by the SALRC in its investigation into family dispute resolution, the Commission has attempted to develop and expand the proposals set out in its previously published Issue Paper.[1]

11.2 The preliminary proposals of the SALRC were summarised in Issue Paper 31 as follows:

> To develop recommendations for the further development of the family justice system that will –
>
> a) provide access to justice;
> b) provide appropriate resolution of family disputes;
> c) allow the voices of children and parents to be heard; and
> d) reduce legal costs.

11.3 Support from written submissions received, numerous discussions with various stakeholders and further research have strengthened the SALRC's original views. These principles now form the basis of the proposed draft Family Dispute Resolution Bill set out in **Annexure B** to this Discussion Paper.

11.4 The draft Bill comprises seven chapters. Chapter 1 contains the definitions and an introductory section setting out the objects of the Bill. Chapter 2 deals with certain general provisions applicable to all alternative dispute resolution processes, such as standards of professional responsibility and proposals concerning a protocol for dealing with coercive or violent relationships. Chapter 3 makes provision for mandatory attendance of information and education programmes, and Chapter 4 for mandatory engagement in family mediation programmes. Chapters 5, 6 and 7 are concerned with other forms of voluntary alternative dispute resolution programmes. Chapter 5 provides for the regulation of collaborative dispute resolution, Chapter 6 for family arbitration and Chapter 7 for parenting coordination. Finally, the miscellaneous and transitional provisions are contained in Chapter 8.

11.5 The SALRC's aim was to keep the proposed legislation as simple and accessible as possible. For the sake of clarity plain language has been used.

11.6 The SALRC's preliminary proposals as set out in the Bill will form the subject of a further consultative process. A series of workshops will be hosted across the country during February

[1] SALRC Issue Paper 31.

and March 2020 at which the draft Bill will be considered and discussed by interested parties. The preliminary proposals and draft legislation need to be debated thoroughly and the SALRC invites written comment from all parties interested in the issue under investigation. Furthermore, any person who wishes to attend one of the workshops should submit their particulars to the SALRC at the address provided on page (iii) above.

ANNEXURE A

LIST OF SUBMISSIONS RECEIVED IN RESPONSE TO ISSUE PAPER 31

1. Association of Parental Rights and Responsibilities Assessment Advisory Group (ASPARAGUS)
2. Barratt, Prof. Amanda – University of Cape Town
3. Boezaart, Prof. CJ – University of Pretoria
4. Boniface, Prof. Amanda – University of Johannesburg
5. Botha, Ms Karen – attorney, Benita Ardenbaum Attorneys
6. Child Welfare South Africa (Ms Julie Todd, National Head of Advocacy)
7. Commission for Gender Equality
8. Department of Justice and Constitutional Development (Mr Lawrence Bassett: Deputy Chief State Law Adviser)
9. Department of Social Development (Directorate: Families, Children's Act and Comprehensive Social Security)
10. Department of Social Development, Gauteng Province
11. Durr-Fitschen, Dr Elzabe (1) – clinical social worker in private practice
12. Durr-Fitschen, Dr Elzabe (2) – clinical social worker in private practice
13. Durr-Fitschen, Dr Elzabe (3) – clinical social worker in private practice
14. Family Mediators' Association of the Cape (FAMAC)
15. Familyzone (Dr Ronel Duchen & Ms Irma Schutte)
16. Gauteng Services to People with Disabilities (SPD)
17. Leppan, Ms Danilia – presiding officer, Children's Court, Wynberg
18. Martalas, Dr Astrid – psychologist
19. Mendelow, Mr Charles – attorney and mediator, Charles Mendelow & Associates Inc.
20. Ministry for Social Development, Western Cape
21. Nicholson, Prof. Caroline – University of the Free State

22. O’Leary, Mr John – attorney and mediator
23. Office of the Family Advocate
24. Paleker, Prof. Mohamed – University of Cape Town
25. Pro-Bono.Org - NGO
26. Roux, Dr Lynette – clinical psychologist
27. Rubain, Ms Suzette & Horn, Ms Johanna – attorney, Athlone Justice Centre, and clinical psychologist, respectively
28. Schneider, Mr Craig – attorney and mediator, Craig Schneider Associates
29. Scrazzolo, Ms Louise (1) – interested party
30. Scrazzolo, Ms Louise (2) – parent litigator
31. Task Force on the Practice of Parenting Coordination in South Africa
32. Tawonezvi, Ms Pasca – interested party
33. Terezakis, Mr Harry - parent litigator
34. The Cape Law Society (Ms Zenobia du Toit)
35. The Cape Law Society (Ms Sandra van Staden)
36. The Cape Law Society (Mr Craig Schneider)
37. The Justice and Reconciliation Centre (Mr Errol Goetsch)
38. The Law Society of South Africa (LSSA)
39. Wessel, Ms Jakkie – Regional Court President: Limpopo Regional Division
40. Wessels, Ms Marion – interested party
41. Women’s Legal Centre

PRESENTATIONS MADE AVAILABLE AT CONSULTATIVE MEETING, PRETORIA, WHERE ISSUE PAPER 31 WAS DISCUSSED

1. Du Toit, Ms Carina – Centre for Child Law, University of Pretoria
2. Faris, Prof. John – UNISA
3. Ozah, Ms Ronaldah Lerato Karabo – Centre for Child Law, University of Pretoria
4. Seabi-Mathope, Adv. Petunia – Chief Family Advocate
5. Sloth-Nielsen, Prof. Julia – University of the Western Cape
6. Swanepoel, Ms Erna – family counsellor, Office of the Chief Family Advocate

ANNEXURE B

DRAFT FAMILY DISPUTE RESOLUTION BILL, 2020

BILL

A Bill to provide for ……..

PREAMBLE

RECOGNISING THAT –

- everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, independent and impartial tribunal or forum as provided in section 34 of the Constitution;

AND BEARING IN MIND THAT –

- every child has the rights set out in section 28 of the Constitution;
- every person has an inherent right to dignity and to have that dignity respected and protected as provided in section 10 of the Constitution;
- every person has the right to privacy as provided in section 14 of the Constitution; and
- the state must respect, protect, promote and fulfil the rights set out in the Bill of Rights as provided in section 7 of the Constitution;

AND IN ORDER TO –

- provide access to justice;
- provide appropriate resolution of family disputes;
- allow the voices of children and parents to be heard;
- reduce legal costs; and
- expedite the resolution of family disputes,

BE IT THEREFORE ENACTED BY the Parliament of the Republic of South Africa as follows:–

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CHAPTER 1
DEFINITIONS AND PURPOSE

1. Definitions

In this Act, unless the context indicates otherwise—

"arbitration tribunal" means the arbitrator or arbitrators acting as such under an arbitration agreement;

"certified mediator" means a person whose name has been entered in the register of certified mediators under the Mediation Act, 20XX;

"Chief Justice" means the Chief Justice of South Africa appointed in terms of section 174(3) of the Constitution;

"collaborative dispute resolution participation agreement" means an agreement in writing by persons to participate in a collaborative dispute resolution process;

"collaborative dispute resolution process" means a procedure intended to resolve a collaborative matter, without intervention by a court, in which persons—

(a) sign a collaborative dispute resolution participation agreement; and

(b) are represented by collaborative legal practitioners;

"collaborative legal practitioner" means a legal practitioner who represents a party in a collaborative dispute resolution process;

"collaborative matter" means a family law dispute which is described in a collaborative dispute resolution participation agreement;

"**Constitution"** means the Constitution of the Republic of South Africa, 1996;

"court" means any court in the Republic as provided in section 166 of the Constitution;

"dispute resolution process" includes family mediation, family arbitration, collaborative dispute resolution and parenting coordination;

"entry point" means the first point of access to the justice system for parties to a family law dispute, and includes—

(a) courts, social workers, legal practitioners, the Office of the Family Advocate, police stations, Thusong Service Centres, Therisano Centres; Legal Aid South Africa, and community advice centres;

(b) traditional courts;

(c) community courts, university law clinics, non-governmental organisations and community-based organisations;

(d) churches and schools; and

(e) any other prescribed entry point;

"family" means a societal group that is or has been related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or cohabitation;

"family law dispute" means a dispute, or alleged dispute, in which one party maintains a particular point of view or claim or contention regarding the parties' respective responsibilities, interests and rights towards, or with respect to, any member of the family to which both parties belong, and the other party maintains a contrary or different one;

"family dispute resolution professional" means any of the following:

(a) a government employee tasked with dealing with family law disputes and includes a family advocate, social worker, social service practitioner, court official, police officer, and a Legal Aid South Africa employee;

(b) a legal practitioner advising a party in relation to a family law dispute;

(c) a mediator conducting a mediation in relation to a family law dispute;

(d) a collaborative legal practitioner;

(e) a parenting coordinator;

(f) an arbitrator conducting an arbitration in relation to a family law dispute; and

(g) a person providing family dispute resolution services within a class of prescribed persons, or any other person designated by the Minister;

"information and education programme" means a programme developed in accordance with this Act for the purpose of providing relevant information and education to the parties involved in a family dispute;

"law firm" means legal practitioners who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company or association;

"legal practitioner" means an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30 of the Legal Practice Act, 2014 (Act No. 28 of 2014);

"mediation" means a process in which a mediator facilitates and encourages communication and negotiation between the mediating parties and seeks to assist the mediating parties in arriving at a voluntary agreement;

"mediator" means a neutral third party who conducts the mediation;

"Minister" means the Cabinet member responsible for social development or, where the context indicates another Minister, that Minister;

"non-party participant" means a person, other than a party and the party's collaborative legal practitioner, that participates in a collaborative law process, including support persons, mental-health professionals, financial neutrals and potential parties;

"parenting coordinator" means a person who may act as a parenting coordinator under section 42;

"parenting coordination agreement" means an agreement in writing between the parties to use a parenting coordinator and includes such an agreement that has been included as a parenting coordination clause in a parenting plan or divorce order;

"parenting coordination service agreement" means an agreement in writing between the parties and the parenting coordinator, governing their working relationship and including information regarding fee payments, billing practices and retainers;

"parenting plan" means a plan that determines parental responsibilities and rights as regulated in Chapter 3 of the Children's Act, 2005 (Act No. 38 of 2005);

"person" means a natural person;

"prescribed" means prescribed by regulation;

"proceedings" means any court litigation, settlement or alternative dispute resolution processes and includes the provision of legal advice;

"programme provider" means a person qualified and appointed in terms of section 12(3);

"Republic" means the Republic of South Africa; and

"this Act" includes any regulation made in terms of this Act.

Objects of this Act

2.(1) The objects of this Act are to—

(a) ensure that consistent, standardised and accurate basic legal information is provided to parties to a family law dispute in relation to all areas of applicable legal services;

(b) ensure that parties to a family law dispute are informed of the various processes available to them to resolve the dispute;

(c) encourage parents and guardians to resolve conflict in the best interests of the child, other than through court intervention; and

(d) regulate alternative dispute resolution processes.

CHAPTER 2
GENERAL PRINCIPLES

Standards of professional responsibility and mandatory reporting not affected

3. This Act does not affect—

(a) the professional responsibility, obligations and standards applicable to a legal practitioner or other licensed professional; or

(b) the obligation of a person to report abuse, neglect, abandonment or exploitation of a child or adult under the law of the Republic.

Urgent order

4. During a dispute resolution process, a court may at any time issue an urgent order to protect the health, safety, welfare or interest of a child or other family member.

Disclosure of information

5.(1) Except as provided by law other than this Act, a party must, during the dispute resolution process, at the request of another party, make timely, full, candid and informal disclosure of information related to the family law matter without formal discovery.

(2) A party must promptly update previously disclosed information that has materially changed.

(3) Failure of a party to comply with subsection (1) has the effect that a negative inference may be drawn about that party's bona fides, and in the event of any subsequent court proceedings a punitive order as to costs may be made at the discretion of the court.

Coercive or violent relationship

6.(1) A family dispute resolution professional consulted by a party to a family law dispute must, as a first step, make reasonable enquiries whether any of parties has been involved in a coercive or violent relationship with any other party.

(2) Throughout a dispute resolution process, the family dispute resolution professional concerned must reasonably and continuously assess whether any of the parties to the dispute resolution has been involved in a coercive or violent relationship with any other party.

(3) If a family dispute resolution professional reasonably believes that any of the parties to the family dispute has been involved in a coercive or violent relationship with any other party, the family dispute resolution professional may not begin with or continue with the dispute resolution process unless—

(a) the potentially vulnerable prospective party or the potentially vulnerable

party requests the commencement or continuation of the process; and

(b) the family dispute resolution professional reasonably believes that the safety of the potentially vulnerable party can be adequately protected during the process.

(4) A family dispute resolution professional's failure to protect a party in terms of this section does not allow a private cause of action against the dispute resolution professional.

Voice of the child

7. During all dispute resolution processes, child participation in family disputes involving children should be actively facilitated in accordance with the provisions of the Children's Act, 2005.

CHAPTER 3
INFORMATION AND EDUCATION

Reception at entry point

8.(1) A family dispute resolution professional concerned consulted by a party to a family law dispute must inform the parties about—

(a) the mandatory and non-mandatory aspects and content of the family law information and education programme as set out in this Chapter; and

(b) the consequences of non-participation.

(2) If the dispute resolution professional has not been appointed as a programme provider, he or she must refer the party to a programme provider appointed in terms of section 12(3) for purposes of participating in an information and education programme.

Information and education programme

9.(1) The Minister, in collaboration with the Minister of Justice and Correctional Services, must develop—

(a) minimum standards for an information and education programme for the purpose of educating family members about the effect of a family dispute on adults and children, and about the manner in which such a dispute may be resolved; and

(b) an information and education programme in accordance with the minimum standards contemplated in paragraph *(a)* and in accordance with this Act.

(2) The minimum standards developed in terms of subsection (1)(a) must address—

(a) the nature of the programme;

(b) the funding of the programme;

(c) the effect of cultural diversity on the nature of the programme;

(d) the importance of acknowledging the voice of the child;

(e) arrangements for disputes in which domestic violence or child abuse may be a factor;

(f) the qualifications of programme providers; and

(g) the means of evaluating and maintaining the programme.

(3) Once the information and education programme has been developed, but prior to implementation, it must be submitted to the Chief Justice for consultation.

Content of information and education programme

10.(1) The information and educational programme referred to in subsection 9(1)(b) must at a minimum include instruction about the following matters—

(a) as set out in Part A of the programme:

(i) Ways in which family law disputes may be resolved other than by the court;

(ii) the suitability of mediation, or of any other way of resolving disputes, such as family arbitration or collaborative dispute resolution, as a possible way of resolving the dispute to which the matter concerned relates;

(iii) the nature of mandatory mediation as set out in this Act;

(iv) the availability of independent legal advice and representation to a party;

(v) the conditions for obtaining legal aid and where the parties can get appropriate legal advice;

(vi) referral to other non-legal service providers or agencies;

(vii) the legal process of divorce or separation and the responsibilities and rights of parties in all circumstances;

(viii) the nature of financial issues that may arise as aresult of divorce or separation, and services that are available to assist the parties; and

(ix) protective measures available in the case of violence and all forms of abuse and how to obtain support and assistance; and

(b) as set out in Part B of the programme:

(i) The role of the Office of the Family Advocate;

(ii) the emotional, psychological, physical and other short-term and long-term effects of conflict on both children and adults;

(iii) the importance of recognising the welfare, wishes and feelings of children;

(iv) how the parties may acquire a better understanding of the manner in which children can be assisted to cope with the breakdown of a relationship or with any other family dispute;

(v) the importance of avoiding the placing of children in the centre of conflict;

(vi) information for children and parents about separation and divorce, and their adjustment after the separation or divorce;

(vii) the responsibilities and rights of parents and the advantages of parenting plans;

(viii) the suitability of parenting coordination; and

(ix) the role of support systems.

(2) Apart from the matters referred to in subsection (1), the information and education programme must also include instruction about the following matters set out in Part C of the programme:

(a) The developmental and psychological needs and responses of children;

(b) the positive parenting behaviour skills needed to build a cooperative parallel parenting relationship; and

(c) the importance of a parent taking care of him- or herself in order to be able to help his or her children to adjust.

Format of the programme

11.(1) The format of the programme must include, but not be limited to, the following communication tools as prescribed:

(a) Internet website;

(b) audio-visual materials;

(c) in-person lectures; and

(d) literature.

(2) The communication tools referred to in subsection (1) above must be provided in a party's home language at prescribed locations.

Availability, administration and implementation of programme

12.(1) The Minister must oversee the administration, adoption and implementation of the programme at all entry points, other than the courts, for use by participants who are required to attend.

(2) The Office of the Chief Justice must oversee the administration, adoption and implementation of the programme in the courts, for use by participants who are required to attend.

(3) An information and education programme must be offered by a person who—

(a) is qualified and was appointed as prescribed; and

(b) has no financial or other interest in any aspect of the family dispute between the parties.

(4) Subject to subsection (3), nothing precludes a dispute resolution professional from acting as programme provider.

(5) The information and education programme must be available at the places and times prescribed.

(6) Information as prescribed must be provided to parties (other than during an information and education programme) in cases where mandatory participation in a programme does not apply.

Applicability of programme

13.(1) The parties in any family law dispute that—

(a) does not affect the rights or interests of a child, must participate in the information and education programme contemplated in section 10(1)*(a)*, as set out in Part A of the programme;

(b) affects the rights or interests of a child, must—

(i) participate in the information and education programme contemplated in section 10(1)*(a)* and *(b)*, as set out in Parts A and B of the programme; and

(ii) ensure that a child involved in the family dispute receives the information contemplated in in section 10(1)(b)(vi),

before any proceedings may commence, unless—

(aa) a court determines, for reasons that may include urgency and possible hardship, that participation is not in the best interests of the parties or the child;

(bb) a party is or will be enrolled in an education programme that the court deems to be comparable;

(cc) a court determines that a party has previously completed an educational programme pursuant to this section, or a comparable programme, and the court is of the opinion that the party need not attend the programme again;

(dd) a family dispute resolution professional is of the opinion that the safety of the parties or of their children is at risk;

(ee) a party lives in an area where the programme is not available; or

(ff) the court determines that participation is unnecessary in the circumstances of the case concerned.

(2) Parties in any family law dispute that affects the rights or interests of a child may participate in the information and education programme contemplated in section 10(2), as set out in Part C of the programme, before any proceedings commence.

Certificate of attendance

14. A programme provider appointed in terms of section 12(3) must furnish each party who attends with a—

(a) certificate of attendance as prescribed; and

(b) list of available certified mediators.

Compliance

15.(1) Failure of a party to comply with section 13(1)*(a)* has the effect that—

(a) when both parties refuse to participate, no further proceedings may take place; and

(b) when one of the parties refuses to participate, a negative inference may be drawn regarding that party's bona fides and a punitive order as to costs, or any other appropriate order, may be made at the discretion of the court in the event of any subsequent court proceedings.

(2) Failure of a party to comply with section 13(1)(b) has the effect that—

(a) when both parties refuse to participate, no further proceedings may take place; and

(b) when one of the parties refuses to participate—

(i) a negative inference may be drawn as to that party's intentions regarding the best interests of the child concerned; and

(ii) a punitive order as to costs, or any other appropriate order, may be made at the discretion of the court in the event of any subsequent court proceedings.

(3) Failure of a dispute resolution professional to comply with section 8 will result in—

(a) a negative inference being drawn with respect to the bona fides of the family dispute resolution professional, and when the rights or interests of a child are affected, to the professional's intentions regarding the best interests of the child concerned; and

(b) a punitive order as to costs, or any other appropriate order, may be made, where applicable, at the discretion of the court in the event of any subsequent court proceedings.

CHAPTER 4
FAMILY MEDIATION

Application of Mediation Act

16. The provisions of the Mediation Act, 2019, apply to any mediation matter conducted in terms of this Chapter, to the extent that—

(a) such a matter has not been dealt with in this Chapter; and

(b) the applicable provision of the Mediation Act is capable of operating concurrently with this Act.

Commencement of mediation before litigation

17.(1) In order to attempt the resolution of a family law dispute, the parties to a dispute must, once they have complied with section 13, submit to mediation in terms of this Act before any other proceedings (including the issuing of summons, or a notice of motion) may commence.

(2) The mediation must be performed by a certified mediator agreed on by the parties or, if the parties are unable to agree, by a certified mediator appointed by a mediation service provider, as prescribed, or by the Court.

(3) Subject to subsection (2), nothing precludes a programme provider from making available his or her services to the parties to facilitate the mediation as a certified mediator.

(4) The parties are not compelled to submit to mediation if—

(a) they intend to file a consent order and both parties consent to the order that is being requested;

(b) they have previously attempted to mediate the dispute concerned but that mediation was unsuccessful;

(c) a mediator, after assessing, as prescribed, whether family violence may be present, is of the opinion that family violence is present and that the family violence may adversely affect the safety of the party or a family member of that party or the ability of the party to negotiate a fair agreement;

(d) a court is satisfied that there are reasonable grounds to believe that abuse of a child by one of the parties has occurred or there would be a risk of abuse of the child if there were to be a delay in applying for protection of the child; or

(e) they have signed a collaborative dispute resolution participation agreement; or

(f) a court determines that participation is not in the best interests of the parties or the child, including urgency or potential hardship.

Jurisdiction of court

18. (1) A court may at any stage of litigation, if it deems it in the best interests of any member of the family concerned, refer a matter to a certified mediator to facilitate mediation of the family law dispute between the parties, and may do so with or without the consent of the parties to the proceedings.

(2) A litigant may, at any stage of the litigation, apply to court for the referral of a dispute to mediation with such order as to costs as the court deems appropriate.

(3) Subject to section 17(4), a court exercising jurisdiction under this Act must not hear a family dispute unless a party files with the court a certificate of outcome furnished to that party by a certified mediator in terms of section 21.

Refusal to submit to mediation

19.(1) Notwithstanding the provisions of sections 17 and 18, a party may, within five days after attending one session with a certified mediator to determine whether mediation appears to be appropriate for the resolution of the dispute, the parties and the circumstances, opt out of further mediation contemplated in those sections, on the following grounds:

(a) The issue constitutes a question of law only; or

(b) any other good cause shown, including urgency and potential hardship.

(2) Parties who refuse to participate in further mediation must provide the mediator with an explanation, in writing, for their refusal.

(3) The court may impose a punitive order as to costs, or another appropriate order, if, during a subsequent hearing, it concludes that a party unreasonably refused to engage in mediation.

Time limit for completion of mediation

20. The time limit for completion of the mediation is 90 days from the date of referral, and on expiry of this date the parties may institute legal proceedings even if the mediation has not been completed, unless the mediator provides the parties with a reasonable explanation, in writing, for the delay.

Certificate of outcome

21. A mediator must provide the parties with a certificate of outcome—

(a) setting out the agreement reached between the parties; or

(b) stating that an agreement between the parties could not be reached.

22. Costs, funding and fees

(1) The parties participating in the mediation process must pay the fees of the mediator in full, except when the services of the mediator are provided free of charge or when a sliding scale, as prescribed, applies owing to the indigence of a party or the parties.

(2) Liability for the fees of the mediator must be borne equally between the opposing parties participating in the mediation process: Provided that any party may offer or undertake to pay the fees of the mediator in full.

(3) The tariff of fees chargeable by mediators must be published by the Minister of Justice and Correctional Services.

CHAPTER 5
COLLABORATIVE DISPUTE RESOLUTION

Requirements for a collaborative dispute resolution participation agreement

23.(1) A collaborative dispute resolution participation agreement must—

(a) be in writing;

(b) be signed by the parties;

(c) state the intention of the parties to resolve a matter through a collaborative dispute resolution process in terms of this Act;

(d) describe the nature and scope of the matter;

(e) identify the collaborative legal practitioner who represents each party in the process;

(f) contain a statement by each collaborative legal practitioner confirming the legal practitioner's representation of a party in the process; and

(g) include a statement that the representation of each collaborative legal practitioner is limited to the collaborative dispute resolution process and that the collaborative legal practitioners are disqualified from representing any party or non-party participant in proceedings other than a collaborative dispute resolution in connection with a collaborative matter consistent with this Chapter.

(2) Parties may agree to include additional provisions not inconsistent with this Act in a collaborative dispute resolution participation agreement, including, but not limited to—

(a) an agreement concerning confidentiality of communications made during the collaborative process;

(b) an agreement that a part or the whole of the collaborative dispute resolution process must not be privileged in any proceeding;

(c) the scope of voluntary disclosure;

(d) the role of non-party participants; and

(e) the retention and role of non-party experts.

Commencement and conclusion of a collaborative dispute resolution process

24.(1) Parties may engage in the collaborative dispute resolution process only once they have obtained a certificate in accordance with section 13.

(2) Participation in a collaborative dispute resolution process is voluntary and the process commences when the parties sign a collaborative dispute resolution participation agreement.

(3) A court may not order a party to participate in a collaborative dispute resolution process in the face of that party's objection to participation.

(4) A collaborative dispute resolution process is concluded by —

(a) the resolution of a collaborative matter as reflected in a signed settlement;

(b) the resolution of a part of the collaborative matter as reflected in a signed settlement in which the parties agree that any remaining parts of the matter must not be included in the process;

(c) the termination of the process; or

(d) a method specified in the collaborative dispute resolution participation agreement.

(5) A collaborative dispute resolution process terminates when a party—

(a) gives notice in writing to other parties that the process has ended;

(b) initiates a proceeding other than a collaborative dispute resolution process in connection with a collaborative matter without the agreement of all the parties;

(c) in pending proceedings other than a collaborative dispute resolution process in connection with the matter—

(i) initiates an action, motion, or application to show cause;

(ii) requests that the proceeding be put on the court's active roll;

(iii) takes similar action that requires a notice to be delivered to the parties; or

(d) except as otherwise provided in subsection (7), discharges a collaborative legal practitioner or when a collaborative legal practitioner withdraws from further representation of a party.

(6) A party's collaborative legal practitioner must give prompt notice in writing to all other parties of a discharge or withdrawal.

(7) A party may terminate a collaborative dispute resolution process with or without cause.

(8) Notwithstanding the discharge or withdrawal of a collaborative legal practitioner, the collaborative dispute resolution process concerned continues if, not later than 30 days

after the date on which the notice of the discharge or withdrawal in terms of subsection (6) was delivered to the parties—

(a) the unrepresented party engages a new collaborative legal practitioner; and

(b) in a signed notice—

(i) the parties consent to continue the process by reaffirming the collaborative dispute resolution participation agreement;

(ii) the agreement is amended in order to identify the new collaborative legal practitioner; and

(iii) the new collaborative legal practitioner confirms his or her representation of the party concerned in the collaborative process.

(9) The provisions of subsection (4) notwithstanding, a collaborative dispute resolution process does not conclude until a party, with all the consent of the parties, requests a court to approve the resolution of the collaborative matter or any part thereof as recorded in a signed document.

(10) A collaborative dispute resolution participation agreement may provide additional methods of concluding a collaborative dispute resolution process.

Proceedings pending before court

25.(1) Persons in proceedings pending before a court may enter into a collaborative dispute resolution participation agreement seeking to resolve a collaborative matter related to the proceedings.

(2) The parties must, within three days of the conclusion of the agreement, file a duly signed record of the agreement with the court.

(3) Subject to subsection (6), the filing operates as an application for a stay of the proceedings.

(4) The parties must, within three days of the conclusion of the collaborative dispute resolution process, file a duly signed record of the conclusion with the court, which filing will have the effect of lifting the stay of the proceedings in terms of subsection (3).

(5) The notice may not specify any reason for termination of the process.

(6) A court in which proceedings have been stayed in terms of subsection (3) may require the parties and collaborative legal practitioners to furnish a status report on the collaborative dispute resolution process and the proceedings, which—

(a) may include only information on whether the process is ongoing or concluded; and

(b) may not include a report, assessment, evaluation, recommendation, finding,

or other communication regarding a collaborative dispute resolution process or collaborative dispute resolution matter.

Confirmation of agreement by court

26. A court may confirm a settlement agreement resulting from a collaborative dispute resolution process.

Time limit for completion of collaborative dispute resolution process

27. The time limit for completion of the collaborative dispute resolution process, after the collaborative agreement has been signed, is 90 days, and on expiry of that date the parties may institute legal proceedings, even if the collaborative dispute resolution process has not been completed, unless the collaborative legal practitioner provides the parties with a reasonable explanation, in writing, for the delay.

Disqualification of collaborative legal practitioner and legal practitioners in associated law firm

28.(1) Except as otherwise provided in subsection (3), a collaborative legal practitioner is disqualified from appearing before a court or in arbitration proceedings to represent a party in a matter relating to the collaborative matter.

(2) Except as otherwise provided in subsection (3), a legal practitioner in a law firm with which the collaborative legal practitioner is associated is disqualified from appearing before a court to represent a party in proceedings relating to the collaborative matter if the collaborative legal practitioner is disqualified from doing so in terms of subsection (1).

(3) A collaborative legal practitioner or a legal practitioner in a law firm with which the collaborative legal practitioner is associated may represent a party—

(a) to request a court to approve an agreement resulting from the collaborative dispute resolution process; or

(b) to seek or defend an urgent application to protect the health, safety, welfare or interests of a party, or family member of a party, if a new legal practitioner is not immediately available to represent that person.

(4) If subsection (3)(b) applies, a collaborative legal practitioner, or a legal practitioner in a law firm with which the collaborative legal practitioner is associated, may represent a party or a family member of a party only until the person is represented by a new

legal practitioner or reasonable measures are taken to protect the health, safety, welfare, or interests of the person.

Confidentiality of collaborative dispute resolution communication

29. A collaborative dispute resolution communication is confidential to the extent agreed on by the parties in a signed document or as provided by law of the Republic other than this Act.

Privilege, admissibility and discovery

30.(1) Subject to sections 31 and 32, a collaborative dispute resolution communication is privileged in terms of subsection (2), is not subject to discovery, and is not admissible in evidence.

(2) In court or arbitration proceedings, the following privileges apply:

(a) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative dispute resolution communication; and

(b) a non-party participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative dispute resolution communication made by the non-party participant.

(3) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely on account of its disclosure or use in a collaborative dispute resolution process.

Waiver and exclusion of privilege

31.(1) A privilege in terms of section 30 may be waived in writing in a record or orally during proceedings if it is expressly waived by all parties and, in the case of the privilege of a non-party participant, if it is also expressly waived by the non-party participant.

(2) A person who makes a disclosure or representation about a collaborative dispute resolution communication which prejudices another person in court or arbitration proceedings may not be allowed to claim a privilege in terms of section 30, but this preclusion must apply only to the extent that it is necessary for the person prejudiced to respond to the disclosure or representation.

Limits of privilege

32.(1) There is no privilege in terms of section 30 for a collaborative dispute resolution communication that is—

(a) available to the public in terms of any law or made during a session of a collaborative dispute resolution process that is open to, or is required by law to be open, to the public;

(b) a threat or statement of intention to inflict bodily harm or commit a crime of violence;

(c) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity;

(d) part of an agreement resulting from the collaborative dispute resolution process, reflected in a document signed by all parties to the agreement; or

(e) not subject to the privilege in accordance with the terms of a collaborative dispute-resolution participation agreement between the parties.

(2) Privileges in terms of section 30 do not apply to the extent that a communication is—

(a) sought or presented to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or relating to a collaborative dispute resolution process; or

(b) sought or presented to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the child protection services agency or adult protection services agency is a party to or otherwise participates in the process.

(3) There is no privilege in terms of section 30 if a tribunal finds, after a hearing *in camera*, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, the need for the evidence substantially outweighs the importance of protecting confidentiality, and the collaborative dispute resolution communication is sought or presented in—

(a) court proceedings involving an offence; or

(b) proceedings seeking rescission of a contract arising out of the collaborative dispute resolution process or in which a defence to avoid liability under the contract is raised.

(4) If a collaborative dispute resolution communication is subject to an exception in terms of subsection (2) or (3), only that part of the communication necessary for the application of the exception may be disclosed or admitted.

(5) Disclosure or admission of evidence excluded from privilege in terms of subsection

(2) or (3) does not render the evidence or any other collaborative dispute resolution communication discoverable or admissible for any other purpose.
(6) The privileges under section 30 do not apply if the parties in a signed document agree in advance, or if a record of proceedings reflects that the parties agree, that all or part of a collaborative dispute resolution process is not privileged.

Severability

33. If any provision of this Chapter or its application to any person or circumstance is held to be invalid, the invalidity does not affect other provisions or applications of this Act, which can be given effect to without the invalid provision or application, and to this extent the provisions of this Act are severable.

CHAPTER 6
FAMILY ARBITRATION

Parties may refer family dispute to arbitration

34. The parties to a family law dispute affecting the rights or interests of a child may, subject to sections 13 and 17 above, agree, as prescribed, to refer the dispute to an arbitration tribunal to be resolved through arbitration in terms of this Act.

Court may refer matter

35. (1) A court presiding over a family law dispute that affects the rights and interests of a child may, with the consent of all the parties to the proceedings, make an order referring the proceedings, or any part thereof, or any matter arising therefrom, to an arbitration tribunal for arbitration in terms of this Act.
(2) If the court makes an order in terms of subsection (1), it may, if necessary, adjourn the proceedings and may make any additional order as it deems appropriate to facilitate the effective conduct of the arbitration.

Additional duties of family arbitration tribunal

36.(1) The arbitration tribunal presiding over a family law dispute that affects the rights and interests of a child must ensure—

(a) compliance with sections 13 and 17 of this Act;

(b) that the consent of the parties to have the dispute resolved through arbitration constitutes informed consent;

(c) that the child's voice is heard and that legal representation is available if required; and

(d) that any other parties who may have an interest in the outcome of the arbitration are notified of that outcome.

(2) The arbitration tribunal is precluded from making his, her or their services available to the parties in terms of subsection (1)*(a)* to facilitate the mediation as a certified mediator.

Confirmation of the family arbitration award

37.(1) No arbitration award affecting the rights or interests of a child may come into effect unless it has been confirmed by the High Court on application to that court and on notice to all parties who have an interest in the outcome of the arbitration.

(2) Application in terms of this section must be made within 30 days after delivery of the award to the applicant.

(3) A court may—

(a) confirm the award;

(b) declare the whole or any part of the award to be void;

(c) substitute another award the court deems appropriate for the award;

(d) vary the award on appropriate terms; or

(e) remit the matter to the arbitration tribunal with appropriate directions.

(4) The court must, on application by a party, confirm the award except when grounds are raised—

(a) as set out in section 33 of the Arbitration Act, 1965 (Act No. 42 of 1965); or

(b) that the award is not in the best interests of all children concerned,

in which case the court must proceed to hear and determine all the issues concerned.

Best interests of the child

38.(1) In considering an application contemplated in section 37 for the confirmation of an arbitration award, the court must be satisfied that the award is in the best interests of all children concerned and to this end the court—

(a) may, in such circumstances as may be prescribed in terms of the Mediation in Certain Divorce Matters Act, 198 (Act No. 24 of 1987), cause an enquiry as contemplated in that Act to be instituted by a family

advocate in whose area of jurisdiction that court is with regard to the welfare of any minor or dependent child affected by the proceedings in question, whereupon the provisions of that Act, with the amendments required by the context will apply*;*

(b) must, if an enquiry is instituted by the family advocate in terms of section 4[1] of the Mediation in Certain Divorce Matters Act, 1987,[2] consider the report and recommendations contemplated in section 4(1) of that Act;

(c) must, if a report or recommendations by a family advocate, a social worker or other suitably qualified person have been ordered in terms of section 29(5) of the Children's Act, 2005[3], consider the report and recommendations.

Requirements

39. An arbitration tribunal who conducts a family arbitration in terms of this Chapter must comply with the prescribed requirements.

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[1] Section 4 of the *Mediation in Certain Divorce Matters Act 24 of 1987* reads as follows:
4. Powers and duties of Family Advocates.—(1) The Family Advocate shall—
(*a*) after the institution of a divorce action; or
(*b*) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act No. 70 of 1979),
if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him by the court.
(2) A Family Advocate may—
(*a*) after the institution of a divorce action; or
(*b*) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979,
if he deems it in the interest of any minor or dependent child of a marriage concerned, apply to the court concerned for an order authorizing him to institute an enquiry contemplated in subsection (1).(3) Any Family Advocate may, if he deems it in the interest of any minor or dependent child of a marriage concerned, and shall, if so requested by a court, appear at the trial of any divorce action or the hearing of any application referred to in subsections (1) (*b*) and (2) (*b*) and may adduce any available evidence relevant to the action or application and cross-examine witnesses giving evidence thereat.

[2] The application of the Mediation in Certain Divorce Matters Act has been extended to customary marriages (section 8 of the Recognition of Customary Marriages 120 of 1998); civil unions (section 13 of the Civil Union Act 17 of 2006); and domestic violence (section 5 of the Domestic Violence Act 116 of 1998) and maintenance (section 10(1A) of the Maintenance Act 99 of 1998) proceedings.

[3] Section 29(1)(5) (a) of the Children's Act 38 of 2005 reads as follows:
Court proceedings
29. (10-(4)….
(5) The court may for the purposes of a hearing order that –
(a) a report and recommendations of a family advocate, a social worker or other suitably qualified person must be submitted to the court;
(b)- (d)

Court's jurisdiction to review arbitration award

40. Nothing in section 37 must be construed as limiting the court's jurisdiction in terms of any law to review an arbitration award in so far as it relates to a family law dispute that does not affect the rights or interests of a child.

Application of Arbitration Act to special laws[4]

41. The provisions of the Arbitration Act, 1965, with the amendments required by the context, must apply to an arbitration conducted in terms of this Chapter in accordance with section 40 of that Act.[5]

CHAPTER 7

PARENTING COORDINATION

Parenting coordinator

43. A person meeting the requirements set out in section 43 who assists parents in resolving family disputes pursuant to section 45 may act as a parenting coordinator.

Requirements

43.(1) The requirements for appointment as a parenting coordinator must be prescribed by regulation.

(2) The minimum requirements for a person to be appointed as a parenting coordinator include that such person must -

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[4] This section implies that the FLAFSA Family Arbitration Rules will be a sector/industry matter.Alternative option 1 would be to include those sections from the Arbitration Act that should be applicable (duplicated, with the necessary changes) in the Family Dispuet Resolution Act. Alternative option 2 would be to incorporate the FLAFSA Arbitration Rules in the format of Regulations in the legislation.

[5] Section 40 of the Arbitration Act, 1965 reads as follows:
Application of this Act to arbitrations under special laws
40. This Act shall apply to every arbitration under any law passed before or after the commencement of this Act, as if the arbitration were pursuant to an arbitration agreement and as if that other law were an arbitration agreement: Provided that if that other law is an Act of Parliament, this Act shall not apply to any such arbitration in so far as this Act is excluded by or is inconsistent with that other law or is inconsistent with the regulations or procedure authorized or recognized by that other law.

(a) be a licensed mental-health professional or licensed legal practitioner practising in a sphere associated with families;

(b) have training and experience in family mediation and be a certified family mediator in terms of the Mediation Act, 20XX; and

(c) have training and experience in family arbitration and meet the requirements set out in section 39.

(3) A parenting coordinator who is not a licensed legal practitioners must not, while performing actions within the scope of his or her duties as a parenting coordinator, be considered to be engaging in the unauthorised practice of law.

(4) A person serving as a parenting coordinator with respect to a family dispute in terms of this Act may not create a professional conflict by serving in sequential or multiple roles with respect to the same dispute.

When parenting coordinators may assist

44.(1) A parenting coordinator may assist parties in resolving a family dispute when a child is involved and in accordance with a parenting coordination agreement—

(a) if there is a parenting plan or court order in place with respect to parenting arrangements, contact with a child or other prescribed matters;

(b) for the purpose of implementing the parenting plan or the court order;

(c) if a short-term, emerging and time-sensitive situation or dispute arises; and

(d) if the consent on which the parenting coordination agreement of the parties is based, constitutes informed consent.

(2) A parenting coordination agreement may be entered into in anticipation of, or as a result of, the need to appoint a parenting coordinator.

Parenting coordination service agreement

45.(1) The parenting coordinator can only assume his or her duties once a parenting coordination service agreement has been signed.

(2) A parenting coordinator's authority to act terminates two years after the parenting coordination service agreement was signed, unless the parenting coordination service agreement or a court order specifies that the parenting coordinator's authority must terminate at an earlier date or on the occurrence of a specified earlier event.

(3) Despite subsection (2), a parenting coordination service agreement may be extended for no more than two years by a further parenting coordination service agreement or a court order.

(4) Despite subsection (2), a parenting coordination service agreement may be terminated at any time—

(a) by agreement between the parties or by a court order made on application by either of the parties;

(b) by the parenting coordinator, on giving notice to the parties and, if the parenting coordinator is acting in terms of an order, to the court.

Exclusive jurisdiction of the court

46. The appointment of a parenting coordinator does not divest the court of its exclusive jurisdiction to determine fundamental issues of guardianship, care, contact and maintenance, and the authority to exercise management and control of the case.

Assistance from parenting coordinators

47.(1) A parenting coordinator may assist the parties—

(a) by building consensus between the parties by—

(i) giving guidelines on how a parenting plan or court order will be implemented;

(ii) giving guidelines for communication between the parties;

(iii) identifying, and creating strategies for resolving conflicts between the parties; and

(iv) providing information about resources available to the parties for purposes of improving communication or parenting skills;

(v) identifying disputed issues; and

(vi) developing methods of collaboration and parenting; and

(b) by issuing directives in accordance with subsection (2) with respect to—

(i) parenting arrangements;

(ii) contact with a child.

(2) For the purposes of subsection (1)*(b)*, a parenting coordinator—

(a) may issue directives in respect of—

(i) a child's daily routine, including the child's schedule in relation to parenting time or contact with the child;

(ii) the education of a child, including in relation to the child's special needs;

(iii) the participation of a child in extracurricular activities and special events;

(iv) the temporary care of a child by a person other than -

(aa) the child's guardian; or

(bb) a person who has contact with the child in terms of an agreement or order;

(v) the provision of routine medical, dental or other health care to a child;

(vi) the discipline of a child;

(vii) the transport and exchange of a child for purposes of exercising parenting time or contact with the child;

(viii) parenting time or contact with a child during holidays and special occasions; and

(ix) any other matters, other than matters referred to in paragraph *(b)*, that are agreed on by the parties and the parenting coordinator; and

(b) may not make directives in respect of—

(i) a change to the guardianship of a child;

(ii) a change to the allocation of parental responsibilities;

(iii) the giving of parenting time or contact with a child to a person who is not entitled to parenting time or contact with the child;

(iv) a substantial change to the parenting time or contact with a child,

(v) the relocation of a child;

(vi) the need for supervised visitation by either parent; or

(vii) the need for psychological or psychiatric treatment for either parent.

Directives by parenting coordinators

48.(1) A parenting coordinator—

(a) may issue directives with respect to matters referred to in section 47 only, subject to any limitation or conditions set out in the regulations;

(b) may not issue a directive in respect of any matter excluded by the parenting coordination agreement, even if the matter is noted in section 47;

(c) may not issue a directive that would affect the division or possession of property, or the apportionment of family debt;

(d) must consider the child’s views if the child has reached such an age and level of maturity and development as to be able to participate; and

(e) may not modify the parenting plan or court order other than minor, temporary departures from the parenting plan or court order.

(2) In issuing a directive with respect to parenting arrangements or contact with a child, a parenting coordinator must consider the best interests of the child only, as set out in section 7 of the Children's Act.

(3) A parenting coordinator may issue a directive at any time.

(4) A parenting coordinator must provide reasons in writing for the directive.

(5) A parenting coordinator may issue an oral directive, but must reduce the directive to writing and sign it as soon as practicable after the oral directive was issued.

(6) Subject to section 49, a directive issued in accordance with the provisions of this Chapter—

(a) is binding on the parties, effective from the date the directive is issued or from such later date as may be specified by the parenting coordinator, and

(b) if filed with the court as prescribed, is enforceable under this Act as if it were an order of the court.

Changing or setting aside directives

49.(1) Any party to a directive issued by a parenting coordinator may, within 10 days after the parenting coordinator issued the directive or within such other period of time as the court may direct, file with the court, and serve on the parenting coordinator and all other parties, an objection to the parenting coordinator's directive.

(2) Responses to the objections must be filed with the court and served on the parenting coordinator and all other parties within 10 days after the objection was served.

(3) The court must review any objections to the directive and any responses submitted to the objections to the directive and, after so reviewing the objections and responses, may amend or set aside the directive, if it is satisfied that the parenting coordinator—

(a) acted outside his or her authority, or

(b) committed an error of law or of an error of mixed law and fact.

(4) The directive of the parenting coordinator must remain in effect until the court gives an order.

(5) If the court sets aside a directive, it may make any order to resolve a dispute between the parties in relation to the subject matter of the directive.

(6) If the court must not set aside a directive, it may make any order to enforce compliance with the directive.

Parenting coordination process

50. The parenting coordination process, as prescribed, must include the following:

(a) An impartial parenting coordinator;

(b) meetings between the parenting coordinator and the parties, which need not follow any specific procedure and may be informal;

(c) an opportunity for each party to state his or her case in the presence of the other party;

(d) an opportunity for each party to challenge or question the other party's statements or views and ask for proof or supporting information; and

(e) a transparent the process.

Information sharing for parenting coordination

51.(1) A party must, for purposes of facilitating parenting coordination, provide the parenting coordinator with—

(a) such information as the parenting coordinator may request in accordance with section 5, and

(b) authorisation to request and receive information in respect of a child or a party from a person who is not a party.

(2) Communication between the parties and the parenting coordinator may not be confidential.

Removal of parenting coordinator

52.(1) If the appointment of the parenting coordinator was made in accordance with a parenting coordination service agreement, the parties may agree to remove the parenting coordinator.

(2) If the appointment of the parenting coordinator was made by the court with the consent of the parties, the court may remove the parenting coordinator at the request and with the consent of both parties.

Fees

53.(1) No parenting coordinator may be appointed unless the court is satisfied that the parties have the means to pay the fees of the parenting coordinator.

(2) The state may not assume any financial responsibility for payment of fees to the parenting coordinator, except that, in cases of hardship, the court may appoint, if it is feasible, a parenting coordinator to serve on a voluntary basis.

(3) The fees of the parenting coordinator must be shared between the parties proportionally and in accordance with child support guidelines: Provided that the court may allocate the fees between the parties differently upon a finding of good cause by the court or good cause set out in the parenting coordinator's report.

CHAPTER 8
GENERAL PROVISIONS

Regulations

54.(1)The Minister of Justice and Correctional Services may make regulations concerning—

(a) any matter this Act requires or permits to be prescribed; and

(b) any matter that may be necessary for the application of this Act.

(2) Before making any regulations, the Minister must consult such persons who can provide relevant information as he considers appropriate.

Amendment of laws

55. The laws referred to in the first and second columns of the Schedule to this Act are amended to the extent indicated in the third column of the Schedule.

Short title and commencement

56. This Act is called the Family Dispute Resolution Act, 2020, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE

LAWS AMENDED BY SECTION 55

No. and year	Short title	Extent of repeal or amendment
Act 42 of 1965	Arbitration Act	The following section is hereby substituted for section 2 of the Act: **Matters not subject to arbitration** **2.** (1) Arbitration is not permissible in terms of this Act in respect of any family dispute affecting the rights or interests of a child, or any matter incidental to any such dispute. (2) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter the parties are entitled to dispose of by agreement may be determined by arbitration unless— (a) such a dispute is not capable of determination by arbitration under any other law of the Republic; or (b) the arbitration agreement is contrary to public policy of the Republic. (3) Arbitration may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement. (4) For the purposes of this section— **"family law dispute"** means a dispute, or alleged dispute, in which one party maintains a particular point of view or claim or contention regarding the parties' respective responsibilities, interests and rights towards, or with respect to, any member of the family to which both parties belong, and the other party maintains a contrary or different one.