

International trends in family mediation – are we still on track?

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OPSOMMING

Internasionale tendense in gesinsbemiddeling: hou ons nog tred?

Alhoewel daar steeds sekere strydvrage rondom gesinsbemiddeling bestaan, word dit wêreldwyd toenemend gebruik om gesinsgeskille te besleg. Die twee belangrikste strydvrage rondom gesinsbemiddeling, naamlik die kritiese besware teen gesinsbemiddeling vanuit 'n feministiese oogpunt en die ongereguleerde aard van die bemiddelingspraktyk, word eerstens in breë trekke in hierdie artikel geskets.

Tweedens word die toepassing van gesinsbemiddeling in Australië, Nieu-Seeland, die Verenigde State van Amerika en Kanada bespreek. Daar word onder andere ondersoek ingestel na die vlag van belangstelling in alternatiewe benaderings tot gesinslitigasie wat uiteindelik gelei het tot die primêre geskilbeslegtingsbepalings van die Australiese Family Law Act wat bemiddeling ten sterkste aanmoedig en selfs gebied. Daar word verder gekyk na die voortgesette pogings van die Nieu-Seelandse regering om die gebruik van private bemiddelingsdienste naas publieke beradingsdienste en bemiddelingskonferensies voor 'n regter te bevorder. Die soeklig val ook op die verordening van bemiddelingswetgewing in 39 van die 50 state in Amerika wat bemiddeling óf verpligtend maak óf aan die houe die diskresie verleen om bemiddeling by egskeiding te gebied. Voorts word die onderskrywing van gesinsbemiddeling in Kanada as 'n proses waardeur gesinsgeskille besleg moet word, ondersoek. Besondere aandag word aan die wyses waarop die strydvrage rondom gesinsbemiddeling in die vermelde lande beantwoord word, geskenk.

Laastens word die huidige stand van sake met betrekking tot die beoefening van gesinsbemiddeling in die openbare sektor, die privaatsektor en op gemeenskapsvlak in Suid-Afrika geëvalueer ten einde te bepaal of ons steeds tred hou met internasionale tendense. Dit is duidelik dat die huidige beweging na verpligte bemiddeling, soos te bespeur in onlangse hofbeslissings en die nuwe Children's Act, 'n stap in die regte rigting is.

1 INTRODUCTION

Despite some controversies surrounding family mediation, there is an ever-increasing awareness worldwide of the vital role it plays in the resolution of family disputes.¹ In this article the two main controversies surrounding family mediation are briefly outlined, followed by a discussion of the application of family mediation in Australia, New Zealand, the United States of America and

¹ Ayrapetova "Mandatory divorce mediation program passed in Utah" 2005 *J of Law and Family Studies* 417 419; Tondo "Mediation trends – a survey of the States" 2001 *Family Court R* 431 432; New Zealand Law Commission *Delivering justice for all – a vision for New Zealand courts and tribunals* Report 85 (March 2004) 24 http://www.lawcom.govt.nz/UploadFiles/Publication_89_219_R85.pdf (accessed 29 July 2007).

Canada. Special attention is paid to the manner in which the controversies surrounding family mediation are addressed in these countries. Lastly, the current state of affairs with regard to family mediation in South Africa is evaluated to determine whether we are still on track.

2 CONTROVERSIES SURROUNDING FAMILY MEDIATION

2.1 The feminist critique of family mediation

The biggest controversy is located in the serious concerns expressed by the feminist critique of family mediation.² Some feminist commentators feel strongly that women are prejudiced by the mediation process, since socially, economically and psychologically women are generally in a subordinate position to their husbands, a fact that the feminist commentators feel mediators do not take into account.³ They therefore fear that many women will not have the same bargaining power as their husbands around the negotiating table and will consequently agree to unfavourable separation arrangements for themselves.⁴ Although proponents of mediation are of the opinion that a properly trained mediator would be able to redress this power imbalance between husband and wife,⁵ feminist critics of mediation feel that mediator neutrality, one of the key elements of mediation,⁶ would then be compromised. They further fear that because we live in a society that is persistently and pervasively patriarchal, mediators cannot be truly independent in any case.⁷

As women, rather than men, are usually the victims of domestic violence, another concern of feminists is that abused women will be totally powerless against their husbands in the mediation environment.⁸ Field⁹ has the following to say in this regard:

"The presence of family violence in the history of the parties' relationship means . . . that there can be no parity in the mediation bargaining environment. Parity cannot exist when one party is fearful of another; and fear is the key element of gendered power and control that a perpetrator wields in mediation. He can control aspects of the process and he can control outcomes because he can make

2 Field "Using the feminist critique of mediation to explore 'the good, the bad and the ugly' implications for women of the introduction of mandatory family dispute resolution in Australia" 2006 *Australian J of Family Law* 45 54; Ayrpetova 419; Saccuzzo "Controversies in divorce mediation" 2003 *North Dakota LR* 425 432.

3 Payne "Family conflict management and family dispute resolution on marriage breakdown and divorce: diverse options" 1999–2000 *Revue Generale de Droit* 663 676; Field 54–56, 67; Clark "No holy cow – some caveats on family mediation" 1993 *THRHR* 454 460.

4 Field 57–58; Freeman "Divorce mediation: sweeping conflicts under the rug, time to clean the house" 2000 *Univ of Detroit Mercy LR* 67 86; Van Zyl *Divorce mediation and the best interests of the child* (1997) 201–202.

5 Saccuzzo 433; Kelly "Power imbalance in divorce and interpersonal mediation: Assessment and intervention" 1995 *Mediation Quarterly* 96; Greatbatch and Dingwall "The marginalization of domestic violence in divorce mediation" 1999 *Int J of Law, Policy and the Family* 175 185–187; Goldberg "Family mediation is alive and well in the United States of America: A survey of recent trends and developments" 1996 *TSAR* 358 370.

6 De Jong "Judicial stamp of approval for divorce and family mediation in South Africa" 2005 *THRHR* 95 96.

7 Field 61 67.

8 Ayrpetova 425; Field 71; Saccuzzo 433; Kaganas and Piper "Domestic violence and divorce mediation" 1994 *J of Social Welfare and Family Law* 265 271–273.

9 Field 75.

his victim fearful; fearful about her own physical and emotional safety, and often also fearful for the safety and well-being of her children.”

Since mediation is a private and informal process where all disclosures by the parties are confidential, feminists are also concerned that abusers will have an opportunity to reinforce and exacerbate their control and domination over their victims¹⁰ and that they may avoid criminal sanctions for their actions.¹¹

2.2 The unregulated nature of the mediation industry

The second controversy surrounding family mediation relates to the informal and unregulated nature of the mediation industry.¹² There is still no formally constituted mediation profession at present¹³ and there are no universally accepted standards for the mediation process or the practice of mediation.¹⁴ Closely associated with the above are the vexed questions as to who should be performing family mediation – lawyers, non-lawyers and/or non-professionals,¹⁵ which sector should be providing mediation – the public sector, the private sector or the community, what kind of training mediators should undergo, what fees mediators should charge, and which model of mediation mediators should use – facilitative, evaluative, transformative, therapeutic, compromise, feminist-informed, culturally specific, multi-generational, managerial, narrative, interest-based or hybrid?¹⁶

Furthermore, the accreditation of mediators to professional regulatory bodies has not been standardised as yet¹⁷ and a universally accepted code of ethics for mediators has not been developed.¹⁸ There are no standardised guidelines for the conduct of mediators as far as neutrality and impartiality, avoidance of conflicts of interests, truth in advertising and disclosure of fees are concerned – and ultimately the public is at risk.

3 THE APPLICATION OF FAMILY MEDIATION ABROAD

3.1 Australia

Since the mid-1980s, there has been a wave of enthusiasm in Australia for alternative approaches to family litigation, in particular for mediation.¹⁹ This wave of

10 *Idem* 74.

11 Saccuzzo 434; Scott-MacNab “Mediation and family violence” 1992 *SALJ* 282 283.

12 Folberg, Milne and Salem (eds) *Divorce and family mediation – models, techniques and applications* (2004) 21–22; Field 68; Saccuzzo 435.

13 New Zealand Law Commission (March 2004) 34; King “Specialists in Family Law Resolution” 1999 *Australasian Dispute Resolution J* 63 69–70.

14 Field 70; Sanchez “Empowering children in mediation: an intervention model” 2004 *Family Court R* 554 555; Saccuzzo 435.

15 Ayrappetova 419; Goldberg “Practical and ethical concerns in alternative dispute resolution in general and family and divorce mediation in particular” 1998 *TSAR* 748 749.

16 Faris “Deciphering the language of mediatory intervention in South Africa” 2006 *CILSA* 427 443–446; Bracken “Providing a comprehensive view of family mediation – divorce and family mediation: models, techniques and applications” 2005 *J of Law and Family Studies* 217 220–222; New Zealand Law Commission (March 2004) 130; Folberg, Milne and Salem (2004) 21; Kruk “Practice issues, strategies, and models: the current state of the art of family mediation” 1998 *Family and Conciliation Courts R* 195 207.

17 Field 70.

18 Saccuzzo 435–436.

19 Bagshaw “Mediation of family law disputes in Australia” 1997 *Australian Dispute Resolution J* 182.

interest in mediation has led to the rapid development of several mediation services in Australia – initially mainly in the private sector and at community level, and later in the family court as well.²⁰

In the private sector independent organisations such as LEADR (Lawyers Engaged in Alternative Dispute Resolution or Leading Edge Alternative Dispute Resolvers) and Mediate Today, to which private professional mediators are accredited, took the lead in rendering mediation services to the public, on both a fee basis and a voluntary basis.²¹ Since the early 1990s these organisations have made significant contributions to the training of private mediators and the promotion and advertising of their services. It is apparent from databases of accredited mediators available on the internet²² that private mediators come from a wide variety of professions and occupations and are available throughout Australia, even in the remote rural areas. Interestingly, the facilitative model of mediation is the model most frequently used and it usually involves a gender-balanced team consisting of a lawyer and a counsellor.²³

At community level several organisations such as Relationships Australia, Lifeworks, Centacare Australia and Family Services Australia, which had previously concentrated mainly on marriage guidance and counselling, also began providing mediation services to the public free of charge. Community justice centres have made important contributions to community-based mediation in Australia as well.²⁴ Since 1989 funding for the community-based mediation services has come mainly from the government²⁵ and to date the government has spent several millions on expanding and improving these mediation services.²⁶ The latest government initiative in this regard concerns “Family Relationship Centres”, which will be established in cities and towns across Australia over the next two years. These centres will provide assistance for separating families by offering, *inter alia*, mediation services for the resolution of all separation issues.²⁷

The family court, which since its inception has emphasised the importance of counselling and conciliation in divorce matters, has also begun to respond to the demand for mediation. In 1992 a mediation pilot project was launched in the Melbourne registry of the family court and today mediation services, known as the “family court mediation service”, are to be found at all the registries of the family court. The family court has also concluded contracts with several approved community-based organisations to render mediation services on behalf

20 Sourdin “Legislative referral to alternative dispute resolution processes” 2001 *Australasian Dispute Resolution J* 180.

21 Spencer “Mandatory mediation and neutral evaluation: a reality in New South Wales” 2000 *Australasian Dispute Resolution J* 237 248; Sourdin 189.

22 About LEADR <http://www.leadr.com.au/about.html> (accessed 04/10/2006); Mediate today <http://www.mediate.com.au/company.htm> (accessed 04/10/2006).

23 Subourne “Motivations for mediation: an examination of the philosophies” 2003 *Texas International LJ* 381 395; Gee “Family mediation: a matter of informed personal choice” 1998 *Australian Dispute Resolution J* 179 185.

24 Faulkes and Claremont “Community mediation: myth and reality” 1997 *Australian Dispute Resolution J* 177 179–180.

25 Bagshaw 182–183.

26 Sourdin 188.

27 *Family relationships online* 1–3 http://www.familyrelationships.gov.au/Family_Relationship_Centres.html (accessed 29 Sept 2006).

of the family court mediation service in cases where distance or pressure of work make it impossible to render such services itself.²⁸ In principle the family court mediation service is only available to parties after they have brought applications involving the interests of the children or financial issues to the family court.²⁹ In some registries of the family court mediation services are available even before an application impacting on the interests of the children has been brought.³⁰

In 1996 the Family Law Reform Act³¹ introduced the so-called "primary dispute resolution" provisions into the Family Law Act.³² The term "alternative dispute resolution" was replaced there and then with the term "primary dispute resolution". These "primary dispute resolution" provisions strongly encourage people to use primary dispute resolution mechanisms such as counselling, mediation, arbitration or other means of conciliation or reconciliation to resolve family disputes.³³ Sections 14F and 14G of the Family Law Act respectively impose a duty on the court and on family law practitioners to reflect on whether they should advise parties or their clients regarding the primary dispute resolution procedures available to them. Although there are no consequences for parties or clients who do not wish to accept this advice, these provisions can nevertheless be seen as an attempt to change the prevailing culture of the Australian courts and legal practitioners.

On the matter of mediation the Family Law Act provides firstly that a person who is involved in a family law dispute may request a court to appoint a family and child mediator to mediate the dispute.³⁴ Parties are also free at any time to approach a family and child mediator directly with a request to mediate a dispute, without the intervention of the court. The definition of "family and child mediators" includes public, community-based and private mediators.³⁵ The Act further provides that a court with jurisdiction under the Family Law Act may refer a dispute or multiple disputes in proceedings before the court to a court mediator with the consent of the parties concerned.³⁶ Private and community-based mediators are therefore not involved here. In terms of the Family Law Act, all admissions and communications made to family and child or court mediators are inadmissible in any court of law.³⁷

In the regulations to the Family Law Act³⁸ clear guidelines are set out on the qualifications required to serve as family and child mediators and on the steps that such mediators should consider before mediation sessions can be started.

With regard to the qualifications of family and child mediators, regulation 60(1) provides that a family and child mediator should have one of the following tertiary qualifications:

28 Sourdin 188.

29 *Australian law online: family court of Australia – mediation: pathway to agreement 3* <http://www.familycourt.gov.au/forms/html/mediation.html> (accessed 28 Apr 2006).

30 Sourdin 184; *Australian law online: family court of Australia – mediation: pathway to agreement 3*.

31 167 of 1995.

32 59 of 1975.

33 S 14.

34 Ss 19A and 19AAA.

35 S 4.

36 Ss 19B and 19BAA.

37 S 19N.

38 Issued ito s 19P.

"[E]ither a degree, diploma or other qualification by a university, college of advanced education or other tertiary institution of an equivalent standard, of either:

- (a) three full-time years of law; or
- (b) two or three full-time years of a social science; or
- (c) one full-time year of mediation or dispute resolution."

In terms of regulation 60(2) the prescribed academic qualifications must be supplemented by the following specific training in mediation:

"[A]t least five days' mediation training, including at least one training course lasting a minimum of three days and supervised mediation of at least 10 hours in the 12 months immediately following completion of that training."

In addition, regulation 61 makes provision for at least twelve hours' further annual training in family and child mediation.

Other aspects contained in the regulations to the Family Law Act deal with the factors that mediators should consider before mediation proceedings commence.³⁹ In terms of regulation 62 it is expected of mediators

"to assess for appropriateness for mediation, considering family violence, the safety of the parties, the equality of bargaining power, the risk of child abuse, the emotional, psychological and physical health of the parties and any other matter the mediator considers relevant to the proposed mediation".

In 2004 new family law rules introduced important pre-action procedures that require parties in both financial⁴⁰ and parenting⁴¹ cases to make a genuine effort to resolve the dispute before starting a case by, *inter alia*, participating in primary dispute resolution, such as negotiation, conciliation, mediation, arbitration and counselling.⁴² This development falls short of mandating mediation, but places an onus on the parties to at least negotiate in some way prior to filing a court application.⁴³

Lastly, a highly significant piece of legislation, the Family Law Amendment (Shared Parental Responsibility) Act,⁴⁴ was passed in 2006.⁴⁵ This Act introduced new provisions regarding the sharing of parental responsibility into the Family Law Act. These provisions phased in a requirement whereby separating parents will have to undertake some form of dispute resolution for parenting disagreements, before they may take the matter to court.⁴⁶ It effectively introduced mandatory mediation in parenting matters, as this requirement prevents a court from hearing an application relating to children unless a certificate from a family dispute resolution practitioner is also filed.⁴⁷ This certificate must state either that the attendees made a genuine effort to resolve the issues in question or

39 Dept of the Attorney-General *Delivery of PDR services* 19 <http://law.gov.au/publications/familypdrs.htm#anchor405247> (accessed 28 Apr 2007); Gee 183.

40 See Pt 1(1) of Schedule 1 to the rules.

41 See Pt 2(1) of Schedule 1 to the rules.

42 Rule 1.05. See also Altobelli "Comments on the Family Law Rules 2004" 2004 *Australian J of Family Law* 92.

43 Field 46 fn 2.

44 46 of 2005.

45 Dept of the Attorney-General *Family Law Amendment Bill passes through Senate* 1 <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/> (accessed 17 Oct 2007).

46 S 60I of the Family Court Act.

47 S 60I(7).

that attendance was inappropriate in the circumstances.⁴⁸ A certificate is, however, not required in circumstances where a history or threat of family violence or child abuse has been established.⁴⁹ Parents can choose to use the dispute resolution services provided by the new family relationship centres,⁵⁰ or another accredited service or practitioner.⁵¹

Because of the ever-increasing role that alternative dispute resolution, and especially mediation, will play in the resolution of family law issues in Australia, the attorney-general's department has made funds available to the National Mediation Conference (Pty) Ltd for the development of a proposal for a national system of mediator accreditation.⁵² In 2007 the proposed National Mediator Accreditation System, as it will be known, was considered for approval by the National Mediation Conference.⁵³ The main objectives of the proposed system are

"[t]he creation of a practical and credible system for the uniform recognition, certification or accreditation of mediators in Australia in order to improve mediator knowledge, skills and ethical standards, to promote quality of mediation practice, to serve and protect the needs of consumers of mediation services and provide accountability where they are not met, to enable mediators to gain external recognition of their skills, and to broaden the credibility and public acceptance of mediation".⁵⁴

3.2 New Zealand

In the early eighties the New Zealand family court was established⁵⁵ with the aim of creating a conciliation service with court appearances as a last resort,⁵⁶ and counselling and conciliation services and mediation conferences before a judge were introduced by the Family Proceedings Act.⁵⁷

In terms of sections 8, 12 and 19 of the Family Proceedings Act, legal practitioners, counsellors and the court have a duty to consider and further the possibility of conciliation and even reconciliation between spouses when family disputes have to be heard by the family court. The counselling that takes place in terms of these provisions is referred to as discretionary counselling.⁵⁸ Furthermore, either of the spouses in a marriage can request the family court in terms of section 9 of the Family Proceedings Act to make arrangements for state-subsidised counselling for them in respect of family law issues. The counselling that takes place in terms of this section is referred to as voluntary counselling.⁵⁹ In

48 S 60I(8).

49 S 60I(9).

50 See fn 27 above.

51 Dept of the Attorney-General *Family Law Amendment Bill passes through Senate 2*.

52 National Mediation Conference *National accreditation standards for mediators 1* <http://www.mediationconference.com.au/html/Accreditation.html> (accessed 18 Oct 2007).

53 Field 70.

54 The National Mediator Accreditation System draft proposal can be viewed at <http://www.cdesign.com.au/nmc2006> (accessed 18 Oct 2007).

55 Ito the Family Courts Act 161 of 1980.

56 New Zealand Law Commission *Family court dispute resolution* (2002) 88.

57 94 of 1980.

58 Adams *et al Family Law Service: Commentary* para 2.5 <http://butterworthsonline.com/lpBin20/lpext.dll/bw/L11/163/fl-com/> (accessed 04 Apr 2006).

59 *Ibid*.

addition, in terms of section 10 of the Family Proceedings Act parties who have already applied for a divorce, maintenance or the custody of a child can even be compelled by the court against their will to undergo counselling with a court-appointed counsellor. This is known as mandatory counselling.⁶⁰

It is very interesting to note, however, that counselling in New Zealand is really a form of mediation rather than counselling in the traditional sense of the word.⁶¹ In other words, counselling not only relates to the improvement of communication and/or relationships between the spouses or between spouses and children, but it also specifically has to do with resolving or reducing the issues in dispute between the parties. Counselling sessions in New Zealand can therefore be equated with what would be termed mediation sessions in other countries.⁶²

When there is a voluntary request for counselling, or when a discretionary or compulsory referral to a counsellor is made, an officer of the family court, known as the family court coordinator,⁶³ refers the parties to a suitable, accredited counsellor⁶⁴ or to an approved organisation, such as Relationship Services or the Marriage Guidance Council, for state-subsidised counselling.⁶⁵ Following these referrals, six hour-long counselling sessions take place.⁶⁶ If there is any question of family violence, the caucus method may be used.⁶⁷ Here each of the parties is seen separately by the counsellor.

The only process labelled "mediation" in the New Zealand divorce process is the mediation conference chaired by a family court judge in accordance with sections 13 to 18 of the Family Proceedings Act. The time allocated for these mediation conferences is usually one to two hours, but longer conferences do take place from time to time, depending on the attitude and the availability of the presiding judge.⁶⁸ As a result of the role the family court judge plays in these proceedings, mediation conferences belie their name – they cannot strictly be regarded as a form of mediation.⁶⁹ The primary role of the judge is to act as an arbitrator and the skills required by this role are substantially different from those usually expected of a mediator.⁷⁰ This judge-led conference is therefore in actual fact just a judicial settlement conference.⁷¹

In terms of section 18 of the Family Proceedings Act, all information, statements and concessions revealed or made during the counselling sessions or the

60 *Ibid.*

61 New Zealand Law Commission (2002) 75–76; SA Law Commission *Commission of Inquiry into the rationalisation of the provincial and local divisions of the supreme court* (RP200/1997) Vol I part 2 para 6.5.1.2.

62 Van Zyl (1997) 149.

63 Is the official who bears the responsibility for the effective functioning of the family court in terms of s 8(1) of Act 161 of 1980.

64 Is a practice notice issued by the chief justice of the family court, dated 10/08/2001, a counsellor must be an accredited or paid-up member of a professional organisation.

65 Atkin "New Zealand: reflections five years after reform" 1986–87 *J of Family Law* 191 192.

66 New Zealand Law Commission (2002) 24. See also s 12A of Act 94 of 1980.

67 New Zealand Law Commission (2002) 124.

68 *Idem* 75.

69 New Zealand Law Commission (2002) 11–12; Van Zyl (1997) 150.

70 Walton *The family court* 1 <http://findlaw.co.nz/articles/default.asp?task=read&id=946&site=CN> (accessed 11 Jan 2006); Wan "Mediating family property disputes in New Zealand" 1999 *Dispute Resolution J* 70 73.

71 New Zealand Law Commission (2002) 12.

mediation conferences before a judge are privileged and in terms of *Lucena v National Mutual Life Association of Australia*⁷² this privilege can never be waived, not even with the consent of both parties.

In addition to these statutory provisions, private mediation services have been gaining in prominence in New Zealand over the past decade or two.⁷³ These mediation services are offered to the public on a voluntary basis outside the court system by professional mediators who charge fees for their services. Parties are free to employ private mediators at any point during a dispute, including while they are awaiting trial.⁷⁴ Mediators can obtain training in mediation from private organisations such as LEADR and AMINZ (Arbitrators' and Mediators' Institute of New Zealand Incorporated) or from universities.⁷⁵ The Dispute Resolution Centre at the Massey University Graduate School of Business, for example, offers a diploma in dispute resolution.⁷⁶ Membership of the private organisations that are attempting independently to regulate private mediation services is not compulsory.⁷⁷ Accreditation to these organisations is generally available to those who have completed a four-day mediator's workshop.⁷⁸ It is interesting to note that there is a strong representation of people with legal training among accredited mediators and that many of these mediators combine a legal practice with a practice in mediation on which they spend about 20% or less of their time.⁷⁹ Although there are a large number of accredited private mediators in New Zealand, it appears that many of them have not had the opportunity to mediate at all, let alone to operate a successful practice as a mediator.⁸⁰ From a report published by the Ministry of Justice in 2004⁸¹ it appears that only 26% of family disputes are resolved through private mediation.⁸² This low intake has been ascribed to the following factors:⁸³

- lack of awareness and understanding of ADR among disputants and their lawyers;
- failure of lawyers to fully inform clients of ADR options;
- concerns of lawyers that ADR might reduce the demand for legal work;
- lack of information about accredited ADR practitioners, making it difficult for both lawyers and disputants to access them.

72 (1911) 31 NZLR 481 (CA).

73 Adams *et al* *Family law service: commentary* para 2.10.

74 New Zealand Law Commission (March 2004) 107.

75 Powell "Mediation training" 2000 *New Zealand LJ* 419; Wan 78; New Zealand Law Commission (2002) 76.

76 Ministry of Justice *Alternative dispute resolution: general civil cases* paras 3.4–3.6 <http://www.justice.govt.nz/pubs/reports/2004/adr.htm> (accessed 21 Aug 2007).

77 Powell 2000 *New Zealand LJ* 419.

78 Ministry of Justice *Alternative dispute resolution: general civil cases* para 3.4.

79 *Idem* para 3.5.

80 New Zealand Law Commission (March 2004) 113–117; Powell 2000 *New Zealand LJ* 419.

81 Ministry of Justice *Alternative dispute resolution: general civil cases* para 3.3.

82 See also Powell "Dispute resolution: Family Court mediation pilot" 2005 *New Zealand LJ* 85–86; Ministry of Justice *Alternative dispute resolution: general civil cases* para 3.3.

83 Ministry of Justice *Alternative dispute resolution: general civil cases* para 7. See also New Zealand Law Commission (March 2004) 113–117; Powell 2005 *New Zealand LJ* 86.

Following proposals to promote the use of private mediation in addition to the judge-led mediation conference,⁸⁴ a Family Court Mediation Pilot was launched in 2005 by the New Zealand Ministry of Justice.⁸⁵ The pilot, which ran for a year in four family courts, offered parties involved in custody, access and guardianship cases the opportunity to participate in mediation under the guidance of a professional private mediator contracted by the family court.⁸⁶ Contracted mediators were required to be paid-up members of either AMINZ or LEADR and to be subject to those bodies' requirements for continuing professional development.⁸⁷ Furthermore, they were required to have had significant mediation experience within the past three years.⁸⁸ The aim of the mediation was to assist parties to develop their own solutions in relation to their children's care, to resolve disputes faster and to provide for the participation of children in the decision-making process.⁸⁹ A multi-generational mediation model was utilised in that children and members of the extended family were able to be involved in the process.⁹⁰ However, from the government's report on this pilot it appears that children attended only 6% of the mediations that took place.⁹¹ The length of mediations ranged from one-and-a-half to seven-and-a-half hours and the average cost of a mediation, which the government covered, was \$777.⁹² For most people involved in the pilot, family mediation was very successful. The vast majority of parties came to an agreement on all or some of the issues in dispute and communication and co-operation between the parties were generally improved in the process.⁹³ We now simply have to wait and see if mandatory family mediation legislation will result from the pilot in New Zealand.

3.3 The United States of America

In the United States of America the divorce rate is staggering – approximately 45% of today's marriages will end in divorce.⁹⁴ In reaction to the increase in the divorce rate, 39 of the 50 states of the United States have already enacted mediation statutes that either mandate mediation or grant the court the discretion to order mediation in divorces, most notably when custody or support issues are involved.⁹⁵ Massachusetts and Connecticut were the first to pass legislation mandating mediation in custody cases in 1980.⁹⁶ Other states that have mandated

84 New Zealand Law Commission *Dispute resolution in the Family Court* Report 82 (March 2003) <http://www.lawcom.govt.nz/ProjectReport.aspx?ProjectID=87> (accessed 30 July 2007).

85 Ministry of Justice *Family mediation – evaluation of the pilot* (Apr 2007) <http://www.justice.govt.nz/pubs/reports/2007/family-mediation-evaluation-of-pilot> (accessed 30 July 2007).

86 Ministry of Justice *Family mediation – evaluation of the pilot* para 2.1.

87 *Idem* para 4.1; Powell 2005 *New Zealand LJ* 85–86.

88 Powell 2005 *New Zealand LJ* 85.

89 Ministry of Justice *Family mediation – evaluation of the pilot* para 1.2; Powell 2005 *New Zealand LJ* 85.

90 Ministry of Justice *Family mediation – evaluation of the pilot* para 1.1.

91 *Idem* para 5.1.

92 *Idem* paras 5.1 and 4.1.

93 *Idem* para 8.5.

94 Ayrappetova 417; Saccuzzo 425; Schacht "Prevention strategies to protect professionals and families involved in high-conflict divorce" 2000 *Univ of Arkansas at Little Rock LR* 565 566 states that the US has the highest divorce rate in the world.

95 Subourne 390, 396; Saccuzzo 426, 429; Tondo 433; Folberg, Milne and Salem (2004) 5.

96 Subourne 382.

mediation to date in one form or another include California, Delaware, Florida, Hawaii, Idaho, Kentucky, Maine, Nevada, North Carolina, Pennsylvania, South Dakota, Utah, Washington and Wisconsin.⁹⁷ It is clear that mediation is rapidly becoming a required step in divorce proceedings to help reduce the time and tensions associated with the process.⁹⁸ In most states that have mediation statutes, mediation is, however, still used at the courts' discretion⁹⁹ and there seems to be a national trend towards making it mandatory to consider alternative dispute resolution, specifically mediation.¹⁰⁰ In the eleven states where mediation has not been codified in statutes, there are usually local rules that deal with mediation, except in Indiana, New York and Vermont.¹⁰¹ It is therefore abundantly clear that mediation is in widespread use in the United States.

Although mediation of family relations is not applied in the same manner in any two states, most states will not refer cases to mediation in which there are mere allegations of domestic violence.¹⁰² There are, however, a few states, most notably California, that mandates mediation in custody disputes, but have no provision for exclusion where domestic violence is present.¹⁰³ Other states have very broad exemption clauses, for example Utah, where the legislature has included "good cause" as an exception to mandatory mediation. This could mean domestic abuse, serious power imbalances, alcoholism, drug abuse and psychological, psychiatric or emotional problems.¹⁰⁴

In the United States family mediation services are typically offered in one of four settings, namely court-connected venues, private practice, agencies and clinics and community mediation centres.¹⁰⁵ Family mediators are mostly mental health or legal professionals.¹⁰⁶ They provide comprehensive divorce mediation in the areas of property division, the establishment of child and spousal support and the development of parenting plans. Services by family mediators also include private and public sector custody mediation and, more recently, marital, pre-marital, non-marital, post-divorce, elder care, adoption, child protection, parent-child, probate, and guardianship mediations.¹⁰⁷ Many family mediators deliver their services individually, but some have opted for co-mediation.¹⁰⁸ Mediations are usually concluded in three to eight sessions, with each session lasting between one and two hours.¹⁰⁹ The second session is usually scheduled

97 Subourne 390–391; Tondo 445–447.

98 Ayrappetova 417; Hoenig "Divorce mediation basics" 1997 *The Practical Lawyer* 39 40.

99 Tondo 433.

100 Hoenig 41.

101 Tondo 433, 440, 444–445.

102 Becker "Representing parties in private divorce mediation" 2001 *Trial* 59 63; Tondo 433; Hoenig 2.

103 Saccuzzo 433–444.

104 Ariano "A lawyer's guide to preparing clients for family mediation" 2002 *Illinois Bar J* 600 602; Ayrappetova 424; Hoenig 2.

105 Folberg, Milne and Salem (2004) 10.

106 Foster and Kelly "Divorce mediation: who should be certified?" 1995–1996 *Univ of San Francisco LR* 665 666; Saccuzzo 430.

107 Foster and Kelly 666–667.

108 Saccuzzo 431; Wolk "Divorce mediation – today's rational alternative to litigation" 1996 *Dispute Resolution J* 39.

109 Folberg, Milne and Salem (2004) 12; Jessani "A step-by-step approach to the divorce mediation process: from soup to nuts" 2002 *American J of Family Law* 118 119.

for three weeks after the first to give clients the opportunity to collect documentation and obtain market assessments on properties. Subsequent sessions are then scheduled two weeks apart.¹¹⁰ Some mediators also get feed-back from clients about two months after the final memorandum of understanding was signed, by sending them a one-page survey about their experiences in mediation with a stamped self-addressed reply envelope.¹¹¹

Mediator's fees are usually on a sliding scale based on the joint income of the parties¹¹² and range between \$75 and \$400 per hour.¹¹³ Jessani¹¹⁴ states that the combined cost of mediation and attorney fees to conclude the settlement agreement and divorce is often one-third of the cost of a litigated divorce. This statement is supported by Subourne,¹¹⁵ who says that at present the average divorce in the United States costs upwards of \$20 000, while the overall cost of mediation may amount to anything between \$3 500 and \$10 000 per couple. These fees, which are payable on a pay-as-you-go basis at the end of each mediation session,¹¹⁶ are generally divided equally between parties,¹¹⁷ or proportionately in relation to their respective yearly incomes.¹¹⁸

In most instances mediators are appointed by the court, but many states allow the parties to select a qualified or approved mediator.¹¹⁹ Only a few states, however, actually provide specific guidelines for mediation training or minimum qualifications for mediators.¹²⁰ A Kansas statute, for example, specifies factors that courts may consider in selecting a mediator, namely whether there is an agreement for a specific mediator, the presence of conflict or bias, the mediator's knowledge of the Kansas judicial system and of clinical issues, and the mediator's training and experience. However, the statute gives no indication of the type of training that is needed.¹²¹ Another example can be found in a Michigan statute which requires mediators to be licensed to practise psychology or to have a master's degree in counselling, social work, or marriage and family counselling, and to have at least 40 hours of classroom instruction and 250 hours of practical experience in family mediation.¹²² In addition, an array of mediation professional and provider organisations, such as the Association for Conflict Resolution, the Academy of Family Mediators, the American Arbitration Association, Society of Professionals in Dispute Resolution, Judicial Arbitration and Mediation Services and the American Bar Association, all have their own requirements regarding the training and certification of family mediators and standards for the practice of mediation.¹²³ As the mediation industry in the

110 *Idem* 122 123 125 126.

111 *Idem* 127.

112 *Idem* 120; Tondo 433.

113 Ayrapietova 423; Folberg, Milne and Salem (2004) 20.

114 Jessani 119.

115 Subourne 394.

116 Jessani 120; Becker 65.

117 Ayrapietova 418.

118 Tondo 433.

119 *Ibid.*

120 Ayrapietova 422.

121 Saccuzzo 430.

122 *Ibid.*

123 Saccuzzo 436; Folberg, Milne and Salem (2004) 6. See also the prefatory note to the draft Uniform Mediation Act at www.pon.harvard.edu/guests/umaDRAFT (accessed 1 Sept 2007).

United States is constantly growing, many mediators feel that a uniform certification process with a uniform code of ethics and standards of practice should be developed, while others, interestingly enough, are concerned that such a uniform process would diminish the creative and diverse use of mediation.¹²⁴ In this regard, the Uniform Law Commission Drafting Committee and the American Bar Association drafted a model Uniform Mediation Act and recommended its enactment in all states.

The model Act attaches increasing importance to and promotes the use of mediation as an appropriate means of dispute resolution, while also protecting the rights of participants in the mediation process. It will strengthen existing state laws and court rules by providing a strong mediation privilege that permits the parties, mediator, and non-party participants to prevent the use of mediation communications in legal proceedings that take place after the mediation.¹²⁵ This privilege is consistent with the current trend of state law protections for mediation and, if adopted uniformly, will assure that mediation communications in one state will not be subject to admissibility in another state. There are only limited exceptions to this general rule, for example to permit disclosures of threats of bodily harm.¹²⁶ The model Uniform Mediation Act further gives parties the option of being accompanied by a friend, family member or lawyer, which is particularly important when a party is compelled into mediation by a court or other state entity.¹²⁷ To further the integrity of the process, the model Act also requires the disclosure of conflicts of interest by a mediator, and requires a mediator to disclose his or her qualifications upon request.¹²⁸ I was unable, however, to establish whether this model Act has already been enacted in all 50 states. It is nevertheless very exciting and insightful to see that family mediation is in widespread use across the United States.

3.4 Canada

During the past 20 years mediation has also played an increasing role in the resolution of family disputes in Canada.¹²⁹ Section 9(2) of the federal Divorce Act¹³⁰ acknowledges the role of mediation by imposing a duty on divorce lawyers to inform clients of "mediation facilities known to him or her that might be able to assist the spouses in negotiating matters that may be the subject of a support order or custody order". In addition, provincial legislation, such as the New Brunswick Family Services Act¹³¹ and the Ontario Family Law Act,¹³² endorses and promotes voluntary mediation as a process for resolving family disputes, including child and spousal support and property entitlements upon divorce. In some provinces, legal aid is also available to meet the cost of

124 Bracken 224–225; Folberg, Milne and Salem (2004) 18.

125 Ss 4–6.

126 S 6(a).

127 S 10.

128 S 9.

129 English and Neilson "Certifying mediators" in Folberg, Milne and Salem (eds) (2004) 485; Walker "Family mediation" in Macfarlane (ed) *Rethinking disputes: the mediation alternative* (1997) 53; Payne 683.

130 Divorce Act, R.S.C. 1985, c.3.

131 Family Services Act, S.N.B. 1980, c.F-2.2.

132 Family Law Act, R.S.O. 1990, c.F.3.

mediation.¹³³ Further, provincial law societies have authorised lawyers to engage in the practice of mediation.¹³⁴

Mediators come from all three sectors that usually undertake mediation – they may therefore be connected to the courts, work in community agencies, such as family service agencies, or be engaged in private practice.¹³⁵

The Province of Alberta was the first to introduce court-connected conciliation services in 1972 on a pilot basis.¹³⁶ Today this service is a permanent agency, known as the Family Conciliation Service, which concentrates on the conciliation or mediation of family disputes arising on divorce. Counselling staff of the Family Conciliation Service are accessible to families through referral by lawyers, judges, Family Court counsellors, or paralegal workers.¹³⁷ Since the mid-1970s, court-connected mediation services have also been developed in all the other nine provinces in Canada.¹³⁸ Today all these services form an integral part of the Unified Family Courts that have been established in some Canadian provinces.¹³⁹ These court-connected services are, however, limited because of budgetary constraints. Consequently, there is a growing demand for private and community mediation services in Canada.¹⁴⁰

The majority of mediators in private practice are affiliated to the national organisation, Family Mediation Canada (FMC).¹⁴¹ In recognition of the notion that national practice and certification standards ought to be inclusive and that certification should enhance, and not inhibit, entry into the discipline or the development of mediation services, FMC has a voluntary and inclusive certification process.¹⁴² Although FMC members are not obligated to engage in the certification process as a condition of membership or practice, they are all obligated to adhere to FMC Standards of Practice and its Code of Professional Conduct.¹⁴³ Kruk states that these mediators devote about a third of their professional practice to mediation, and that they consider it to be an adjunct to other professional endeavours, such as law, family counselling and therapy, and social work.¹⁴⁴ Private mediators in Canada are well trained in that they usually go far beyond the required 40-hour basic mediation training, with the average practising mediator having a total of 111 hours of formal mediation training.¹⁴⁵ They use a wide array of mediation models, although it seems that the facilitative model is still the most popular.¹⁴⁶ Some mediators favour the team approach where a social worker or psychologist and a lawyer jointly or sequentially engage in the

133 Payne and Payne *Canadian family law* (2001) 163; Payne 668.

134 See eg the Ontario Rules of Professional Conduct, rule 4.07 entitled "Lawyers as Mediators" 22/06/2000.

135 Walker in Macfarlane (1997) 61; Payne and Payne (2001) 148; Payne 674; Kruk 196.

136 Walker in Macfarlane (1997) 61.

137 Payne and Payne (2001) 161.

138 Walker in Macfarlane (1997) 61.

139 Payne and Payne (2001) 161.

140 Payne 668.

141 Kruk 196.

142 Bracken 225; English and Neilson in Folberg, Milne and Salem (2004) 488 499.

143 English and Neilson in Folberg, Milne and Salem (2004) 488.

144 Kruk 197.

145 *Idem* 198.

146 *Idem* 204 208 210–211 214.

mediation process,¹⁴⁷ and more experienced mediators include children and extended family members in mediation sessions.¹⁴⁸ On average, a comprehensive divorce mediation lasts 10,5 hours, scheduled over 6,4 sessions.¹⁴⁹ Current mediator fees range from about \$45 to \$370 per hour, with the average being \$140.¹⁵⁰

It further appears that parties are free to select “open” or “closed” mediation. Payne explains that open mediation signifies that the parties waive their rights as to confidentiality, while closed mediation implies that confidentiality is critical and that neither the parties nor the mediator will be permitted to give evidence in any subsequent litigation as to what transpired during mediation.¹⁵¹

Most mediators feel that divorce mediation is not always inappropriate in spousal and child abuse situations,¹⁵² but some will not mediate when either of the parties is physically violent, addicted to alcohol or drugs, or cannot face the reality of the death of the marriage.¹⁵³ In October 2003 FMC revised its Standards of Practice to restrict the use of face-to-face mediation in partner abuse cases.¹⁵⁴

Although significant progress has been made in Canada, “fighting it out” is unfortunately still the legal norm in divorce cases.¹⁵⁵

4 FAMILY MEDIATION IN SOUTH AFRICA

4.1 Introduction

In South Africa, family mediation is also practised in many different ways by various organisations, institutions and individuals. First, we have the public or court-connected mediation services rendered by the office of the family advocate in terms of the Mediation in Certain Divorce Matters Act.¹⁵⁶ In addition there are private mediation services offered by private mediators to the more affluent section of the population and community mediation services offered by non-governmental and community-based organisations to the poorer sections of the population.

4.2 Public mediation services by the office of the family advocate

Like most other public mediation models, the activities of the office of the family advocate are confined to issues relating to the custody of, guardianship over and access to children.¹⁵⁷ Because an investigation by the family advocate can be initiated by any of the parties involved, the court or the family advocate himself or herself,¹⁵⁸ it can be argued that the services offered by the office of the

147 Payne and Payne (2001) 148.

148 Kruk 201.

149 *Idem* 198.

150 *Idem* 197.

151 Payne and Payne (2001) 151.

152 Kruk 202.

153 Payne 676.

154 English and Neilson in Folberg, Milne and Salem (2004) 509.

155 Payne 667.

156 24 of 1987.

157 S 4(1)(b) and 4(2)(b).

158 S 4(1).

family advocate include elements of both voluntary and mandatory mediation. As both family advocates and family counsellors are involved in an enquiry in terms of section 4 of the Mediation in Certain Divorce Matters Act, it can further be said that the office of the family advocate offers co-mediation. Lastly, because it is part of the family advocate's function to evaluate the parties concerned and the relevant circumstances at an inquiry in order to make a recommendation to the court,¹⁵⁹ the family advocate would appear to use the evaluative model of mediation. However, to expect parties to participate in a mediation attempt, knowing full well that the facts and information provided might later be used as part of the evaluation process, militates against the idea of mediation.¹⁶⁰ In view of the official reporting function of family advocates, they should not be regarded as mediators, but rather as advocates for the children.¹⁶¹

Furthermore, the present operations of the office of the family advocate are seriously hampered by a lack of funds and human resources.¹⁶² Glasser, who did an in-depth study of the family advocate in the Western and Eastern Cape, has the following to say in this regard:

"Despite the best intentions of very dedicated staff, the offices are presently are [sic] not equipped to cope with any increased workload. No matter how good in design and extensive in application, a programme will fail if there is insufficient capacity to carry it out. As a result of being severely underresourced, the current Family Advocate's offices in both provinces lack this capacity on account of insufficient and poorly trained staff and inadequate equipment. There are no computers, and the offices are not electronically linked to any other offices, departments, welfare organisations or even other courts dealing with family matters."¹⁶³

4.3 Private mediation services

South Africa also has a network of private mediators in all the big cities across the country.¹⁶⁴ Private mediators are mostly attorneys, psychologists or social workers who have at least 40 hours' training in family mediation.¹⁶⁵ They usually engage in comprehensive mediation and charge professional fees for the services they offer, either individually or as an interdisciplinary team. Although affiliation is not compulsory, private mediators are generally affiliated to mediation organisations such as SAAM (The South African Association of Mediators in Divorce and Family Matters), MISA (Mediation Institute of South Africa), FAMAC (The Family Mediators Association of the Cape) and the recently established umbrella body SANCOM (South African National Council of Mediators). As the general public is still uninformed about the numerous advantages of

159 Kaganas and Budlender *Family advocate* (1996) 4.

160 Van Zyl "The family advocate: 10 years later" 2000 *Obiter* 372-388.

161 De Jong *Egskedingsbemiddeling in Suid-Afrika: 'n vergelykende studie* (2002) 186.

162 Glasser "Can the family advocate adequately safeguard our children's best interests?" 2002 *THRHR* 74 84-86; Van Zyl 2000 *Obiter* 388; SA Law Commission (RP200/1997) Vol 1 part 2 para 4.

163 Glasser 85.

164 SA Law Commission *Alternative dispute resolution* (Discussion doc 8 Project 94 1997) 22; Van der Merwe "Overview of the South African experience" 1995 (Apr) *Community Mediation Update* 1 3; Bosman "Mediation: an alternative to divorce litigation" 1996 *Career Success* 21.

165 Goldberg 1996 *TSAR* 359-360; Mowatt "Alternative dispute resolution: some points to ponder" 1992 *CILSA* 44 50.

private mediation,¹⁶⁶ it appears that only a very small percentage of the more prosperous section of the population presently makes use of these services.¹⁶⁷ While the mediation services offered by private mediators may be offered on a small scale, they deliver excellent results in practice.¹⁶⁸

4.4 Community mediation services

There are various non-governmental and community-based organisations and institutions, such as street committees, traditional leaders, community courts (*makgotla*), community-based advice centres, Family Life and FAMSA (the Family and Marriage Society of South Africa), that offer family mediation services to the indigenous and/or poorer sections of the population free of charge or at a minimal cost.¹⁶⁹ These community mediation services are very popular among the majority of the South African population.¹⁷⁰ They are generally perceived as accessible and responsive to community concerns, but unfortunately these services are also seriously hampered by a lack of funds and human resources.¹⁷¹

4.5 Move towards mandatory mediation

In terms of the Mediation in Certain Divorce Matters Act parties can be forced to submit to limited court-connected mediation before being granted a divorce order.¹⁷² Furthermore, our courts and the legislator have started to mandate mediation in certain family matters. In *Van der Berg v Le Roux*,¹⁷³ for example, the court ordered the parties to privately mediate all future disputes with regard to their 10-year-old daughter before either of them would be permitted to approach a court which has jurisdiction to decide the matter.¹⁷⁴ In terms of the new Children's Act,¹⁷⁵ certain issues regarding the rights of unmarried fathers, for example, have to be referred to mediation before those issues can be taken to court.¹⁷⁶ It is therefore clear that there is a definite move towards mandatory mediation in family matters in South Africa.

5 EVALUATION OF THE POSITION LOCALLY AND ABROAD

When comparing the available mediation services in South Africa with those in the countries referred to above, it is clear that we do not lag too far behind. In fact, South Africans can walk tall as the current state of affairs with regard to family mediation is more or less in conformity with international standards. As in Australia and Canada, family mediation is offered in the public and the private sector and at community level. We should, however, learn from the Canadian experience of public or court-connected mediation services. If a first-world, welfare state like Canada experiences budgetary constraints in offering these

¹⁶⁶ Bosman 21.

¹⁶⁷ Van der Merwe 3.

¹⁶⁸ De Jong 2005 *THRHR* 96.

¹⁶⁹ Van der Merwe 3–4.

¹⁷⁰ De Jong "An acceptable, applicable and accessible family-law system for South Africa – some suggestions concerning a family court and family mediation" 2005 *TSAR* 33 41–42.

¹⁷¹ *Ibid.*

¹⁷² See para 4.2 above.

¹⁷³ [2003] 3 All SA 599 (NC).

¹⁷⁴ See also *Townsend-Turner v Morrow* [2004] 1 All SA 235 (C).

¹⁷⁵ 38 of 2005.

¹⁷⁶ S 21, which came into operation on 1 July 2007.

services, South Africa, as a largely third-world country,¹⁷⁷ should realise that an extension of public mediation services would probably not be a viable option for us. We would be better advised to concentrate on improving and expanding private and community mediation services.¹⁷⁸

Since mediation is not yet an established profession, private and community mediation services need to be nationally regulated. This is also the general sentiment in Australia, where a national system of mediator accreditation is currently being developed, the United States, where a model Uniform Mediation Act is presently being considered for implementation in all states, and Canada, where the national organisation, Family Mediation Canada, has already developed a voluntary and inclusive certification process for family mediators.

There is much to be said for the strict professional training requirements in Australia and the high training standards in both New Zealand and Canada. Family mediation training in South Africa should also go far beyond the 40-hour basic mediation training programmes. The requirement for annual ongoing mediation training in both Australia and New Zealand also seems to be a move in the right direction. It is submitted, however, that family mediators in South Africa should not be required to have a tertiary qualification, as is required of mediators in Australia. Such a requirement would disqualify too many community mediators, whose valuable contributions we cannot afford to lose.¹⁷⁹

It was also interesting to see that in both New Zealand and Canada, where there is no question as yet of mandatory mediation, family mediators spend only a small percentage of their time on mediation and have no choice but to combine their mediation practices with other endeavours to make ends meet. This also seems to be the case in South Africa, where private mediation services are still largely underutilised. Hopefully, this state of affairs will soon change with the advent of cases like *Van der Berg v Le Roux*¹⁸⁰ and the new Children's Act, which have begun to mandate mediation in certain family matters.¹⁸¹

Another noteworthy development is the involvement of children and extended family members in the mediation process in New Zealand and Canada. In the light of the child participation provisions in the Children's Act¹⁸² and the United Nations Convention on the Rights of the Child,¹⁸³ South Africa should follow suit.

There are valuable lessons to be learnt from family mediation practices in the United States. Family mediators in South Africa should also expand their mediation practices to include the resolution of marital, pre-marital, non-marital, elder care, adoption, child protection and parent-child disputes. Furthermore, family mediators should not be in too much of a hurry when mediation sessions are

177 See Burman and Rudolph "Repression by mediation: mediation and divorce in South Africa" 1990 *SALJ* 251 274.

178 See De Jong 2005 *TSAR* 41 for more reasons why the focus in SA should not be on public, court-connected services.

179 De Jong (2002) 325.

180 *Supra*.

181 See para 4 5 above.

182 S 10 of Act 38 of 2005. This section came into operation on 1 July 2007: *GG* 30030 of 29 June 2007.

183 S 12 of the Convention (UN Doc A/44/49 (1989)). SA ratified the Convention on 16 June 1995.

scheduled. As in the United States, mediation sessions should be stretched out over about nine weeks to give clients enough time to consider and reconsider the important decisions that have to be made upon divorce.¹⁸⁴ Family mediators should also not hesitate to charge proper professional fees for their services – in both the United States and Canada the average hourly rate charged by family mediators amounts to the equivalent of about R1 000.

Lastly, it was illuminating to see that the presence of domestic violence is not always regarded as a bar to family mediation. In New Zealand the caucus method of mediation is used when allegations of domestic violence have been made. Although there are exemption clauses in most American states which exclude the use of mediation in the presence of family violence, some states have no such exemption clauses, even in cases where mediation is mandatory. In Canada most mediators feel that divorce mediation is not always inappropriate in spousal and child abuse situations. The message is therefore clear – although mediators should be wary of mediating in the midst of family violence, the point of departure should always be that almost all parties stand to benefit from the mediation process.

The defendant argued, and the trial court found, that the plaintiff did not resign because his position had become intolerable, but because he wished to claim compensation for the injury he felt he had suffered at the hands of the navy, and because he was advised that to do so he would have to resign. If correct, this would mean that the causal impetus for the resignation was not that the plaintiff's position had become intolerable, but that he desired to claim compensation even though it had not. I cannot endorse this argument. There is some basis for concluding that the plaintiff heeded legal advice that resignation was a necessary precursor to a claim for compensation. But that does not mean that his position was tolerable, or that the desire for compensation was the main operating factor in his decision. He testified that he wanted to remain in the navy, but on terms that gave him justice and fairness. The correspondence makes it clear, as does the plaintiff's lengthy "redress of wrongs" affidavit, which he penned after his resignation, that he considered himself simultaneously entitled to compensation for injury and in an intolerable position in his employment, both because of the navy's conduct. The navy's refusal to compensate him resulted in a stalemate. He did not forfeit his claim because he was intent on being compensated, and decided that therefore he had no alternative but to resign.

Cameron JA in Murray v Minister for Defence [2008] All SA 66 (SCA) para 67.

¹⁸⁴ See also Payne 669 who states that the emotional divorce rarely takes less than 2 years.