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OPPORTUNITIES FOR MEDIATION IN THE NEW CHILDREN'S ACT 38 OF 2005

1 Introduction

Chapter 2 of the new Children's Act 38 of 2005 (ss 6–17) sets out general principles dealing with the affirmation of children's rights and responsibilities in line with the Constitution of the Republic of South Africa, 1996, and international legal instruments (Davel and Skelton *Commentary on the Children's Act* (2007 loose-leaf) 2-2). Very early in the chapter, the importance of an alternative approach to the settlement of child-centred disputes is set out. Section 6(4)(a) provides that in any matter concerning a child an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided (s 6 came into operation on 1 July 2007: *GG* 30030 of 29 June 2007). It is nowadays generally accepted that the adversarial system of litigation, in which parties are pitted against each other, is not designed or developed to deal with the important, intimate, emotional, social and psychological aspects of child-centred or other family disputes (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). Alternative dispute resolution methods have therefore been developed, of which mediation, in particular, is in great demand for the resolution of child-centred or other family disputes (Van Zyl *Mediation and the best interests of the child* (1997) 137; Cohen "The many faces of arbitration: Why not use it for property disputes in divorce?" 1993 *De Rebus* 642; Altobelli "Mediation: Primary dispute resolution 1996: Mandatory dispute resolution in 2000?" 1997 *Australian J Family L* 67).

Mediation is a two-tiered process of which conciliation is an essential part (Scott-MacNab and Mowatt "Family mediation: South Africa's awakening interest" 1987 *De Jure* 50). Once the parties concerned have been oriented through conciliation to communicate with each other in an objective and rational manner, the discussion of the issues in dispute can commence or be continued. However, parties end up in the mediation process because their own endeavours to solve their differences have failed. As they are unable to deal with all the conflict and emotional turmoil on their own, they need the assistance of a neutral third person, a mediator, to facilitate their negotiations (Levy and Mowatt "Mediation in the legal environment" 1991 *De Jure* 65). By using specific techniques and strategies (eg empathic listening, power balancing or equalising, rephrasing or reframing, refocusing, summarising, identifying, clarifying, mutualising, neutralising, normalising, role reversal, hypothesising, option generation, option identification, prioritising, reality testing, etc) the mediator assists the parties to

systematically isolate their disputes, to generate different options for the resolution of these disputes, to reflect on alternative options and, finally, to reach an agreement which satisfies the unique needs of each party (Goldberg "Practical and ethical concerns in alternative dispute resolution in general and family and divorce mediation in particular" 1998 *TSAR* 748). Mediation is nonetheless a consensual process in which the parties themselves make all the decisions about the resolution of their disputes (McEwen, Rogers and Maiman "Bring in the lawyers: Challenging the dominant approaches to ensuring fairness in divorce mediation" 1995 *Minnesota LR* 1319; Greatbatch and Dingwall "The marginalization of domestic violence in divorce mediation" 1999 *Int J of Law, Policy and the Family* 174). It is also a private and informal process (Goldberg "Family mediation is alive and well in the United States of America: a survey of recent trends and developments" 1996 *TSAR* 367) which acknowledges the fact that the feelings of the parties are just as important as the legal aspects of the disputes between them. In so far as the mediator assists the parties to investigate all possible solutions to their disputes, the mediation process allows far more room for flexibility and creativity (Cohen "Mediation: Giving law a human face" 1992 *De Rebus* 126; Rogers and Palmer "A speaking analysis of ADR legislation for the divorce neutral" 2000 *St Mary's LJ* 893). The mediation process can further be adapted to different cultural value systems and/or religious convictions and specific customs, practices and perspectives can easily be built into the mediation process (Moodley "Mediation: the increasing necessity of incorporating cultural values and systems of empowerment" 1994 *CILSA* 46–48).

It is also significant that mediation fits neatly into the legal process as a whole. Although it is an objective of mediation to keep parties and children out of court as it were, the mediation process acknowledges that the High Court is the upper guardian of all minor children and that all decisions made in mediation have to be reviewed and approved by an appropriate court. Parties are merely given an opportunity to try to sort out and solve their own private and intimate problems before going to court. It is therefore not surprising that the Children's Act 38 of 2005 very specifically refers to mediation for the resolution of various child-centred disputes. In some instances the Act expressly mandates mediation and in certain other instances the Act grants the court or even a designated social worker the discretion to order mediation. There are also several provisions in the Children's Act which do not specifically mention mediation, but where mediation, in my opinion, is definitely implied if the general provisions of the Act regarding procedural matters are to be taken seriously.

2 Mandatory mediation in terms of the Children's Act

2 1 Provisions that mandate mediation directly

In two instances the Children's Act provides for the mandatory referral of child-centred disputes to mediation. The first one is to be found in section 21 of the Act, which deals with the parental responsibilities and rights of unmarried fathers and the second in section 33, which deals with parenting plans (s 21 came into operation on 1 July 2007: *GG* 30030 of 29 June 2007, but s 33 had not yet come into operation when this note was completed). Justification for these provisions can be found in the fact that family mediation offers overwhelming advantages to all involved – the parties to the dispute, the children affected by the dispute and the judicial system in general (see De Jong "Judicial stamp of approval for divorce and family mediation in South Africa" 2005 *THRHR* 96–99;

Goldberg "Family courts in South Africa and the implication for divorce mediation" 1995 *THRHR* 277).

In terms of section 21(1)(a) an unmarried father automatically acquires full parental responsibilities and rights in respect of his child if at the time of the child's birth he is living with the mother in a permanent life-partnership. Regardless of whether or not he has ever lived with the child's mother, he also acquires full parental responsibilities and rights if he, in terms of section 21(1)(b),

(i) consents to be identified or successfully applies . . . 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.

Section 21(3)(a) continues to provide that if there is a dispute between the child's unmarried biological parents as to whether the father meets the requirements for acquiring full parental responsibilities and rights in terms of section 21(1)(a) or (b), the dispute must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.

In the same way, section 33(2), read with section 33(5) determines that the co-holders of parental responsibilities and rights in respect of a child who are experiencing difficulties in exercising their responsibilities and rights must first seek to agree on a parenting plan by attending mediation through a social worker or other suitably qualified person or by obtaining the assistance of a family advocate, social worker or psychologist.

It is apparent from both sections 21 and 33 that parties may not approach the court as a first resort for the resolution of their disputes. They must first attend mediation through a family advocate, social worker or other suitably-qualified person or, in the case of section 33, obtain the assistance of a family advocate or other social welfare officer. As it is one of the functions of the family advocate in practice to mediate (the other two functions being to monitor and to evaluate – Kaganas and Budlender *Family advocate* (1996) 4; Glasser "Can the family advocate adequately safeguard our children's best interest?" 2002 *THRHR* 77), I believe that when the assistance of a family advocate is sought, he or she would in any case try to mediate the dispute between the parties as a matter of course. When the assistance of a social worker or psychologist is sought, they would in all probability also try to mediate the dispute between the parties or possibly just try to give the parties some advice. The objective of sections 21 and 33 is nevertheless clear – the parties need the intervention of a mediator or neutral third party to assist them in solving their disputes privately and informally.

If the mediation or intervention by a neutral third party is successful and the parties reach an agreement either on whether the unmarried father qualifies for full parental responsibilities and rights or on an appropriate parenting plan, the agreement may be subjected to judicial approval or review. In this regard section 21(3)(b) provides that any party to the mediation may have the outcome of the mediation reviewed by a court and section 34(1)(b) determines that a parenting plan may be registered with a family advocate or made an order of court. Section 34(3) further provides that when an application for the registration of a parenting plan or the incorporation of such a plan into a court order is made, the application must be accompanied, *inter alia*, by a statement by a family advocate, social worker or psychologist to the effect that the parenting plan was prepared after consultation with him or her, or by a social worker or other appropriate person to the effect that the plan was prepared after mediation by him or her.

If the mediation or intervention by a neutral third party is unsuccessful, the parties will probably also need some kind of proof that they have indeed attended mediation or have consulted a family advocate or other social welfare officer before they can approach the court with their dispute. In Australia, for example, the Family Law Amendment (Shared Parental Responsibility) Act 46 of 2006, introduced new provisions regarding the sharing of parental responsibilities into the Family Law Act 59 of 1975. These provisions effectively introduced mandatory mediation in parenting matters (s 60I of the Family Law Act) by preventing a court from hearing an application relating to children unless a certificate from a family dispute resolution practitioner is also filed (s 60I(7)). This certificate must state either that the attendees made a genuine effort to resolve the issues in question or that attendance of mediation was inappropriate in the circumstances (s 60I(8)). A certificate is, however, not required in circumstances where a history or threat of family violence or child abuse has been established (s 60I(9)). It is submitted that in South Africa the mediator or other designated intermediary should also, by regulation, be required to issue such a certificate to the parties after an attempt to mediate a dispute has failed. Although mediators should generally not comment upon the extent to which parties participated in the mediation process, the fact that a party flatly refused to participate in the mediation process or abused the mediation process should be recorded. For the purposes of this certificate, it would be very useful if a prescribed form could be provided in the regulations to the Children's Act for completion by the mediator in each case.

The drafters of the Children's Act should possibly also take heed of the Australian legislation's exemption from the filing of a certificate in the presence of family violence or child abuse. On the other hand, there are various writers and mediators who feel that mediation can be applied and may be effective in cases of family violence (Pearson "Ten myths about family law" 1993 *Family LQ* 288; Goldberg 1996 *TSAR* 366; Greatbatch and Dingwall 1999 *Int J of Law, Policy and the Family* 185–187; Kruk "Practice issues, strategies and models: The current state of the art of family mediation" 1998 *Family and Conciliation Courts R* 202). However, if mediators attempt to mediate child-centred disputes in the midst of abuse or family violence they need to be properly trained and sufficiently knowledgeable to deal with these precarious conditions (see para 2 5 below).

2 2 Provisions that grant the court (or an official) the discretion to order mediation

There are also a few instances where mandatory mediation is in the discretion of the children's court. The first two concern lay-forum hearings as contemplated by sections 49, 70 and 71 and pre-hearing conferences in terms of section 69 of the Children's Act (these sections had not yet come into operation when this note was completed). The third instance relates to children who might have been in need of care and protection, but who are found not to be in such a situation. In all these instances it can be argued that since the court process is an expensive use of public resources, it is acceptable to require the parties to make some effort to settle their cases in a cost-efficient way before being entitled to take up the

court's time (Klug "ADR: trends and directions in commercial disputes" 1997 *Australian Dispute Resolution J* 174).

In terms of section 49(1) a children's court may, before deciding 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. These lay-forum hearings may include

- mediation by family advocates, social workers, social service professionals or other suitably qualified persons (s 49(1)(a));
- family group conferences as contemplated in section 70 (s 49(1)(b)); and
- mediation in any appropriate lay forum as contemplated in section 71 (s 49(1)(c)).

Although sections 49(1)(b) and 70 do not specifically mention mediation in connection with the family group conferences, it is clear that mediation is precisely what the legislator had in mind for these conferences. Section 70 envisages that the children's court will appoint a suitably qualified person or organisation to facilitate at a family group conference set up with the parties involved and any other family members of the child in order to find solutions for any problem involving the child. It should be borne in mind that mediation is in fact nothing other than facilitated negotiation (see para 1 above). Multi-generational mediation, which entails mediation with the extended family, is also a well-known and widely-used model of intervention today (Kruk 1998 *Family and Conciliation Courts R* 207).

With regard to lay forums, section 71(1) provides that a children's court may refer a matter before it to any appropriate lay forum, including a traditional authority, in an attempt to settle the matter by way of mediation out of court. As traditional community-based organisations or institutions such as street committees, community courts, community-based advice centres and traditional leaders still play the most important role in resolving the family disputes of the majority of the South African population (Van der Merwe "Overview of the South African experience" 1995 (Apr) *Community Mediation Update* 3; SA Law Commission *Alternative dispute resolution* Discussion doc 8, Project 94 (1997) 22–23), this provision will contribute significantly to making the formal law more accessible (De Jong 2005 *TSAR* 41–43). As traditional leaders and the facilitators at street committees, community courts or community-based advice centres are usually not trained mediators (see para 2 5 below), it is understandable that section 71(2) excludes the use of lay forums where there are any allegations of child abuse.

The second instance where mandatory mediation is in the discretion of the court deals with pre-hearing conferences. Section 69(1) determines that, when a matter in the children's court is contested, the court may order that a pre-hearing conference be held with the parties in order to

- mediate between them;
- settle disputes between them as far as possible; and
- define the issues to be heard by the court.

The intention of the legislator regarding these pre-hearing conferences is clearly the mediation of all outstanding disputes. Although the section does not stipulate which individuals or agencies should provide the mediation, section 69(4)(a) provides that the court may prescribe how and by whom the pre-hearing conference should be set up and conducted and by whom it should be attended. In my

opinion the court would probably take note of the other prescriptions of the Act in this regard (ss 21(3)(a), 33(5), 49(1)(a), 71(1)) and refer the pre-hearing mediation to a family advocate or a social worker, social service professional, other suitably qualified person or even a lay forum which would include a traditional authority. It is also submitted that a multi-generational model of mediation (which involves the extended family, including, of course, the children affected by the proceedings) would probably be used. In any case, section 69(3) expressly provides for the participation of children in pre-hearing conferences.

It is also interesting to note that section 69(2) contains a general exclusion clause which prohibits pre-hearing conferences in matters involving the alleged abuse or alleged sexual abuse of a child. Elsewhere in the Act (s 71(2)), this exclusion only applies where mediation is to be conducted in lay-forum hearings. In my opinion such a selective exclusion would have been appropriate in section 69(2) as well, since it is often proposed that properly trained mediators would indeed be able to mediate where there are allegations of abuse or family violence (see para 2 1 above). It is only untrained mediators who should not be allowed to mediate in the presence of family violence or abuse (see para 2 5 below).

In the case of family group conferences (ito ss 49(1)(b) and 70), appropriate lay forums (ito ss 49(1)(c) and 71) and pre-hearing conferences (s 69(1)), the children's court may 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 (ss 69(4)(b), 70(2)(b) and 71(3)(a)). On its mere production such a report will, subject to the decision of the presiding officer, be admissible as evidence of the facts stated therein (s 63(1)). The fact that the mediator or facilitator might have to record "any fact emerging from such conference which ought to be brought to the notice of the court" in addition to any agreement or settlement reached, may however inhibit parties from being completely honest during these conferences. They might try to conceal certain relevant facts in order to make a good impression on the mediator or facilitator so that nothing negative about them might be reported to the children's court.

Any agreement or settlement reached will, once again, be subjected to judicial review. In terms of sections 69(3)(c), 70(2)(c) and 71(3)(b), records kept at pre-hearing conferences, family group conferences and lay-forum hearings will be considered by the court when the matter is heard.

If no agreement or settlement is reached at these proceedings, the parties will probably, once again, need some kind of proof that they have indeed attended the family group conference, lay-forum hearing or pre-hearing conference, before proceedings in the children's court can be resumed. Here, and in the case of unsuccessful section 49(1)(a) mediations, I would like to repeat my previous proposal (see para 2 1 above) that the mediator or facilitator should be required to issue a certificate to the parties to the effect that they made a genuine effort to resolve the issues in question, but with no success.

The third instance where it might also be argued that mandatory mediation is in the discretion of the children's court relates to children who are brought to the children's court after a designated social worker (ito the definition in s 1 such a designated social worker can only be one employed by the Dept of Social Development, a municipality or child protection NGO that is specially authorised by the Dept of Social Development to undertake care and protection investigations)

has found them to be in need of care and protection, but the court in terms of section 155(8) finds that they are not in such need. Under these circumstances the children's court may, in terms of section 155(8)(b), make an order for early intervention services in terms of the Act (this section had not yet come into operation when this note was completed). According to Advocate Ronel Van Zyl, one of the drafters of the Children's Act, such intervention services include mediation (opening address at SAAM's AGM on 23-11-2007).

Besides the fact that mandatory mediation may be in the discretion of the court, it may also be in the discretion of a designated social worker who deals with children who, after investigation, are found not to be in need of care and protection. These provisions are set out in sections 150(3) and 155(4)(b) of the Children's Act (these sections had not yet come into operation when this note was completed). As in the case of the mandatory mediation provisions discussed under the previous heading (see para 2 1 above), justification for these provisions can be found in the fact that family mediation offers overwhelming advantages to all involved, particularly the children (Kelly "Mediated and adversarial divorce resolution processes" 1991 *Family Law Practice* 386 387).

If, after investigation, a designated social worker finds that a child who is either a victim of child labour (s 150(2)(a)) or a member of a child-headed household (s 150(2)(b)) is not a child in need of care or protection, the social worker must, where necessary, take measures to assist the child, which may include counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving or referral to another suitably qualified person or organisation (s 150(3)). This also seems to be the case where a designated social worker has investigated the question whether a child is in need of care and protection in terms of section 155(2), but found that the child is not in need of such care and protection. In the report that the social worker must provide after the investigation (s 155(3)), he or she must, where necessary, indicate which measures were recommended to assist the family (s 155(4)(b)). As in the case of section 150(3), these measures may include mediation. It is therefore clear that in both these instances children and their family groups might be subjected to welfare services, including mediation services, in the social worker's discretion.

2 3 Sanctions against resisting parties and parties who are not willing to mediate in good faith

Parties who are not desirous of mediation, but who are ordered to participate, should still act ethically (Dearlove "Court-ordered ADR: Sanctions for the recalcitrant lawyer and party" 2000 *Australasian Dispute Resolution J* 16). This means that parties must participate in mediation in good faith and must disclose all relevant documentation and information honestly and candidly. If a party refuses to participate in the mediation process, or does not participate in good faith, or abuses the mediation process, the *bona fide* party should be able to request that the *mala fide* party be penalised by the court at the hearing of the case. The court can do this by applying any one of the following three possible sanctions:

(i) The most usual sanction against a resisting party or a party not acting in good faith in the mediation process is an order as to costs. In terms of this order, a court can recommend at the hearing of the case that the *mala fide* party pay all legal costs as well as mediation costs. Although the children's court does not have the power to make costs orders in terms of the Child Care Act 74 of 1983 (Gallinetti "The Children's Court" in Davel and Skelton *Commentary on the Children's Act* 4-15), section 48(1)(d) of the Children's Act specifically empowers the children's court to make appropriate orders as to costs in matters before the court (this section had not yet come into operation when this note was completed). When this section comes into operation, parties will hopefully be discouraged from refusing to participate in mediation or from acting *mala fide* in the mediation process.

(ii) Strictly speaking, where parties are required in terms of legislation to go for mediation, as in terms of sections 21 and 33 (see para 2 1 above), they cannot be found guilty of contempt of court if they refuse to observe the legislative provisions. (However, nothing prevents legislation that expressly makes mediation mandatory from determining that a party who refuses or neglects to participate in mediation, or who acts unreasonably or dishonestly during the mediation process, is guilty of an offence and punishable with a fine of a specific amount.) Where the mediation takes place pursuant to a court order in terms of sections 49, 69, 70 and 71, there is no reason why a *mala fide* party cannot be found guilty of contempt of court and be penalised with a fine or even imprisonment (Dearlove 2000 *Australasian Dispute Resolution J* 22).

(iii) In both Australia (ss 19B and 19BAA of the Family Law Act 59 of 1975) and New Zealand (s 19(2) of the Family Proceedings Act 94 of 1980), the family courts have the authority to postpone or adjourn court proceedings to allow the parties to seek mediation. There, a resisting party who is hampering the mediation process runs the risk of having the court suspend the hearing of a case until the mediation process has run its course. This should also be the case in South Africa. It is therefore significant that section 64(1) of the Children's Act authorises the children's court to adjourn proceedings for a period of up to 30 days (this section had not yet come into operation when this note was completed). (Currently, section 14(3) of the Child Care Act only allows inquiries to be postponed for 14 days at a time.)

Where parties are referred to mediation by a designated social worker in terms of section 150(3) or section 155(4)(b) (see para 2 2 above), it might be more difficult to compel resisting parties to engage in the mediation process. Matthias and Zaal ("Children in need of care and contribution orders" in Davel and Skelton *Commentary on the Children's Act* 9-7) argue that the correct approach in such a situation would be for the social worker to consider whether the fact that the child concerned or other family members are resisting the mediation is not perhaps an indication that the child is indeed in need of care and protection in terms of one of the grounds listed in section 150(1). The listed ground that would be applicable here is section 150(1)(f), which provides that a child is in need of care and protection where he or she lives in or is exposed to circumstances which may seriously harm his or her physical, mental or social well-being. The mere knowledge that the social worker could make such a finding if the child or other family members resist mediation should in itself be adequate motivation for the child and other family members to participate in the mediation in good faith.

2 4 Who should provide mandatory mediation services

Except for section 69 (which leaves it up to the court to decide who should provide mediation at pre-hearing conferences), all the other sections of the Children's

Act that either mandate mediation (ss 21(3)(a) and 33(5)) or grant the court the discretion to order mediation (ss 49(1)(a), 70(2)(a) and 71(1)) give a definite indication as to who should provide mediation. In terms of these sections mediation can be provided by a family advocate, a social worker, a social service professional, another suitably qualified person or organisation or a lay forum, which includes a traditional authority. A suitably qualified person would probably be someone who is not a family advocate, a social worker or a social service professional, but who has a degree, diploma or other qualification from a university, college of advanced education or other tertiary institution and has undergone specific training in mediation. A suitably qualified person could, for example, be a lawyer who also completed an approved training programme in family mediation of at least 40 classroom hours. An approved training programme would be one that is endorsed by 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) or the recently established umbrella body SANCOM (South African National Council of Mediators). As pointed out earlier (see para 2 2 above), a traditional authority would include community-based and non-governmental organisations or institutions such as street committees, community courts, community-based advice centres and traditional leaders. It is therefore clear that in terms of the Children's Act mediation may be offered in the public and the private sector and at community level.

As South Africa is often classified as a third world country (Burman and Rudolph "Repression by mediation: Mediation and divorce in South Africa" 1990 *SALJ* 274), the government does not have the financial capacity to offer large-scale and country-wide mediation services through the office of the family advocate or the social development department. Any extra burden on the family advocate, whose present operations are already being seriously hampered by a lack of funds and human resources (Glasser 2002 *THRHR* 84–86), would therefore prove to be unbearable. Consequently, it is my submission that where the Children's Act does not explicitly stipulate that a government official should perform the mediation, mandatory mediations in terms of the Act should preferably be referred to existing community-based and private mediation organisations or institutions. This would be a relatively cheap option for the state since these services are, to a large extent, already available countrywide. However, as most of the mediation services at community level are currently also hampered by a lack of funds and human resources, the state will have to provide funding to these organisations or institutions in one form or another. To overcome this problem and/or to alleviate this burden on the state it might be a good idea to first refer parties to private mediation for which they would be expected to pay themselves. However, if financial, cultural or other logistical considerations (such as distance or language barriers) justify this, parties could be referred to state-subsidised community mediation services (De Jong 2005 *TSAR* 40–44).

2 5 The training of mediators in South Africa

Formal mediation training is believed to be essential for the protection of the consumers of mediation (Rogers and Palmer 2000 *St Mary's LJ* 943). Mediators are therefore required to complete an approved training course in family mediation of at least 40 classroom hours. These training courses should focus on the fundamental aspects of family mediation (De Jong 2005 *THRHR* 96), the different forms of family mediation (Folberg, Milne and Salem *Divorce and family mediation: Models, techniques, and application* (2004) 29–126) and the mediation process, with specific reference to the techniques and strategies to be used by mediators (Charlton and Dewdney *The mediator's handbook: Skills and strategies for practitioners* (1995) 3–118). Special attention should be given to issues like multiculturalism (Goldberg 1998 *TSAR* 754; Moodley 1994 *CILSA* 51) and family violence or abuse (Landau "OAFM, standards for assessing presence of abuse and whether mediation may be appropriate" 1996 (Nov) *SAAM News* 7–8). Since it is impossible to cover all these subjects and issues in a basic 40-hour training course and, furthermore, since family mediation is still developing, it is important that mediators should be obliged to attend annual ongoing training of at least 12 hours (this is also a requirement for mediators in both Australia and New Zealand). This kind of ongoing training is essential for the maintenance and promotion of good mediation skills and will ensure that mediators keep abreast of new developments.

However, where mediators do not comply with the above training requirements, broad exemption clauses should prohibit them from facilitating negotiations in the midst of family violence (as in s 71(2)).

3 Provisions in the Children's Act where mediation is implied

Several provisions in the Children's Act encourage parties to try to reach an agreement on certain issues. For instance, in terms of section 22(1) the mother of a child or other person who has parental rights and responsibilities in respect of a child may enter into an agreement with either the unmarried father of the child who does not already have parental rights and responsibilities or another person who has an interest in the child's care, well-being and development in order to confer upon such father or other person the parental rights and responsibilities specified in the agreement (s 22 had not yet come into operation when this note was completed). Likewise, section 30(3) determines that a co-holder of parental rights and responsibilities may enter into an agreement with the other co-holder of parental rights and responsibilities to allow such other co-holder or another person to exercise specified parental rights and responsibilities on the co-holder's behalf (s 30 came into operation on 1 July 2007: *GG* 30030 of 29 June 2007). Furthermore, section 234(1) provides that the parent or guardian of a child may, before an application for the adoption of a child is made (ito s 239), enter into a post-adoption agreement with a prospective adoptive parent of that child to provide for communication between the child and the parent or guardian and such other person as may be stipulated in the agreement and the provision of information about the child after the application for the adoption is granted (the whole of chapter 15 dealing with adoption had not yet come into operation when this note was completed). Lastly, section 292 read with sections 293 and 295 requires that a surrogate mother and her husband or permanent life partner and the commissioning parents or the commissioning parent and his or her spouse or permanent life partner may enter into a surrogate motherhood agreement to provide for matters not regulated by the Act (the whole of ch 19 dealing with surrogate motherhood had not yet come into operation when this note was completed).

Although no mention is made of mediation in these sections, mediation can surely play a vital role in facilitating negotiations between the parties in these matters. As pointed out above, the general provisions of the Act regarding procedural matters (see para 1 above) underpin the importance of an alternative

approach, like mediation, to the settlement of child-centred issues. It would therefore be advisable for parties to seek the assistance of a mediator when trying to reach an agreement on all the issues referred to above.

It is, however, very important that all agreements reached in the mediation process should be judicially reviewed and approved (see para 1 above). In this regard section 72(1) determines in general that all matters that are settled out of court must be submitted to the children's court for confirmation or rejection (s 72 had not yet come into operation when this note was completed). In terms of section 72(2) the court must consider the settlement and, if it is in the best interests of the child, may confirm the settlement and make it an order of court, refer the settlement back to the parties for reconsideration of specific issues or reject the settlement. Furthermore, most of the sections that encourage the parties to reach an agreement on certain matters have their own provisions for the judicial review of any agreements reached. For example, in terms of section 22(4) a parental responsibilities and rights agreement takes effect only if it is registered with the family advocate or made an order of the High Court, a divorce court or the children's court on application by the parties to the agreement. The agreement will, however, only be registered or made an order of the court if it is in the best interests of the child (s 22(5)). In addition, a post-adoption agreement will only take effect if made an order of the children's court (s 234(6)(a)) and a surrogate motherhood agreement will only be valid if confirmed by the High Court (ss 292(1)(e) and 295).

4 Conclusion

When the whole of the Children's Act comes into operation, mediation, whether mandatory, in the discretion of the court or another official, or voluntary upon the request of the parties, will play an ever-increasing role in the resolution of child-centred disputes. Proper and comprehensive mediation services should therefore be made available to everyone. These services must be representative of all ethnic and cultural groups, all religions, all age groups and all socio-economic levels (Faulkes and Claremont "Community mediation: Myth and reality" 1997 *Australian Dispute Resolution J* 179). It is also vital that all public and private mediators, and preferably also community-based mediators, should undergo the necessary training, including ongoing training (see para 2 5 above). At this stage, community-based mediators who do not comply with this requirement should not be disqualified from delivering mediation services as we cannot afford to lose their valuable contributions. It is, however, advisable that mediators who have not undergone formal mediation training should not be allowed to mediate where there are mere allegations of family violence (see paras 2 1, 2 2 and 2 5 above).

In order to ensure mediation services of the highest standard and to protect the relevant parties as well as the mediator, it is further essential that uniform and comprehensive standards for the mediation process and the practice of mediation are developed (Goldberg 1998 *TSAR* 749; Rogers and Palmer 2000 *St Mary's LJ* 947). As regards the mediation process, guidelines need to be laid down to regulate matters such as the number of sessions over which the process should run, the involvement of children and other relevant players in the mediation process, the way in which agreements reached in the mediation process should be recorded and the way in which mediators are required to report back to the court once the mediation process has run its course. Regarding the practice of

mediation, mediators must be required, *inter alia*, to comply with certain basic rules of fairness and reasonableness, to treat all parties with respect, to act without any sexual, religious or cultural prejudice, to redress any power imbalance between parties by strengthening and supporting the weaker party, to thoroughly investigate all allegations of family violence and caucus with parties if necessary, and to ensure that all decisions made about children are always in their best interests. These standards for the mediation process and the practice of mediation should further be re-evaluated from time to time so as to avoid rigidity (Goldberg 1998 *TSAR* 750).

In my opinion, the highly important task of ensuring high-quality mediation services throughout South Africa should be undertaken as a joint endeavour by the national organisation, SANCOM, the Office of the Family Advocate and the Department of Social Welfare and Development. It is perhaps also a matter that could be addressed fruitfully in the regulations to the Children's Act (which are currently being drafted).

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THE NATIONAL CREDIT ACT 34 OF 2005: THE PASSING OF OWNERSHIP OF THE THING SOLD IN TERMS OF AN INSTALMENT AGREEMENT

1 Introduction

The National Credit Act 34 of 2005 ("the Act") which is now in full effect (the Act was put into operation on 2006-06-01, 2006-09-01 and 2007-06-01; s 172 which came into operation on 2006-06-01 repealed the Act's immediate predecessors, the Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968) applies to credit agreements (credit facilities, credit transactions or credit guarantees or any combination thereof – s 8(1)) between parties dealing at arm's length and made within or having an effect within the Republic, unless one of the exclusions from the ambit of the Act applies (s 4(1); see Otto *The National Credit Act explained* (2006) 15ff; Renke, Roestoff and Haupt "The National Credit Act: New parameters for the granting of credit in South Africa" 2007 *Obiter* 230–238; Boraine and Renke "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 (Part 1)" 2007 *De Jure* 230–235 for a discussion of the field of application of the Act). One of the credit transactions to which the Act applies is the instalment agreement (s 8(4)).

An instalment agreement entails a contract of sale of movable property where payment of the price or part thereof is deferred and is to be paid by periodic payments. Interest, fees or other charges are payable to the credit provider in respect of the agreement or deferred amount. Possession and use of the property is transferred to the consumer (buyer; s 1 defines "consumer" *inter alia* as the