

ATTORNEYS' ATTITUDES TO DIVORCE MEDIATION,  
WITH PARTICULAR ATTENTION TO THE SOCIAL WORKER'S  
ROLE IN DEVELOPING A COLLABORATIVE APPROACH

by

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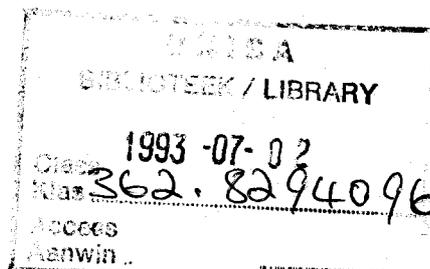
I, Susan Gladys Folb, declare that

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ATTENTION TO THE SOCIAL WORKER'S ROLE IN DEVELOPING A  
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quoted have been indicated and acknowledged by means of  
complete references.

Susan Folb

10.12.92



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**To Peter**

## PREFACE

The seeds of this dissertation were sown early in 1990, when I was given the task of developing the divorce mediation service of FAMSA (Western Cape). It was clear at that time that attorneys were able to influence their clients either in favour of or away from mediation, and that the most effective strategy was likely to be to find common ground with the legal profession.

On hearing of my plans, a colleague in Johannesburg warned that I would never gain the cooperation of attorneys for this study. I am indebted to the 328 who responded to the initial inquiry, even those who do no divorce work, and to the 148 who took the trouble to participate fully in the investigation.

I wish to thank the following for their special help:

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Despite a very busy schedule, Lisa Parkinson, Director of the Family Mediators Association of the United Kingdom, read through the manuscript while she was in Cape Town, and offered some valuable comments which have been incorporated.

My children, Jonathan and Naomi, have survived the years spanning my two degrees with patience and good humour, although neither has been persuaded to study social work.

My greatest thanks are reserved for my husband, Peter, who encouraged me to embark on this journey and has shared it all the way. I thank him for the hours spent at the computer doing the statistical work, and for his editing skills, and look forward to him being able once again to spend more time on his woodcuts.

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## SUMMARY

Recent legislation passed by the South African Parliament has sharpened attention on the importance of mediation in the process of divorce. Without the understanding and cooperation of the legal profession, and of attorneys in particular, there appears to be small chance that this will be adequately recognised and brought to fruition.

The research reported in this dissertation reflects the results of an investigation of Cape Town attorneys working in the field of divorce. Their attitudes to and knowledge of the concept of divorce mediation are reported, and the prospects of collaboration between a social work agency and the legal profession in divorce mediation have been analysed. It is clear that some collaboration is achievable between the social work and legal professions in this area.

A methodology has been developed and validated that is generally applicable, and which could also be used for investigation of other professional groups.

## TABLE OF CONTENTS

PREFACE	i
SUMMARY	iv
LIST OF TABLES	x
LIST OF FIGURES	xi
<b>CHAPTER 1 - INTRODUCTION AND ORIENTATION</b>	
1.1 Introduction	1
1.2 Formulation of the problem	2
1.3 Motivation	6
1.3.1 The divorce process	6
1.3.2 The legal experience	9
1.3.3 Divorce mediation/conciliation	14
1.3.4 Co-mediation	16
1.3.5 Training of mediators	17
1.3.6 Summary	19
1.4 The role of the social worker in the mediation process	20
1.5 Objectives	22
1.6 Hypotheses	23
1.7 Research design	23
1.8 Method of investigation	24
1.9 Shortcomings and limitations	27
1.10 Definition of concepts	28
1.10.1 Mediation	28
1.10.2 Conciliation	28
1.10.3 Reconciliation	29
1.10.4 Solicitor/attorney	29
1.11 Presentation of contents	29

**CHAPTER 2 - THEORETICAL AND LITERATURE STUDY**

2.1	Divorce statistics	31
2.2	The divorce process	33
	2.2.1 The effects of divorce	33
	2.2.2 The stages of divorce	36
2.3	Divorce conflict	42
2.4	Conciliation/mediation	46
	2.4.1 Development	46
	2.4.2 Terminology	50
	2.4.3 Assumptions	51
	2.4.4 Principles	53
	2.4.5 Models	54
	2.4.6 Techniques and skills	58
	2.4.7 Conflict	60
2.5	Comparison between mediation/conciliation, counselling/therapy and family therapy	61
2.6	Mediation and children	64
2.7	The Mediation in Certain Divorce Matters Act No. 24 of 1987	70
2.8	Co-mediation	74
	2.8.1 Co-mediation compared with solo mediation	77
2.9	Lawyers' attitudes to mediation	79
2.10	Advantages of conciliation/mediation	82
2.11	Research	84
	2.11.1 Promoting mediation	84
	2.11.2 Evaluation of mediation	85
2.12	Training of mediators	89
2.13	Ethical, professional and legal issues	92
2.14	Summary	95

**CHAPTER 3 - EMPIRICAL RESEARCH**

3.1	Design	98
3.2	Approach to the problem	98
3.3	Sampling	99
3.4	Method of data collection	101
3.5	The questionnaire	102
3.6	Validity	103
	3.6.1 Content validity	103
	3.6.2 Face validity	104
	3.6.3 Criterion validity	104
	3.6.4 Construct validity	105
3.7	Reliability	106
	3.7.1 The test-retest method	106
	3.7.2 The alternate-form method	107
	3.7.3 The split-half technique	108
3.8	Analysis of results	108
	3.8.1 Method of evaluation	108
	3.8.2 Scoring	109
	3.8.3 Statistical analysis	110
	3.8.4 Validation of the questionnaire	111
3.9	Follow-up talk and videotape	112
3.10	Evaluation	113
3.11	Analysis of follow-up evaluation	113
3.12	Additional feedback	114

**CHAPTER 4 - RESULTS**

4.1	Introduction	115
4.2	Divorce mediation collaboration inquiry	116
4.3	Demographic details	116
	4.3.1 Discussion	119
4.4	Validation of the questionnaire	119

4.5	Examination of demographic status against criteria A-F	123
4.6	Distribution of the evaluation criteria	125
4.7	Correlation of the criteria of evaluation	127
4.8	Correlation of the criteria of evaluation - women respondents only	130
4.9	Individual results	132
4.10	Questions not included in the statistical evaluation	135
4.10.1	Question 15 of the original questionnaire	136
4.10.2	Question 19 of the original questionnaire	137
4.10.3	Question 23 of the original questionnaire	140
4.10.4	Question 26.4 of the original questionnaire	140
4.11	Questions requiring additional comment	142
4.11.1	Question 7	142
4.11.2	Question 16	143
4.11.3	Question 17	143
4.11.4	Question 18	144
4.12	Requests for additional input	144
4.13	Follow-up evaluation	144
4.13.1	Questions 1(i) to 1(vi)	146
4.13.2	Question 2	148
4.13.3	Question 3	149
4.13.4	Question 4	149
4.13.5	Question 5	150
 <b>CHAPTER 5 - CONCLUSIONS AND RECOMMENDATIONS</b>		
5.1	Conclusions	152
5.1.1	Objectives	152
5.1.2	Hypotheses	156
5.2	Recommendations	157

**APPENDICES**

Appendix A	Initial letter of inquiry to attorneys	161
Appendix B	Divorce Mediation Collaboration Inquiry and covering letter	162
Appendix C	Scoring for Divorce Mediation Collaboration Inquiry	167
Appendix D	Talk given to the attorneys and letter of invitation	169
Appendix E	Evaluation	181
Appendix F	Summary of main findings	182
Appendix G	Demographic details of the 148 respondents	186
Appendix H	National Family Conciliation Council conciliation skills list	188

**BIBLIOGRAPHY**

194

## LIST OF TABLES

TABLE 4.1:	AGE OF RESPONDENTS	117
TABLE 4.2:	SEX OF RESPONDENTS	117
TABLE 4.3:	YEARS IN PRACTICE AS AN ATTORNEY	117
TABLE 4.4:	PERCENTAGE OF WORK DEVOTED TO DIVORCE	118
TABLE 4.5:	DIVORCE STATUS OF RESPONDENTS	118
TABLE 4.6:	PARENTAL STATUS OF RESPONDENTS	118
TABLE 4.7:	SIGNIFICANCE LEVEL FOR COMPARISON OF EACH QUESTION WITH THE AGGREGATE RESULT OBTAINED BY EVERY INDIVIDUAL (BY QUARTILE) FOR THE CRITERIA A, B, C, D, E AND F (KRUSKAL-WALLIS ANALYSIS OF VARIANCE) BEFORE DELETION OF THE INVERSIONS	121
TABLE 4.8:	SIGNIFICANCE LEVEL FOR COMPARISON OF EACH QUESTION WITH THE AGGREGATE RESULT OBTAINED BY EVERY INDIVIDUAL (BY QUARTILE) FOR THE CRITERIA A, B, C, D, E AND F (KRUSKAL-WALLIS ANALYSIS OF VARIANCE) AFTER DELETION OF THE INVERSIONS	122
TABLE 4.9:	SUMMARY STATISTICS DESCRIBING RESPONSE CRITERIA A, B, C, D, E AND F (AFTER DELETION OF THE INVERSIONS)	126
TABLE 4.10:	SPEARMAN RANK CORRELATION COEFFICIENTS FOR CRITERIA A, B, C, D, E AND F, AFTER DELETION OF INVERSIONS	127
TABLE 4.11:	SPEARMAN RANK CORRELATION COEFFICIENTS FOR CRITERIA A, B, C, D, E AND F, AFTER DELETION OF INVERSIONS (WOMEN ATTORNEYS ONLY)	130
TABLE 4.12:	INDIVIDUAL SCORES OF EACH RESPONDENT FOR EACH CRITERION EXPRESSED AS A QUARTILE IN COMPARISON WITH THE WHOLE GROUP	134

TABLE 4.13:	RESPONDENTS SCORING IN THE FIRST QUARTILE FOR EACH OF THE SIX CRITERIA TESTED: DEMOGRAPHIC DETAILS, AND THE SIGNIFICANCE OF THEIR COMPARISON WITH OTHERS IN THE ENTIRE GROUP OF RESPONDENTS (CHI-SQUARE GOODNESS OF FIT)	135
TABLE 4.14:	CHI-SQUARE GOODNESS OF FIT FOR QUESTION 15 OF THE ORIGINAL QUESTIONNAIRE	136
TABLE 4.15:	CHI-SQUARE GOODNESS OF FIT FOR QUESTION 19 OF THE ORIGINAL QUESTIONNAIRE	138
TABLE 4.16:	PEOPLE TO WHOM RESPONDENTS WOULD BE PREPARED TO REFER CLIENTS FOR MEDIATION	140
TABLE 4.17:	SCORING OF CHANGE AS A RESULT OF THE INTERVENTION	146
TABLE 4.18:	SUMMARY STATISTICS FOR QUESTIONS 1(i) to 1(iv)	147

#### FIGURE

FIGURE 1:	PLAN OF THE INVESTIGATION	26
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## CHAPTER 1

### INTRODUCTION AND ORIENTATION

#### 1.1 INTRODUCTION

A glance at the Cape Supreme Court Roll, as published in the Cape Times, will reveal that on any one weekday up to forty divorces are granted in Cape Town. The total number of divorces granted in the Cape Supreme Court in 1991 was 6 456, 905 more than the 5 551 granted in 1990 (information obtained from the Registrar). Data from the Central Statistical Services show that in 1989 the total number of marriages solemnized in South Africa was 70 992 (excluding the African population, where no figures are available). In the same year 24 784 divorces were granted (excluding Africans), involving approximately 33 000 minor children (Central Statistical Services 1989). These figures show an approximate relationship of one divorce for every 2.86 marriages.

Each divorcing individual is likely to traverse a long and painful process of physical and emotional separation, struggling to regain a sense of self-worth as a person while needing to continue a relationship with the ex-spouse so that they might continue to function as parents when there are children involved.

The act of separation has traditionally been handled by members of the legal profession in an adversarial way, with

one attorney attempting to obtain the best for his or her client in competition against the opposing attorney/client team. The purpose of this study was to examine whether an alternative approach to settling divorce, namely through mediation, might be more widely established, and to determine whether a measure of acceptance of this by and cooperation from attorneys might be achieved.

## 1.2 FORMULATION OF THE PROBLEM

The Family and Marriage Society of South Africa (FAMSA) is a private welfare organisation whose objectives are to promote the quality of family life by providing professional services on a preventative and remedial level to individuals, couples, groups and communities. The Western Cape Society was established in 1958, and it now offers a range of specialist services, including pre-marital guidance, marriage counselling, divorce counselling (both individually and in support groups), divorce mediation, family therapy, and training for other professionals in the community.

Working with divorcing people at FAMSA (Western Cape) during marriage counselling prior to the decision to divorce, in divorce counselling once the decision to divorce has been made, and in support groups for those in the process of divorce and in the period after divorce, has confirmed for the researcher the knowledge that divorce is more than the

simple breaking of a legal contract of marriage. In its full sense, divorce is a lengthy process, which may take months or years to resolve. Some people bear the scars of their experiences for the rest of their lives.

Legal proceedings, aimed at achieving the physical separation of the couple, tend to be instituted at a time when tension is considerable, feelings are extreme, and the individuals are most vulnerable. It is often a time of punishment, conflict and revenge, rather than of reaching a workable agreement in a cooperative way. The consequential effects of the separation, particularly the emotional and social aspects, take a secondary position in the priorities of the couple at this stage.

Feelings of anger, bitterness and resentment are aggravated when two lawyers, each representing their respective client's "best interests", and by extension also the children's best interests, fight a battle which ends in a feeling of having won or lost. It is easy to understand how this experience may leave the individuals on bad terms, and it is the children who are likely to remain in the middle of the conflict, bearing the burden of what may be a divorce in legal, but not emotional terms.

The concept of divorce mediation as it is currently practised was developed in the United Kingdom (UK) and the United States of America (USA) from the mid-1970s. By

divorce mediation is understood the application of mediation to divorcing couples. A full definition is given on page 28. In South Africa, attention has been given to this means of resolving disputes around divorce only in the past five years by individuals interested in a conciliatory approach. The first body of family mediators, the South African Association of Mediators in Family Matters (SAAM), was established in 1989, with one of their aims being to find suitable criteria for accreditation and a code of practice.

The aim of divorce mediation is to turn a situation where each partner strives to be the winner, into one where both parties emerge from the negotiations with positive gains, while recognising the right and the need of the other to do the same. In the presence of an impartial third party, husband and wife together negotiate the terms of their divorce agreement. Issues covered include property and financial matters, custody, access and maintenance of minor children. This requires cooperation, and improves the prospects of the individuals establishing a new relationship, which may help them in their future contact over the children. The focus is on the future rather than on the past.

Divorce and family mediation is now widely available, both within the family court system and outside the courts, in countries such as the UK, USA, Australia, New Zealand, Japan

and a number of European countries. South Africa plans to establish a family court. The Mediation in Certain Divorce Matters Act No. 24 of 1987 provides, as an interim measure, for the appointment of family advocates and family counsellors to investigate when minor children are involved in divorce suits. This is likely to create a growing need in this country for knowledge about the value of mediation, and for trained mediators.

It has been interesting, and disturbing, to note an ignorance and at times an antagonism by attorneys towards divorce mediation as an alternative to contested court proceedings. Ignorance hinges around the notion that mediation is linked with arbitration, and antagonism seems to stem from the conviction held by many lawyers that non-lawyers should not be permitted to deal with the legal aspects of divorce: indeed, to do so constitutes in their view illegal practice of law. Furthermore, the idea of representing the couple and not an individual, and focusing on the best interests of the family with regard to its financial survival and ongoing wellbeing of the children, is alien to many attorneys. Indeed, approaches by clients for mediation, in an attempt to reach agreement more amicably, have actually been rejected by lawyers suspicious of the intentions behind mediation and concerned to prevent any encroachment on their professional territory.

Thus, in order to gain the cooperation of attorneys and to encourage a willingness on their part to let go of their traditional ways of handling divorce suits, it was felt that a closer examination was needed of their attitudes to divorce mediation. These need to be understood better, and the lawyers made aware of the potential benefits of divorce mediation as an alternative to contested court proceedings, and not as a substitute for legal advice and assistance, which are still necessary within a mediated divorce.

The development of a divorce mediation service needs the cooperation of the community (divorcing persons) and of the legal profession. Lawyers who are sympathetic to a conciliatory approach to resolving divorce issues will need to work in conjunction with mental health professionals (psychologists and social workers) if such a service is to become established.

### 1.3 MOTIVATION

The research was undertaken after an overview had been conducted of divorce mediation in general, and its present status in South Africa in particular. The divorce process, the legal experience, divorce mediation/conciliation, co-mediation and the training of mediators were considered.

#### 1.3.1 The divorce process

Divorce is a lengthy process. This has been stressed by numerous authors, all of whom describe a similar process in

their own way. Bohannan (1971) identifies the "six stations of divorce", namely the emotional divorce, the legal divorce, the economic divorce, the coparental divorce, the community divorce and the psychic divorce. Lyon et al (1985) divide the process into the decision-making stage, the litigation/restructuring stage and the postdissolution stage, noting that it may take between one and four years for an individual to recover from the divorce experience.

In similar vein, Haynes' Divorce Adjustment Process comprises four developmental stages, namely deliberation, litigation, transition, and redirection (Haynes 1981). Robinson (1989) describes a six-stage process of divorce, namely (1) recognising marital breakdown, (2) decision to separate or divorce, (3) preparing and planning outcome, (4) separation, (5) the legal process, and (6) the post-divorce family. Wallerstein and Blakeslee (1989) discuss three broad, overlapping stages, namely the acute stage, marked by strong emotions, the second stage which is marked by efforts to adjust to the new family structure and instability, and the third stage, in which there is a renewed sense of stability.

Kressel, Lopez-Morillas, Weinglass and Deutsch (1978) have suggested that the divorce process is unavoidable and unmodifiable, and throughout it decision-making and rational planning are impaired. They identify four primary stages: (a) denial, (b) depression and disorientation, (c) feelings

of betrayal leading to anger, and (d) readjustment. They note that the experience of the initiator is less difficult than that of the noninitiator, and that successful completion of psychic divorce is not assured.

The emotional effects of divorce on the family, and particularly on children, have been discussed by many authors. Weiss (1979) notes that there persists after the end of most marriages, whether happy or unhappy, a sense of bonding to the spouse similar to the attachment bond of children to their parents described by Bowlby (1969). Isolina Ricci (1980) notes that the emotions of ending a marriage seem to come in stages, during which the energies released can work for or against an individual. The "first wave" lasts two to three years and is divided into five stages, namely: (1) preseparation, marked by denial, review work, anxiety, depression, hostility and recurring illness; (2) separation, which can lead to feelings of both relief and shock but which is a crisis period which may be accompanied by poor judgment, accident and illness proneness, and depression; (3) "off the wall", characterised by strong emotions experienced as out of control and atypical; (4) "adult adolescence", or testing new roles and finding a new identity; and (5) a more mature identity and new life-style, accompanied by a sense of comfort and ease.

Wallerstein and Kelly (1980) identify central themes of the child's divorce experience, noting that for the child

divorce is frightening. It is a time of sadness and yearning and of loss; it is a time of worry; of feeling rejected; a lonely time. It is also a time of conflicting loyalties, of anger, and of guilt.

In their follow-up study, Wallerstein & Blakeslee (1989) stress that the experience of divorce is entirely different for parents and for children. They list the psychological tasks for adults as (1) ending the marriage; (2) mourning the loss; (3) reclaiming oneself; (4) resolving or containing passions; (5) venturing forth again; (6) rebuilding a new, sustained adult relationship; and (7) helping children through the breakdown of the marriage and the postdivorce years. The psychological tasks for children include (1) understanding the divorce; (2) strategic withdrawal; (3) dealing with loss; (4) dealing with anger; (5) working out guilt; (6) accepting the permanence of the divorce; and (7) taking a chance on love.

The divorce mediator needs an understanding of this process, in order to be able to deal with the emotional issues which frequently obstruct the mediation process.

### 1.3.2 The legal experience

This section deals with the experience of the legal divorce, which traditionally has entailed the representation of each party by an attorney, who negotiates on behalf of his or her client and steers the divorce through the court. The

relationship between client and attorney is discussed, as well as the role of the attorney in divorce and the use of mediation services by attorneys.

Coogler (1978) points out that legal divorce does not guarantee emotional divorce. Legal divorce simply gives sanction to the physical separation of the partners, putting an end to the ongoing bitterness and acrimony and opening up the possibility that one and perhaps both will eventually find a more fulfilling relationship. Since the adversarial legal system is seen as highly structured and rational, it is understandable that many lay persons imagine that marital matters are handled by the courts in this way. Coogler has concluded that most divorcing couples experience disillusionment. He cites a six-year study by Levy and Fulton (unpublished at that time) showing that couples who were not able to reach their own settlements and sought recourse in the courts came back repeatedly with settlement controversies.

Pearce (1990) has related how, in the early days of family conciliation in the UK, conciliation was described, in the space of one week, by divorcing parents as "the most helpful hour since our divorce," and by a solicitor as "the most dangerous thing I have encountered during my long legal experience."

Lyon, Silverman, Howe, Bishop and Armstrong (1985) reported that only nineteen (19) per cent of their respondents were of the opinion that their lawyers had had a "positive" effect on the settlement negotiation process, while a similar proportion described a "negative" attorney effect, perceiving their lawyers to be more interested in the best settlement for them than for the family as a whole.

Kressel et al (1978) identified a continuum of six overlapping stances that describe lawyers' views. These are described in detail in section 2.9 (page 79). The stance taken defines the way the lawyer acts to represent his or her client. The authors conclude that the adversarial method of divorcing is inappropriate to the human and psychological aspects of the divorce, and it is so beset with internal problems that it is an improbable tool for constructive conflict resolution. Both the quality of divorce settlements and the degree to which the spouses keep their agreements are low, and in their view mediation is the most likely candidate to replace the adversarial system.

Felner, Primavera, Farber and Bishop (1982) note that the attorney representing a divorcing client often functions as a crisis counsellor. With no-fault divorce, they suggest, the attorney's legal role in family law is changing in favour of an expanded mental health role, and this has resulted in legal professionals and social scientists alike calling for greater interdisciplinary collaboration in

practice and research. In their study the authors found that attorneys spend 22 per cent of their time providing counselling and support for a wide range of divorce-related problems, and nearly 50 per cent of attorneys saw these functions as an important part of their role.

The conclusion that might be reached from Felner's article is that those attorneys who act as caregivers appreciate mediation as an approach to divorce.

A survey carried out in Greater London in 1987 by Neilson (1990) revealed that even when family lawyers are in favour of mediation, they tend to refer only a small number of their clients to mediation services. There were thought to be two possible explanations for this: firstly, lawyers think their clients are unwilling to attend mediation; and secondly, lawyers have misgivings about the education and training of those who provide the service. The majority of solicitors opposed mediation on finance and property issues by non-lawyers, but Neilson felt that this stemmed from a concern for their clients rather than from a desire to protect professional boundaries.

A lack of clarity amongst attorneys regarding terminology, is referred to by Effron (1989), who finds that there is confusion regarding the terms "adjudication", "arbitration", "mediation", and "conciliation", which are considered in terms of their "intrusiveness". Adjudication is the most

intrusive form of dispute resolution, arbitrators are less intrusive than courts, and the least intrusive processes are mediation or conciliation, where the neutral third party may take control of the process of decision-making, while the ultimate decision on how to resolve the dispute is left with the parties themselves. Effron comments that others believe that adjudication destroys relationships, and alternatives to adjudication are more likely to improve relationships.

In a study of individuals who choose either to accept or reject the opportunity to mediate contested child custody and visitation issues, Pearson, Thoennes and Vanderkooi (1982) note that men and women choose mediation because their attorneys urge them to do so. It appears that lawyers play a critical role in translating the divorce process, including mediation, to the divorcing population. The conclusion derived from this study is that for a mediation service to succeed the cooperation of attorneys is necessary.

In this vein, Pruhs, Paulsen and Tysseling (1984) describe the establishment of a private divorce mediation service in Ames, Iowa. In considering how to present the project to judges and lawyers, it was agreed that it was necessary to "go with the resistance" of legal professionals by respecting their arguments and acknowledging the importance and competence of the existing system. The agency makes it

possible for power to remain with the lawyer and it avoids competitive relationships with legal professionals. The conclusion drawn from this study is that lawyers are in general likely to be resistant to the idea of divorce mediation.

### 1.3.3 Divorce mediation/conciliation

Various models of divorce mediation have evolved over the years, all with the objective of parties reaching an agreement so that they might avoid having to live with unacceptable conditions imposed on them either by a court or by an arbitrator. Experience has shown that when parties are unwilling to comply with an agreement, they usually find a way to frustrate enforcement (Coogler 1978: 64).

Comprehensive mediation, covering property, finance and child-related issues, is usual in the USA, whereas until recently this was discouraged by lawyers in the UK and avoided by conciliators, who focused only on custody, access and child-related matters. One of the first definitive works is that of O J Coogler (1978), who founded the Family Mediation Association and developed a model of structured mediation. This was followed by Haynes (1981), who developed a twelve-stage model of mediation (Haynes 1982), and by Folberg and Taylor (1984) who describe a seven-stage mediation process. Numerous dispute resolution services have been established in the USA.

The first family mediation agency in the United Kingdom was the Bristol Courts Family Conciliation Service, set up in 1978, followed by the Bromley Bureau in 1979. Since then numerous divorce conciliation services have developed, which operate within different frameworks, for example (i) the completely independent services, such as the one in Bristol, (ii) conciliation undertaken by a judge, registrar or welfare officer on court premises, (iii) conciliation undertaken by divorce court welfare officers which, although often beneficial, may still undermine the principle of party-control if the "conciliator" ultimately has to prepare a highly influential report for the court, and (iv) the Bromley model, in which mediation is a discrete activity, clearly separated from the preparation of welfare reports (Davis & Roberts 1988).

The Conciliation Project Unit (CPU), established in 1985 at the University of Newcastle upon Tyne, reported that it is unusual for couples to be in dispute over a single issue, and that as one dispute is resolved, another often emerges. The CPU Report recommended that conciliation should not focus exclusively on child issues, but should be capable of tackling all the issues in dispute (Walker 1990: 161).

Haynes (1982: 16) maintains that it is too early in the development of family mediation to freeze either mediation or the training of mediators into any one model or profession. One of the strengths of mediation is its

interdisciplinary character. This applies equally to South Africa in the early 1990's, as we aim to develop a service of our own.

#### 1.3.4 Co-mediation

Parkinson (1989) describes the setting up in London of a system of co-mediation using lawyer and non-lawyer mediators, and the establishment of the Family Mediators Association (FMA) which was formed in response to a growing demand by divorcing couples for one solicitor to see them together, and from the lack of expertise and experience relating to financial and property settlements of conciliators trained in social work or counselling skills. The FMA feels that the value of pairing a lawyer mediator with another family mediator from a different professional background lies in their equal involvement and shared role. The more they work together as co-mediators, the more they can integrate their approach and skills (Parkinson 1990).

Gold (1982) and colleagues have found the interdisciplinary co-mediation team the most flexible model of mediation. The benefits include: (i) recognition of the complex fusion of legal, emotional and economic issues, permitting flexibility in responding and providing a sense of safety to a party who might be at a disadvantage emotionally or due to lack of information; (ii) achieving parity in the male/female balance, and the modelling function of the facilitators; (iii) minimising the likelihood of

transference; (iv) providing symmetry and preventing triangulation, so that balance is provided by the four people in terms of maintaining neutrality, equalizing bargaining power and sharing control; and (v) providing support for each of the clients when they are fighting. For the mediators there are the advantages of collegial support, the opportunity to check perceptions and biases, and the benefits of cross-disciplinary expertise and learning.

Folberg and Taylor (1984) and Blades (1985), who admit the advantages of co-mediation, also point to the disadvantages of such a model. These include the greater cost, scheduling of time when the two mediators are active in different practices, and the difficulty when mediators are not accustomed to working in a team or when they do not understand the division of functions.

#### 1.3.5 Training of mediators

It is important to examine the need for training in divorce mediation.

Coogler (1978: 75) has stated that a mediation service needs a panel of mediators with varied backgrounds of training and life experience, and he notes that it is generally easier for a person trained in behavioural sciences to acquire legal and other knowledge required for mediation

than for the legally trained person to gain knowledge and a feel for behavioural science and counselling skills.

Robinson and Walker (1990) note that the conciliator is emerging as a new professional, working at the boundaries of law and social work, and consequently training programmes tend to be divided into three parts. These are understanding of the impact of separation and divorce on families, the law and legal process, and practice skills. A major component of training is the determination of the appropriate amount of supervised practice to be undertaken prior to any practitioner being regarded as a conciliator, although pioneer conciliators have had to develop training programmes from their practices.

The Conciliation Project Unit (CPU) study (1989) urged that training in the United Kingdom should be centrally coordinated, perhaps by a national body such as the National Family Conciliation Council (Robinson & Walker 1990: 151).

Opinions vary as to whether there should be an approved graduate curriculum for mediators, whether mediation is a set of skills to be added to an existing professional base, and whether it can be offered by lay persons (Folberg & Taylor 1984: 233). These workers suggest that at least five subjects should be included in any training programme, namely understanding conflict, mediation procedure and assumptions, mediation skills, substantive knowledge, and

mediation ethics and standards. Mediators from different backgrounds will learn and utilize skills in different ways. The authors warn that learning the tricks of the trade does not mean that one knows the trade.

In her study linked with the Solicitors Family Law Association (SFLA), Neilson (1990) reported that solicitors were supportive of conciliation and mediation but that they suggest that stringent education and training standards are necessary. They propose that 120 hours of instruction be established as a minimum for those who have no conciliation or family law training if their services are limited to child-related issues, and that full-time graduate courses should be required for non-family lawyers who seek to provide comprehensive mediation services.

In South Africa, the South African Association of Mediators in Family Matters (SAAM) is the official body that gives accreditation to training courses. By June 1992 courses held around the country on behalf of the Law Society had resulted in 62 lawyers being trained as mediators (Hoffman W, personal communication).

#### 1.3.6 Summary

Divorce mediation takes place at the interface between the various experiences occurring simultaneously for the parties. Whilst dealing with their emotions, the individuals are also required to divide one household into

two, and to maintain a relationship as parents. The mediator needs an understanding of these processes, and to have had the necessary experience and training.

#### 1.4 THE ROLE OF THE SOCIAL WORKER IN THE MEDIATION PROCESS

The experience at FAMSA (Western Cape) over the past three years has been that couples seeking divorce mediation have predominantly been those who have first attended the agency for marriage counselling and who have in so doing been informed of the benefits of mediation, for themselves and for their children (unpublished). In this way ambivalence, which so often prevents a final agreement from being reached, can be dealt with. Although Mathis and Yingling (1991) found no significant relationship between spousal consensus on the divorce decision and mediation outcome, the FAMSA experience has been that many couples presenting to the agency for divorce mediation are not ready for the mediation process, and that careful preparation is necessary.

In the light of the finding of Lyon et al (1985) that only 19 per cent of their respondents considered that their lawyers had had a "positive" effect on the settlement negotiation process, and the call of Felner et al (1982) for greater interdisciplinary collaboration in practice and research, it became clear that it would be necessary to

foster a spirit of cooperation and collaboration with attorneys. This conviction was strengthened by the finding of Pearson et al (1982) that lawyers are the key to urging clients to choose mediation over litigation, and the warning of Scott-Macnab (1988) in the South African context that it is essential that a proper and cooperative rapport should be established with the legal profession. Neilson's (1990) contention that lawyers tend not to refer clients to mediation services in view of their opposition to mediation by non-lawyers, led the researcher to the conclusion that it is the task of the social worker to initiate collaboration with the legal profession, whilst taking into account the resistance of lawyers to the idea of divorce mediation (Pruhs et al 1984).

It was concluded that research was essential in order to understand the attitude of attorneys to collaboration, and that this research would need to include an investigation of the potential role of education about divorce mediation, and the place of the social worker in this process. Unless there is a better understanding of the attitudes of the legal profession to the mediatory approach, any attempt to establish cooperation between couples will be undermined at the point when clients are referred either for the first time, or back to their respective lawyers (Folb and Hill, 1991).

It was noted that Cigler (1986: 444) believes that social workers as a professional group are best equipped to serve as mediators, since the philosophy, goals, ethics, values, practice skills and principles of the two disciplines are in accord. However, she warns that it is difficult to exclude other mental health professionals from related fields. It should perhaps be remembered that social workers are often accustomed to exercising statutory powers and may have particular difficulty adapting to the mediator role (Parkinson, verbal communication).

#### 1.5 OBJECTIVES

The objectives of the investigation reported in this dissertation were:

- (i) to study and describe the concept of mediation as it pertains to the divorcing process;
- (ii) to examine the understanding and attitudes of attorneys to divorce mediation, with particular reference to (a) the emotional needs of clients, (b) the role of the attorney in divorce suits, (c) their willingness to accept an alternative to the traditional adversarial method, and (d) their ideas as to who might be acceptable in the role of mediator;
- (iii) to develop and evaluate an educational programme for those attorneys interested in knowing more about divorce

mediation and its potential for reducing the trauma of divorce in respect of the emotional aspects of the process, and the need to preserve the ongoing parenting role of the individuals after termination of their marriage;

(iv) to ascertain whether, as a result of the intervention planned in (iii), the attitudes of the attorneys might be influenced in favour of mediation and referring their clients for divorce mediation to non-lawyers;

(v) to develop and validate an investigative method aimed at examining the attitudes and knowledge of attorneys towards divorce mediation.

## 1.6 HYPOTHESES

(i) Planned information and education programmes, initiated from a social work agency, have the potential to influence positively the attitudes of attorneys in favour of divorce mediation.

(ii) Attorneys with a "caregiver" attitude are likely to be more interested in referring their clients for divorce mediation than those concerned strictly with the legal process.

## 1.7 RESEARCH DESIGN

The study was exploratory in nature (Arkava & Lane 1983; Collins 1984: 19), since there is little knowledge about

the interest of attorneys in divorce mediation in South Africa. It was anticipated that questions would be raised that might lead to further investigation, and that this would provide a rational basis for further development of divorce mediation services. The research was also associational, as described by Tripodi (in Grinnell 1985: 234), in that it examined the relationship between variables, notably knowledge about divorce mediation (the independent variable) and attitudes (the dependent variable). A relationship between the two would suggest, but not prove, causality.

#### 1.8 METHOD OF INVESTIGATION

The research was carried out in Cape Town during 1991. The steps that were taken are indicated diagrammatically in Figure 1 (page 26):

(1) A letter was sent to 591 attorneys in central Cape Town, asking whether they practised divorce work and, if so, whether they were prepared to collaborate in the study (Appendix A). Details of the sampling procedure are provided in Chapter 3.

(2) Those attorneys who were not involved in divorce work were not studied further. The six who confirmed their involvement in divorce work in the first question but declined to participate were contacted by telephone and asked their reasons for declining.

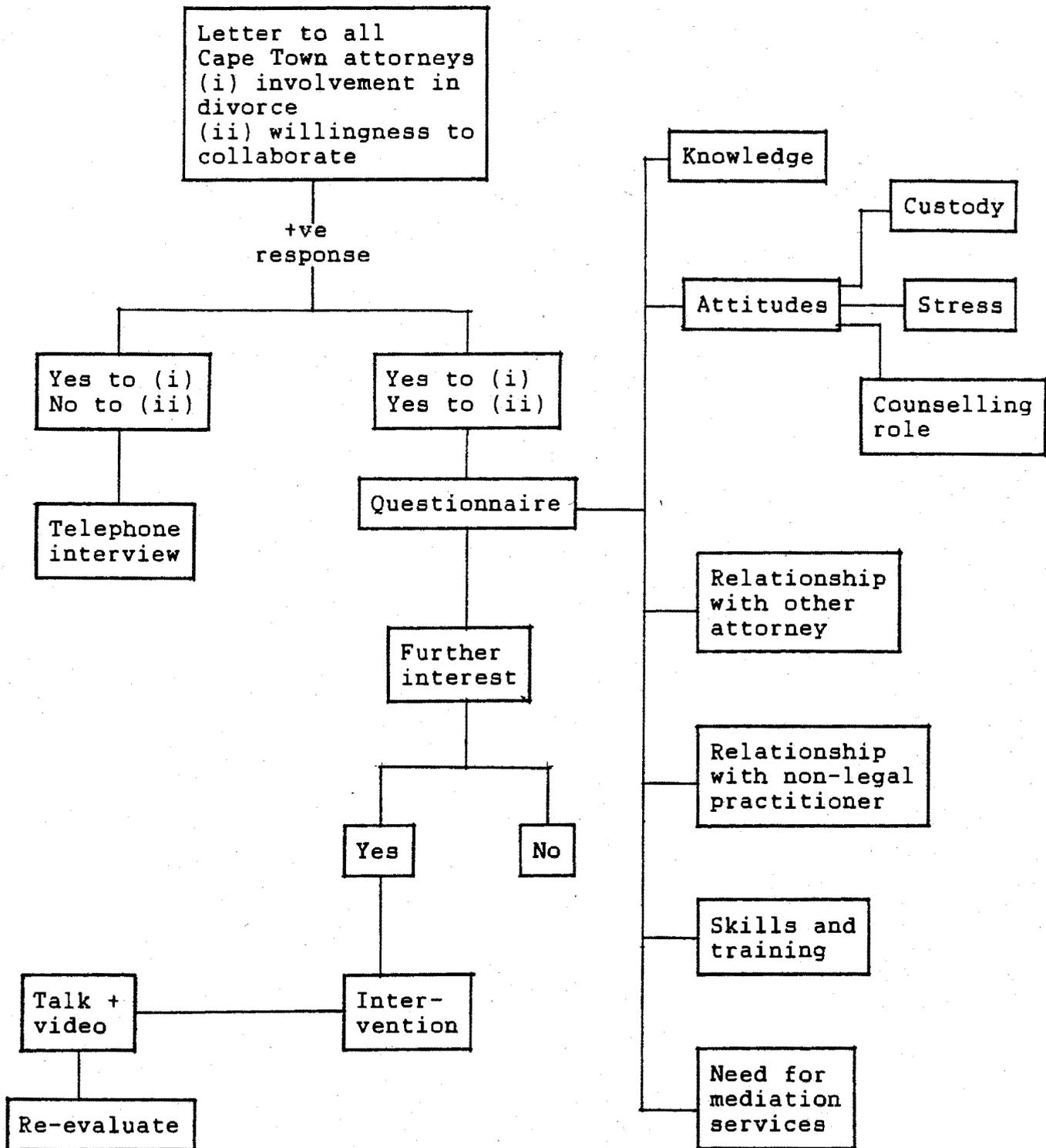
(3) The 169 respondents who were eligible and who agreed to participate in the study were sent a questionnaire (Appendix B) which examined aspects pertaining to the objectives of the study, notably knowledge about divorce mediation, attitudes towards their own role, relationships with other attorneys and non-legal practitioners during the divorce process, opinions concerning the training of mediators, and the respondents' willingness to use a mediation service.

(4) Those respondents who expressed interest in learning more about divorce and family mediation were offered further information in a talk (Appendix D) and a videotape of a mediation session conducted by Dr John Haynes, the noted American mediator.

(5) The latter group referred to in (4) above completed an evaluation of the entire experience (Appendix E), to ascertain its impact.

(6) All respondents to the questionnaire were sent a summary of the main findings of the study, and a print-out of their results compared with the entire group (Appendix F). [All details regarding the group were presented anonymously.]

FIGURE 1: PLAN OF THE INVESTIGATION



### 1.9 SHORTCOMINGS AND LIMITATIONS

(i) It was inescapable that there was some degree of selection bias, in the attorneys who chose to respond to the initial inquiry and in their previous experience with clients. The study was *ab initio* likely to select those attorneys who, even if they may have had negative attitudes towards divorce mediation, were nevertheless willing to acknowledge the concept and to learn more, and who were not entirely resistant to the idea of an alternative approach.

(ii) Since the study was being conducted alongside requests for information and education concerning divorce mediation, at a time when alternative dispute resolution in general was receiving greater attention amongst the legal profession in South Africa than ever before, respondents were likely to have had some prior exposure to the concepts of divorce mediation, either through colleagues or directly, prior to the administration of the questionnaire.

(iii) It was not altogether possible to avoid "all or none" concepts, and the investigation did not fully allow for the expression of complex rather than categorical opinions.

(iv) The process of initial assessment was likely to have influenced the subsequent evaluation of the respondents.

(v) Since the final evaluation was completed immediately after the explanatory talk and videotape, it was difficult

to assess the longer-term effects of the programme on the respondents.

## 1.10 DEFINITION OF CONCEPTS

### 1.10.1 Mediation

Mediation is "the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. Mediation is a process that emphasizes the participants' own responsibility for making decisions that affect their lives. It is therefore a self-empowering process." (Folberg & Taylor 1984: 7).

### 1.10.2 Conciliation

Conciliation is defined by the Finer Committee Report on One Parent Families (1974) as "assisting the parties to deal with the established breakdown of their marriage, whether resulting in divorce or separation, by reaching agreements or giving consents or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers' fees and every other matter arising from the breakdown which calls for a decision on future arrangements" (Davis & Roberts 1988: 6).

Conciliation, as practised in the United Kingdom, refers primarily to child-related issues.

Fisher (1990b) notes that "mediator" derives from the Latin meaning a "go-between", whereas "conciliation" means being active in the pursuit of peace. Mediation, semantically, is more connected with process and conciliation more with outcome. However, the two terms tend increasingly to be used interchangeably, and no strict distinction is made between them in this dissertation. There has been a move in the UK to adopt the common term "mediation" (Parkinson, personal communication).

#### 1.10.3 Reconciliation

The Finer Committee distinguished "conciliation" from "reconciliation"; the latter is defined as the "reuniting of spouses" (Robinson & Parkinson 1985).

#### 1.10.4 Solicitor/Attorney

Divorcing clients may be represented in the legal process by a "solicitor" in England and Wales and by an "attorney" in the United States of America and in South Africa.

### 1.11 PRESENTATION OF CONTENTS

This dissertation is divided into four parts:

- Chapter 1 presents an introduction to the research;
- Chapter 2 contains a review of the literature pertaining

to the objectives of the study and the theoretical background;

- Chapters 3 and 4 describe the design of the empirical investigation and the results of the study; and
- Chapter 5 discusses the conclusions reached and presents a series of recommendations.

## CHAPTER 2

### THEORETICAL AND LITERATURE STUDY

The following is a review of the published literature relevant to the objectives of this study. It was not always possible to evaluate critically the methodology and statistics on which a number of the studies based their conclusions. Nevertheless, the sum of the papers considered in this chapter points to increasing concern regarding the escalating incidence of divorce as well as the emotional effects on all family members. The stages of the divorce process, the confusion regarding terminology, and the assumptions and principles inherent in the process of divorce mediation are reviewed. It is argued that these issues are also appropriate in South Africa, and that there is a need for further research.

#### 2.1 DIVORCE STATISTICS

There is a need for the development of new strategies to deal with the high divorce rates in the western world. Parkinson (1983) noted that the divorce rate in England and Wales increased in the twenty-year period between 1963 and 1983 by 600 per cent, with one in three marriages ending in divorce. In 1980, one in six divorces was a second divorce for one or both parties. Wallerstein and Blakeslee (1989) state that the divorce rate in the USA reached a plateau in the 1980s, at a level where one in two marriages could be

expected to end in divorce. Children born in the mid-1980s in the USA have a 38 per cent chance of experiencing their parents' divorce before they reach the age of eighteen.

For Americans the divorce court is second only to the traffic court as a source of exposure to the judicial system (Swart 1987). More than one million children under the age of eighteen are affected by marital breakups each year (Bureau of Census 1979, as reported in Swart 1987) and 33 per cent of American children under eighteen years of age do not live with their families of origin. The picture may be worse for South Africans. Burman (1987), in her study of the economic problems facing divorced families in Cape Town, noted that white South Africans have one of the highest divorce rates in the world. In 1982 the official figures showed that one in 2.3 white marriages would end in divorce: the rate was lower in rural than in urban areas, and the probability was nearly 50 per cent that white marriages in the urban areas would end in divorce. Statistics for 1988 and 1989 reveal that one in 2,5 and one in 2,8 marriages, respectively, (including "coloured" but excluding "mixed" marriages between individuals of different population groups) would end in divorce (Central Statistical Services 1988; 1989). This suggests that the divorce rate in South Africa may have reached a plateau.

## 2.2 THE DIVORCE PROCESS

Much of the available published material on the divorce process concentrates on two aspects: the emotional process, and the stages of divorce. A comprehensive review of this is not attempted here. The publications referred to provide a background to the process of divorce mediation, in addition to what has been presented in Chapter 1.

### 2.2.1 The effects of divorce

The work of Wallerstein and Kelly (1980) and Wallerstein and Blakeslee (1989), based on a fifteen-year study of the long-term effects of divorce on 60 families and their 131 children, shows that it takes women an average of 3.0-3.5 years and men 2.0-2.5 years to re-establish a sense of external order after separation. Although in the legal sense divorce is a single event, psychologically it is a chain of events and a process that forever changes the lives of those involved. It is a wrenching experience for many adults and almost all children, but it is considered to be more disrupting for children than for their parents. It is not a single event in children's or adults' experience, but a process that begins in the unhappy marriage and extends through separation, divorce and any remarriage and second divorce. Its effects on the children may be long-lasting. Almost all children of divorce regard their childhood and adolescence as having taken place in the shadow of divorce (Wallerstein & Blakeslee 1989: 312).

One-half of the children in the aforementioned study saw one parent divorced again within ten years; one-half experienced their parents remaining angry with each other after the divorce; in two out of five cases there was a drop in standard of living; three out of five felt rejected by one parent; and very few received financial help with college education, even though they continued to visit their fathers regularly. Although many of these children subsequently experienced good marriages of their own, almost one-half entered adulthood worried, underachieving, self-deprecating and sometimes angry. Boys had a more difficult time over the years than girls, but this changed when the young women started to struggle with anxiety and guilt when establishing their own relationships, and this tended to lead to multiple relationships and impulsive marriages that ended in early divorce. A large number of teenagers felt abandoned, both physically and emotionally. The problems of divorce are compounded by the fact that cooperative and effective parenting is more difficult after divorce. Both men and women experience a "diminished capacity to parent", giving less time, providing less discipline, and being temporarily unable to separate their children's needs from their own. It is especially difficult for fathers to sustain a close relationship with their children, although the authors stress that the nature of the father-child relationship has a more important influence on the child's psychological development than the frequency of visits.

Weiss (1979) has provided a useful insight into why individuals may have difficulty in attaining emotional divorce and feel compelled to re-establish contact with their spouses after separation, irrespective of the quality of the marriage and the possibility of other relationships. He concluded that the persisting bond between spouses resembles the attachment bond of children to their parents described by Bowlby (1969). In unhappy marriages most of the components of love (such as trust, idealization and liking) fade, yet attachment persists, fading only slowly with absence. Separation also produces fundamental changes in an individual's social role and relationship with children, kin and friends, and the symptoms of "separation distress" in adults resemble those of young children who have lost attachment figures. These include rage and protest over desertion, maintenance of a fantasy relationship, repeated efforts at reunion, anxiety, and a sense of narcissistic injury.

Cigler (1986: 76) has identified the losses experienced in divorce. In addition to the loss of a significant person, these include the losses of a relationship, of an established position in society, roles, identity, form and structure, home, finance and possessions, standard of living, hopes and expectations for the future, routine and lifestyle. Smith (1990: 86) also looked at the disruption caused by divorce and the effects of the change in family

structure. A parent becomes an ex-spouse with obligations to the former relationship which primarily include the needs of the children. Contact has to be maintained with grandparents, aunts and uncles, and this may often be a difficult task: children may lose contact with a parent, or with other family members, and relationships may be lost and mourned, or held in bitter memory.

#### 2.2.2 The stages of divorce

A definitive study describing the stages of divorce is that of Bohannan (1971), who pointed out that divorce is both a complex social phenomenon and a personal experience. At least six experiences of separation ("the six stations of divorce") are happening simultaneously:

(1) The emotional divorce, which occurs with the deterioration of the marriage and the growing apart of the spouses, and involves active rejection with a reaction of grief at the loss of a relationship. Mourning may take months or years and has to be resolved alone. This is affected by the fact that there is no generally accepted way to mourn a divorce.

(2) The legal divorce, which does nothing more than create the possibility for remarriage. However, it helps deal with some of the problems caused by emotional divorce. Because lawyers are not usually trained in aspects of psychology and sociology that have a bearing on families, and because there are few areas where they deal with people

so emotionally upset, divorce may be regarded by them as a "messy" or "dirty" kind of practice.

(3) The economic divorce, whereby the family's capital and personal property are divided amongst the parties, and decisions are made about alimony and maintenance.

(4) The coparental divorce, which deals with custody, single-parent homes, and visitation, and is likely to cause the most enduring pain of divorce.

(5) The community divorce, which deals with changes in relation to friends once a person ceases to be part of a couple, and with changes in community attitudes, which may be experienced as ostracism and disapproval, and which are likely to result in feelings of loneliness.

(6) The psychic divorce, which is the difficult process of regaining individual autonomy. People who have been married for a long time lose the habit of seeing themselves as individuals. It is even worse for those who married in the first place in order to avoid the need to become independent.

Kaslow (1984) reorganised Bohannon's six stations into a dialectic model, comprising stages of "predivorce," "during divorce" and "postdivorce", each characterised by numerous feelings, actions and tasks, and appropriate therapeutic interventions.

Haynes (1981) discusses the "divorce adjustment process" as a way to understand the broader emotional context of the

couple. The four developmental stages in the divorce process are not necessarily sequential, and clients may be in more than one stage at the same time; namely (i) deliberation; (ii) litigation; (iii) transition, which may include a period of irrational behaviour and a feeling of having no control over that behaviour; and (iv) redirection, marked by different choices being made independently and new values being adopted.

Ahrons (1980) presents a normative concept of divorce as a crisis of family transition, by integrating family stress and systems theories. Rather than dissolving the family, she contends that divorce culminates in its redefinition from a nuclear to a binuclear system. Considering Erickson's (1968) concept of transition as "a turning point, a crucial period of increased vulnerability and heightened potential within the life cycle," divorce is seen as an unscheduled life transition. In this scheme five transitions in the divorce process are identified, which usually overlap:

- (1) Individual cognition, whereby spouses come to acknowledge marital stress;
- (2) Family metacognition, which is marked by ambivalent feelings of love and hate, euphoria and sadness, and which is affected by the mutuality of the decision to separate or divorce;

(3) Systemic separation, when the extent of the crisis will depend on whether the family has completed the process of the other transitions prior to the physical separation. The legal divorce often escalates a power struggle, which adds additional stress to an already disorganized system.

(4) Systemic reorganization. In the earlier transition, the absence of clear boundaries creates much of the confusion and stress, whereas in this transition the clarification of boundaries generates the distress. Each parent needs to establish an independent relationship with the child, but the continuation of each parent-child relationship requires continued interdependence of the former spouses. The label "single parent family" assumes that divorce results in one parent leaving the system, and this aggravates stress and family dysfunction.

(5) Family redefinition: How the divorced family defines itself, both within itself and to community and friends, is critical to the family's struggles with identity, boundaries and individuation.

Robinson (1991: 64) has clarified the various theoretical perspectives used to describe the divorce process. There are those who describe the psychological process, from the experience of the individual, the couple or the children, or from that of the whole family. Divorce also crosses the boundary which divides the private sorrows within the family and those of divorce as a public issue. Robinson's model,

like that of Ahrons (1980), is based on a family systems perspective and adopts a developmental approach to family dislocation during the divorce process. The family life cycle is transformed and extended to include additional phases: (i) recognising marital breakdown; (ii) the decision to separate or divorce; (iii) preparing and planning the outcome; (iv) the physical separation; (v) the legal process; and (vi) the postdivorce family. Each phase involves changes in the various interacting levels of the family system, with each of the partners as an individual, as a couple subsystem, and at the level of the children's subsystem. The changes in each of these subsystems may result in second-order changes both in the nuclear family and in the extended family. Robinson (1989) notes that it is useful to identify these various stages so that therapists, lawyers and others may identify the stage that the family has reached and the pressures which are likely to influence its ability to achieve changes.

Brown (1991: 180) differentiates between the initiator and the noninitiator in three phases of the divorce process; namely, the decision-making phase, the crisis phase (which comes after separation), and the rebuilding phase. The initiator goes through the grieving process prior to making the decision to divorce, whereas the noninitiator must deal with that process at the ending of the marriage. Regaining the ability to develop new social relationships

and to explore new opportunities and challenges will occur later for the noninitiator. It is in the grief process of the noninitiator that the greatest difficulties are experienced.

Ricci (1980) and Wallerstein and Blakeslee (1989) have provided similar accounts of the emotions experienced in ending a marriage. The psychological tasks for adults and children, presented by Wallerstein and Blakeslee (1989) were mentioned in Chapter 1.

Three major sources of stress for divorcing couples have been identified; namely (i) the concrete changes in life circumstances; (ii) non-mutuality of the decision to divorce, which may cause the initiator to feel guilt and may produce a "settlement at any cost" mentality or, alternatively, anger directed at the noninitiator, whose diminished feelings of self-worth may inhibit the ability to bargain constructively and result in the acceptance of any terms offered; and (iii) separation distress, which may be the most profound source of psychological turmoil. The latter is characterised by anxiety, irritability, anger, depression and a heightened degree of attention concentrated on the soon-to-be-divorced spouse. "Persistence of attachment", described by Weiss (1975), may manifest in sexual intercourse between the divorcing partners, in fierce legal combat, or in jointly seeking help for an emotionally disturbed child. Although every divorcing person's

experience is individual, a general pattern of coping with "psychic divorce" can be identified as a gradual movement from psychological investment in the former marital relationship to psychological autonomy. This process is a normal and a self-limited reaction to a stressful life experience, and it should not be confused in the acute stages with psychopathology (Kressel et al 1978).

All these studies come to the same conclusion: divorce is a process with identifiable stages. It is necessary that anyone intervening during such a time, whether lawyer, counsellor or therapist, should understand this.

### 2.3 DIVORCE CONFLICT

Milne (1988) has pointed out that successful mediation of disputes is dependent on an understanding of the origin of the conflict, its diagnosis, and the use of appropriate interventions. She classifies conflict into several categories:

#### 1) Psychological conflicts, including:

- internal conflict (which is difficult to manage in mediation);
- adjustment dissonance (a mourning process);
- ambivalence, leading to unwillingness to communicate in order to protect the decision to divorce, or to behaviour that will force the other to institute a divorce action;

- finding an explanation for the divorce.

2) Communication conflicts, caused by unresolved prior issues, ineffective communication, strategies such as hard bargaining or power tactics, or structural impediments such as the adversarial nature of the legal process, and communicating through children.

3) Substantive conflicts, which are tangible issues such as property division, financial provisions and plans for the children. These may be influenced by a number of issues: claims and counterclaims; incompatible needs and interests, which may concern survival and involve other parties such as children, grandparents and new spouses; limited money, time and energy; differences in knowledge and expertise of the spouses; value conflicts; and systemic conflicts, attributable to outside factors, which may involve the family and the legal process.

Milne (1988) has commented that the legal system sets the stage for competition, and that conflict is inherent in competition. The attitude of each party's attorney will have a direct impact on the nature of the conflict. Lawyers who aggressively represent their clients may be fighting more for their own needs. Legal proceedings may escalate the conflict, particularly if the parties are not included in the process.

Another typology of conflict between separating couples is given by Parkinson (1987: 25), to help gauge the degree of

control that may be needed in structured discussions with both parties. This, and the possible therapeutic interventions, are described as follows:

- 1) Semi-detached couples, who manifest little overt conflict but are still partly engaged emotionally. Joint discussions may be useful to improve cooperation.
- 2) Closed door conflict, manifested by couples who avoid direct confrontation by retreating behind closed doors, physically, psychologically, or both. Their silence conveys rejection. Individual sessions may help such couples face the strain of talking to each other.
- 3) The battle for power: individuals faced with a major loss in their lives may react by fighting for a dominant position in the divorce proceedings. Some may respond to structured conciliation, in which issues are identified and an agenda drawn up which allots equal time to each spouse's concerns.
- 4) Tenacious clinging of one party, whilst the other partner attempts to push the other away. There may be emotional blackmail to coerce the other to return. An attempt at reconciliation is likely to fail. Conjoint work may perpetuate rather than solve their problems, and individual counselling or groups should be considered.
- 5) Confrontation, by way of physical violence. This needs to be handled firmly from the start. A focus on their role as parents and other issues concerning the children may help.

6) Enmeshed conflict describes couples who have an emotional need to maintain their conflict, and to be angry in order to keep a grip on themselves. They are difficult to help, and it is useful in such cases to focus on immediate practical matters. Co-working (the use of two counsellors) may be helpful, and court adjudication may be necessary in the interests of the children. One or both partners may be willing to accept longer-term counselling or participation in a support group.

7) Domestic violence: it is important to establish whether both parties acknowledge the violence and whether the victim wishes to end the relationship or only the violence. Urgent action may be needed to protect the spouse and the children, if they are at risk of physical injury.

Folberg and Taylor (1984: 18) define conflict as "a set of divergent aims, methods or behaviour." The degree of divergence determines the extent and duration of the conflict and affects the outcome of its resolution. Conflict may be seen as intrapersonal or interpersonal, and mediation is primarily concerned with the latter. A dispute is an interpersonal conflict that is manifested, whereas a conflict does not become a dispute if it is not communicated as a perceived incompatibility or a contested claim. Since conflict is often viewed negatively or as a crisis, being equated with win/lose situations, mediation is one way of balancing power in noncoercive ways.

Folberg and Taylor (1984: 133) have noted that lawyer mediators are likely to focus more on the manifest dispute and less on the underlying conflict, whereas mediators with a mental health background are more likely to recognise the underlying conflict and deal with its causes, rather than simply address the manifest dispute or the presenting problem.

## 2.4 CONCILIATION/MEDIATION

### 2.4.1 Development

The practice of mediation dates back to ancient China, where it was the principal means of dispute resolution. Its use grew out of Confucianism and it continues to be practised today through People's Conciliation Committees. One of the striking aspects of the modern Chinese legal system is the importance of mediation in the resolution of disputes including divorce and child custody issues (Brown 1982: 4).

According to Blades (1985: 33), mediation arose when lawyers and counsellors became frustrated by their inability to meet the needs of those divorcing clients who did not want the traditional adversarial divorce. Kaslow (1981: 684) explains that Coogler began developing structured mediation in 1974. In 1975 he founded the Family Mediation Association (FMA). By mid-1977 over 100 couples had made use of the services of the FMA. The goals of the FMA are

to improve the quality of family life by offering cooperative methods of conflict resolution in divorce.

The modern conciliation movement is said to have started in 1913 in Cleveland, Ohio, where a conciliation branch of the municipal court was set up in order to assist litigants who were unable to obtain lawyers to settle their small claims. Participation was voluntary, the judge acted as mediator and the outcome rested upon the consent of the parties (Davis & Roberts 1988: 4). During the past decade there has been a rapid growth of extra-legal dispute resolution agencies, particularly in the United States of America.

Robinson (1988) has explained that the Court Welfare Service in England and Wales is the civil branch of the probation service, formed as a specialist divorce court service to deal with requests for investigative reports and to assist couples in dispute at an early stage of proceedings. These In-Court services are distinct from Out-of-Court services, which are independent, or semi-independent. The National Family Conciliation Council (NFCC) was established in 1983, and it developed criteria for the affiliation of these independent schemes, and a Code of Practice.

A number of differences are identifiable between the way in which conciliation/mediation is conducted in the United States and in the United Kingdom: (i) The systems within which conciliation/mediation is practised are different, and

this inevitably influences the process; (ii) In the USA there are many private mediators, while in the UK only a very small number engage in private practice; (iii) In the USA it is more generally accepted that people who are having emotional difficulties should seek therapeutic help; (iv) In the USA many mediators are also analysts, psychotherapists, psychologists or lawyers, whereas in the UK the National Family Conciliation Council (NFCC) requires conciliators to be social workers or marriage counsellors with further training; there are also lawyers who have become conciliators; (v) In the USA most mediators deal with all the conflicted issues, including financial. The couples sign a memorandum of agreement which they usually take to their lawyers. In the UK the guidelines agreed upon by the NFCC and the Law Society preclude the conciliator from concentrating on financial matters, other than in outline when intertwined with custody issues. (This arrangement does not apply in the case of co-mediation conducted by the Family Mediators Association).

Conciliation services have developed in order to minimise the conflict engendered by the process of divorce. The Conciliation Project Unit (CPU), established in 1985 at the University of Newcastle-upon-Tyne, reported that it was unusual for couples to be in dispute over a single issue, and that as one dispute was resolved, another often emerged (Walker 1990: 161). One of the CPU recommendations was

that conciliation should not focus exclusively on child issues (as had hitherto been the case in England and Wales), but that it should be capable of tackling all the issues in dispute. These researchers did not take into account the comprehensive mediation developed by "Solicitors in Mediation" and subsequently by the Family Mediators Association (Parkinson, personal communication). James (1990: 19) notes that much of the rationale for the development of a coherent philosophy about divorce, based on conciliation, has come both directly and indirectly from families who have reacted against the deficiencies of the current divorce system in Great Britain. It derives from recognition of the importance of encouraging rational decision-making by divorcing parents, and the need to give full weight to parental and individual responsibility in the process. Implicit in conciliation is a commitment to the family and family life.

There is growing agreement among legal and non-legal professionals that "litigation and the adversarial legal system is the worst possible approach for most divorcing couples" (Brown 1982). Mediation does not cause, support or encourage divorce, but rather provides a means for resolving disputes, restructuring family relationships and promoting the best interest of the children *once divorce has become inevitable*.

#### 2.4.2 Terminology

There is often confusion over the use of the the words "conciliation", and "reconciliation". Robinson (1991: 195) notes that this is particularly apparent in the legal context. In the United States conciliation is a form of intervention usually practised within a court service, whereas in Britain this is not necessarily the case and such intervention may also be described as mediation.

Davis and Roberts (1988: 6) have noted that the term "conciliation", although familiar in the context of labour relations, was probably first used in relation to family disputes by the Finer Committee Report (1974), which advocated extra-judicial "conciliation," as distinct from "reconciliation" (reuniting persons who are estranged). With a long history in North America, "mediation" refers to the facilitation of joint decision-making by a third party, whilst the authors use the term "conciliation" when referring to organisations' own accounts of what they do and to the ideas outlined by the Finer Committee.

In practice, it appears that the term "mediation" as used in the United States covers all the issues of divorce, including property and finance, whereas the term "conciliation" was initially preferred in the United Kingdom, and has referred specifically to child-related issues, and has not included property and finance. "Mediation" is now the term used by the voluntary

organisations working in this field in England and Wales (Parkinson, personal communication).

Mediation differs from both arbitration and adjudication in that authority for decision-making remains with the parties rather than with an outside decision-maker. In arbitration, the parties invite one or more impartial persons to make a decision on an issue about which they themselves cannot agree. The decision is not legally binding, but the parties usually agree to honour the decision. The adjudicator imposes a decision by virtue of the office he holds, and his decision is binding upon the parties. Adjudication follows a formal hearing at which the parties face one another as adversaries and are usually represented by professional advocates.

#### 2.4.3 Assumptions

Divorce mediation is based on a number of assumptions. Haynes and Haynes (1989: 2) identified eight: (i) Conflict is healthy, but unresolved conflict is dangerous; (ii) Conflict over issues is resolvable in mediation; conflict over behaviour is resolvable in therapy; (iii) Almost everyone wishes to settle; (iv) Successful negotiations are more likely when the parties to a dispute require an ongoing relationship than when they envisage no future relationship; (v) The outcome is the responsibility of the parties; (vi) The mediator is responsible for the process; (vii) There is

an inner wisdom in everyone; and (viii) The mediator's behaviour is situational.

These assumptions are qualified by several propositions:

(i) People generally try to escape what they perceive as pain and go towards what they perceive as pleasure; (ii) People make better decisions when they are consciously aware of the feelings created by conflicts and they deal effectively with those feelings; (iii) The participants in a personal dispute can normally make better decisions about their own lives than can an outsider; (iv) The participants to an agreement are more likely to abide by its terms if they feel some responsibility for it; (v) The past history of the participants is only important in relation to the present or as a basis for predicting future needs; (vi) The more accurately the mediated agreement reflects the needs, intentions, and abilities of the participants, the more likely it is to last; (vii) Since the participants' needs will probably change, the process should include a way of modifying the agreement in the future; (viii) The mediation process is essentially the same for all participants and all situations, but techniques, scheduling and tasks to be accomplished vary to match the circumstances, the participants, and the mediator (Folberg & Taylor 1984: 14).

The same authors noted that other issues also need to be confirmed by the participants. For example:

- both participants must wish for the conflicts between them

- to be resolved;
- the participants must, to some degree, change their perceptions, feelings, beliefs, priorities, thoughts or actions in order to bring about resolution;
  - the participants need to accept the mediator to lead them through the process; and
  - the mediator's attitudes and conduct provide a model for the process.

It is necessary that mediation should respect and support people's ability to make decisions that affect their lives, that it should encourage couples to rely on their own sense of fair play and justice rather than on generalized societal norms, that it should provide a forum in which to develop cooperative solutions that benefit everyone, that mediators' neutrality is maintained, that the appearance of neutrality is as important as neutrality itself, and that personal growth is recognised as a secondary goal of mediation.

#### 2.4.4 Principles

The principles upon which divorce mediation is based have been clearly set out by Robinson and Parkinson (1985) and Robinson (1991: 197):

- a) Separating, divorcing or divorced couples need voluntarily to involve themselves in the mediation process.
- b) The primary goal is to assist the couple to reduce the intensity of their conflict and to work towards reaching

agreements, especially in disputes related to their children, such as custody and access.

c) The mediator works to empower the couple to consider the best interests of the whole family.

d) The mediator works with an explicit contract, using only overt techniques.

e) The tasks are concrete, and concentrated on external data and issues, rather than on family communications or meaning. Although the expression of feelings is acknowledged, it is kept to the minimum necessary to achieve the tasks agreed upon by the parties.

f) The role of the mediator is that of managing the process, not the outcome, and acting as educator, clarifier and organiser, not as a therapist. The changes which result may indeed prove therapeutic for the couple, but this is not the primary objective of the process.

g) The methods used by the mediator are appropriate to the goals and tasks agreed upon.

h) The process of mediation is confidential and may not be reported to others without the consent of the parties.

i) The mediator respects the legal context within which she or he and the couple are working.

#### 2.4.5 Models

With the growing interest in mediation over the past twenty years, numerous methods of practice have been developed, ranging from comprehensive mediation, which covers all the

issues, to conciliation, which has focused on child-related issues and a family systems approach. Haynes (1982) maintained that it is still too early in the development of family mediation to freeze either mediation or the training of mediators into any one particular model or discipline.

There are various models of comprehensive mediation. Haynes (1981; 1989) works as a solo mediator, using negotiation and bargaining techniques and rarely involving children. In Coogler's (1978) model of structured mediation, the mediator calls in a neutral legal consultant to review the proposed terms of settlement. The Family Mediators Association in the United Kingdom pairs a lawyer mediator with another family mediator from a different professional background. This will be further discussed in section 2.8.

The organizational frameworks within which conciliation is practised in the United Kingdom have been discussed in Chapter 1. The work of the family advocates in South Africa, aided by family counsellors, fits into the setting of court welfare officers who use conciliation in the course of a welfare enquiry ordered by the court; there is concern that the principle of party-control may be undermined if the conciliator has to prepare an influential report for the court.

Folberg and Taylor (1984: 32) advocate a seven-stage model of the mediation process, consisting of:

1. Introduction - creating trust and structure
2. Fact finding and isolation of issues
3. Creation of options and alternatives
4. Negotiation and decision making
5. Clarification and writing a plan
6. Legal review and processing
7. Implementation, review, and revision

Blades (1985: 37) describes the above steps in a five-stage model. Haynes (1982), in detailing his twelve-stage model, points out that mediation is a fluid process, and is applied individually to each family. The stages, which do not necessarily correspond to the specific sessions, are referral; intake/orientation; budget development; reconciliation of budgetary needs; identification of assets; identification of parenting goals; clarification of issues; rank order of issues; identification of options; bargaining; drafting the memorandum of understanding; and consultation with the attorney(s).

There are both similarities and differences between conciliating in industrial and family disputes, but the objectives are the same and the stages in the conciliation process are common (Hall 1990: 77).

A model described specifically for South Africa by Welch (1990), the "Welch/Pretorius mediation model", is no different, consisting of six stages: initiation; orientation/role induction; problem definition and contracting; problem-solving; negotiation and agreement; and evaluation and follow-up.

Robinson (1991: 59) describes the family systems approach to conciliation in the UK, noting that the mediation process attempts to complement both the psychological processes of marital breakdown and divorce, and those of the legal processes in which the couple are likely to become involved. This five-stage model tends to focus on the use of family therapy techniques, and provision is made for including children, with the consent of both parents.

Gee and Elliott (1990: 99) add to the above. The conciliator calls on the theory of attachment and loss, aware of the "bereavement" experienced in terms of the loss of a partner and family. Viewing the family as a system allows planning for a new and unique family scenario. They point out that when a conciliator sits in a room with parents or family, each individual influences the other, whatever the model of conciliation being followed.

A family systems approach has certain advantages. It enables the conciliator to keep the needs of all the family members in perspective, and to maintain a position of

neutrality in the conflict. It assists the conciliator to help the parents distinguish their spousal roles from their parental roles, and to recognise when either of the parties is trying to draw the conciliator into an alliance. The conciliator is better able to gauge when to suggest that the children, or other family members, might join the sessions. Since conciliators may themselves have been affected by separation and divorce, either directly or indirectly, a family systems approach enables them to monitor their own feelings (Robinson & Parkinson 1985).

#### 2.4.6 Techniques and skills

A comprehensive list of conciliation skills has been drawn up by the National Family Conciliation Council (NFCC) and is included in Appendix H (Fisher 1990c).

Techniques and skills have been detailed in various ways by many authors (Barsky 1984; Blades 1985; Coulson 1983; Haynes 1982; Irving & Benjamin 1987; Robinson & Parkinson 1985). Barsky (1984) believes that interviewing skills need to be grounded in a knowledge of the divorcing process and an understanding of the experience of each family member. She distinguishes between what she refers to as macro techniques (overall strategies) such as use of the physical environment, awareness of self, teaching the mediation process, identification of patterns, relationships and issues, and management of the process, and micro techniques. The latter consist of direct interventions on the part of

the mediator and are divided into (i) conflict-reduction techniques, such as the maintenance of self-worth, ventilation, reframing the question, having a "verbal buffer zone" (speaking through the mediator) and the use of body language; (ii) communication improvement techniques such as positive reinforcement, speaking directly to the other, calm restatement, private time with one partner and role reversal; and (iii) clarifying what can be agreed upon.

Coulson (1983: 70) lists some of the "tricks of the trade" as: opening channels of communication, translating for deaf ears, creating doubts by challenging assumptions and confronting the parties with reality, digging for concessions, keeping discussions alive, nailing down concessions, and bringing the negotiations to a close.

Irving and Benjamin (1987) suggest additional information gathering and/or intervention techniques which are used with virtually all their clients. These include directing the flow of communication; questioning; "active" listening; positive connotation; reframing; pre-empting; task prescription; observation; giving information; confrontation; metaphoric story-telling and clarification/summation.

Robinson and Parkinson (1985) feel that in a family systems model, conciliators need skills which enable them to engage two or more parties in considerable conflict, when each has

a great deal to lose. Many of the skills commonly used in family therapy are useful, but those which deny or restrict the parents' power to make their own decisions should not be used. These authors stress the difference between controlling structure and controlling outcome of the process.

#### 2.4.7 Conflict

Couples in conflict often pose a problem to the mediator. In a study of fourteen conciliation sessions, Fisher (1990a) concluded that conciliators might be reasonably confident that the couple would reach agreement if they experienced low or direct conflict, engaged in joint problem-solving, had a normal level of difficulty in the issues they sought to resolve, expressed empathy for each other, and where there was a degree of attachment to one another. Agreement might be difficult to reach if there was a high degree of conflict, particularly if masked or locked in style; an ineffective problem-solving style where neither expressed any empathy for the other; and where the partners diverged greatly in their attachment. Identifying these styles may be of help to conciliators in adjusting their expectations realistically.

The "failures of mediation" are more likely to be highly conflicted and enmeshed divorcing couples, many of whom appear to have unresolved psychological conflicts and personality disorders. It is necessary to develop new

methods of mediation to work with these high-conflict families, as well as an understanding of the dynamics of high conflict divorce (Johnston 1991). The "divorce-transition-impasse" may be produced at three levels: the internal level of individual psychological dynamics, the interactional level of couple and family dynamics, and the external level of the dynamics of the wider social system. Of relevance here is that attorneys have long been implicated in the escalation of family conflict because of their role within an adversarial judicial system. The role of mental health professionals in fuelling conflict has been less clearly acknowledged, but "expert testimony" based on only one party's story is an example of this.

There is a fine line between divorce conflict and conflict during mediation, and one cannot address the latter without understanding the former. Understanding this enables the mediator to be aware of when failure to reach agreement is beyond his or her control.

## 2.5           **COMPARISON BETWEEN MEDIATION/CONCILIATION, COUNSELLING/THERAPY AND FAMILY THERAPY**

According to Rice and Rice (1986: 162), the divorce therapist (counsellor) has a role that differs from that of the mediator. The long-term success of the mediator may depend on how effective the prior divorce therapy has been, since effective mediation is dependent on the extent of the

lingering emotional conflict between the partners. Divorce therapy facilitates problem-solving and compromise, and compromise is aided if the couple is helped to resolve irrational and projected anger, to disengage emotionally to the point of neutrality, and to make paramount their own development and that of their dependants.

Questions are often asked about the boundaries between conciliation and counselling, and between conciliation and family therapy. Inevitably there is some overlap between these processes, but there are also important differences (Parkinson 1987: 98). Conciliation involves both parties, and possibly children and other family members as well. Parents are encouraged to reach consensual decisions for the future which normally have legal as well as emotional consequences for the rest of the family. Divorce counselling, on the other hand, often involves only one partner, and generally has no formal links with the legal process. Conciliation is characterised by its brevity and intensity and by the difficulties of balancing the discordant needs and views of those involved.

Other authors have made comparisons between these different interventions, stressing the similarities and differences (Robinson 1988; Oddie 1990; Walker & Robinson 1990). These have been brought together by Robinson (1991: 57-58; 188), who notes that while there are differences as to the goals and focus of the work with the couple, many of these are

differences of emphasis. Conciliators who use a systemic approach often use the strategies and skills of family therapy, such as reframing, positive connotation and diversion. One major difference is the effect of working alongside the legal system, which imposes a time frame on the decisions which have to be taken. Mediation therefore requires knowledge of the law, and family therapy is based on systemic theory. Another difference is that whereas the aim of therapy is primarily therapeutic, that of mediation is primarily task-focused, and any therapeutic effect is incidental to the process. Unlike therapists, conciliators do not work with the losses which the family is experiencing, although these are acknowledged.

The goals of individual counselling or psychotherapy, and marital or family therapy are in general reconciliatory. Mediation, on the other hand, accepts the couple's intention to part, but aims to help them achieve settlement on issues to be agreed between them, and the contract tends to be more explicit. In family therapy the role of the worker is sometimes very active, in psychotherapy it is likely to be passive, and in mediation the practitioner is often more active, managing the process but not the outcome.

Other differences concern the relationship between practitioner and client, the mediator struggling to be impartial and to empower the couple, in contrast to the other forms of intervention, and in the expression of

feelings, which is the main focus of counselling, psychotherapy and often of family therapy, but which is not encouraged in mediation. Mediation is future orientated, in contrast to the other interventions, and there is emphasis on conflict management and negotiation strategies.

Despite the clarity suggested by the above authors, there is sometimes considerable confusion concerning these differences. This is reflected in a discussion on the Mediation in Certain Divorce Matters Act of 1987, which states at one stage that "mediation is the process aimed at giving the parents insight into the problems that accompany divorce" and, later, that "mediation is the process whereby counselling is given to all members of the family involved in divorce" (Wentzel 1988). Although mediation does often achieve these aims, the author appears to confuse counselling and mediation.

## 2.6 MEDIATION AND CHILDREN

Pringle (1984) has written that there are four emotional needs which have to be met for a child to grow up into a mature adult. These are the need for love and security, the need for new experiences, the need for praise and recognition, and the need for responsibility. The child whose need for love and security is not met adequately may react with anger, hate and lack of concern for others. Children of divorce are particularly at risk of becoming

stunted or damaged in their psychological development because of personal, family or social circumstances.

Noting that King Solomon was the first judge to place priority on safeguarding the interests of the child, Wallerstein (1987) stresses that effective use of family mediation requires clinical understanding of divorce-induced changes in parent-child relationships, skill in distinguishing the child's real needs from those of the parent, an understanding of the psychological theory underlying mediation, and an understanding of the indications and contraindications for the selection of family mediation as the intervention of choice.

Children facing their parents' separation or divorce understand neither the problem nor the solution in the same way as their parents. Very few would ever choose their parents' divorce as a solution, either for their parents or for the family as a whole (Collinson & Gardner 1990; Parkinson 1987).

The debate as to whether or not children should be included in mediation continues. Taylor and Adelman (1986) report that children and adolescents are frequently excluded from decision-making processes that affect their lives, the reason given being that minors are less competent than the adults who make the decisions for them. They cite evidence which suggests that there are substantial benefits when

youngsters are involved in decision making, such as reduction of negative affect towards unpopular decisions, improved understanding, and better relationships between the children and adults. Participation in decision making is also important for developing the ability to make good decisions, reducing dependency on adults, and enhancing feelings of competence and self-determination.

Blades (1985: 49) questions how much influence a child should have over custody arrangements, noting that some mediators and parents believe that children should be actively included in the mediation process, while others believe that the parents alone should ultimately make decisions regarding custody, especially when the children are young. Authoritarian parents feel it is their prerogative to make arrangements for their children regardless of the age of the latter.

Conciliation occupies a crucial setting in which the voice of the child may be heard (Simpson 1989; 1991). A variety of reasons can lead divorcing parents to avoid the child's need to have information and a sense of participation in the decisions which concern him or her. Children drawn into their parents' conflict may have to face an intolerable dilemma: it is wrong to love both parents, yet it is equally wrong not to. A number of functions are fulfilled when children participate directly in conciliation: (i) The child is given the opportunity to express feelings and views

113

which might otherwise go unnoticed or be submerged; (ii) Parents may be encouraged to communicate information, both directly and indirectly, and the children may see and experience this being done rationally and with civility; (iii) It provides a means of conveying messages to the parents and alerting them to the consequences of their actions. It may also control open conflict and speed up the pace by concentrating energy on an outcome rather than a stalemate; (iv) The forum may be used as a setting for supervised access; and (v) Children may enable the conciliator to observe family interaction.

Drapkin and Bienenfeld (1985) maintain that children should always be included in the mediation process, since this provides the best assurance that the children's needs are considered and that both parties actively participate in the negotiating process. In their view, children need not be included in only two situations: (i) when both parents describe their child's needs similarly and have consistent ideas as to what is best suited to their child; and (ii) children under three years of age, who are unable to communicate adequately in play. There are additional purposes served by including children: (i) The mediator acts as a non-aligned confidant. Children of divorce usually tell parents what they want to hear rather than what they need, and they are usually relieved to have a warm, understanding contact at a time when their parents are absorbed with their

own needs; (ii) The mediator is able to maintain the parenting focus of mediation; (iii) First-hand access to the child enables the mediator to inform parents about their child's needs; (iv) Through direct contact with the child the mediator gleans useful information to assist parents in working out the details of a future living structure; and (v) Serious problems may be averted if parents are given a satisfactory experience of mutual problem-solving. This implies that including children in the mediation process can have a powerful influence in reducing acrimony between divorcing parents.

Important questions remain (Simpson 1991). For example, how should the child contribute to postdivorce arrangements, and should the child's role be a primary one as a direct participant, or is it necessary and sufficient that the child remains outside the process of conciliation? Should children remain the secondary beneficiaries and not be included in the conciliation so as to avoid placing moral pressure on parents and coercion and denial of parental autonomy by the conciliator? Is it wise to involve children in what are essentially adult decisions? Is the incorporation of a child's perspective necessary in arriving at sound postdivorce parenting arrangements?

Factors to be taken into account in addressing these issues include the children's ages, maturity, ability to contribute to an agreement, their own desire to participate, their need

for reassurance, and the parents' ability to maintain a constructive atmosphere while the children are present (Blades 1985: 49).

In a survey conducted in the United Kingdom, only 19 per cent of parents reported that their children had been involved in conciliation, and they were divided in their opinion as to whether it had been useful. Custodial parents tended to feel that they were in the best position to know what was in their child's best interests, and the exclusion of children was often a means of maintaining the status quo. For the non-custodial parent the desire to include the child in the process was a means to alter the status quo (Simpson 1989; 1991).

Davis and Roberts (1989) report on a study conducted at the Bromley Conciliation Bureau, whose practice is based on the model developed by Coogler (1978). Children are not involved directly in the negotiations, but the central concern for children's interests remains. It is made clear that, as well as being the focus of the dispute, children are the most damaged by it. Bromley mediators are less inclined than they were in the past to present themselves as experts on child development, feeling that parents are best equipped to decide on the arrangements for access and other matters.

One concludes that the advantages and disadvantages of including children in mediation cannot be considered in terms of hard and fast rules. Although many conciliators intuitively feel that involving children is a good idea, only few do so (Simpson 1991). Much depends on the background of the conciliator, but in the end the wishes of the parents must be respected.

## 2.7 THE MEDIATION IN CERTAIN DIVORCE MATTERS ACT NO. 24 OF 1987

There is no family court in South Africa, although this was recommended by The Hoexter Commission (Hoexter 1983), which advocated a "shift in emphasis away from the adversary system of litigation towards more inquisitorial procedures" (section 9.4.3). The Mediation in Certain Divorce Matters Act No. 24 of 1987 provides for the appointment of one or more family advocates to each division of the Supreme Court, for the purpose of providing a report and recommendations at a divorce trial in respect of the welfare of each minor or dependent child of the marriage. The family advocate may also appear at the trial. The Act also provides for the appointment of a family counsellor to assist the family advocate with an enquiry (Hoffman 1989).

In three critical reviews of this legislation, two by lawyers (Mowatt 1988; Schafer 1988) and one by a social worker (Hoffman 1989), the authors agree that the Act is a

misnomer, in so far as it is not clear what is meant by "mediation", and this results in an incongruity between the title of the Act and its contents. The provision for the family advocate to cross examine witnesses or adduce evidence is not couched in the language of mediation, and the Act offers little assistance as to how mediation might be achieved.

Hoffman (1989) notes that divorce mediation and custody evaluation are two distinct processes. Custody evaluation follows unsuccessful mediation or serves as an alternative when mediation is contra-indicated. The differences emphasise the confusion contained in the title of the Act:

- (i) Custody evaluation is rooted in litigation whereas mediation avoids the adversarial process;
- (ii) In mediation an objective neutral third party structures and controls a joint decision-making process, whereas in custody evaluation a third party formulates an opinion on a parenting plan;
- (iii) The custody evaluation report is submitted to court as part evidence on which a decision is made by the judge, whereas the agreement reached in mediation is submitted for review and ratification;
- (iv) In mediation both parents participate jointly, whereas in custody evaluation both may be seen together at the beginning and possibly at the end of the process;
- (v) The custody evaluation process does not necessarily reinforce parental roles and responsibilities;
- (vi) Mediation aims to empower the weaker parent, whereas

custody evaluation emphasises the weaknesses of a parent and the deficiencies in his or her social functioning; (vii) Self-determination is not promoted in custody evaluation, but is fundamental to mediation; (viii) Mediation aims to reduce anxiety, whereas custody evaluation has the opposite effect; (ix) Negotiation and bargaining are central to mediation; (x) Fact-finding and assessment are central to custody evaluation; (xi) Custody evaluation tends to focus on the past and present, whereas mediation emphasises the present and future; (xii) The goal of custody evaluation is to recommend the award of custody to a particular parent, which reinforces the adversarial process and exacerbates conflict, whereas the goal of mediation is conflict management and reduction; (xiii) In divorce mediation the two parents remain the principal sources of information; (xiv) The mediator plays an active role in seeking out options and solutions together with both parties, whilst agreement is not necessarily sought in the custody evaluation process; (xv) Mediation fosters cooperation, whilst custody evaluation may encourage competition; (xvi) Mediation prepares parents to accept the consequences of their decisions, whereas custody evaluation envisages the court making a decision which one or both parents may not favour and which they may find difficult to adhere to; (xvii) The mediation process serves as a model in decision-making by consensus rather than by litigation; (xviii) Psychometric testing may be submitted as evidence in custody

evaluation, thus emphasizing abnormality, in contrast to the mediation process; (xix) Mediation can facilitate the settlement of financial, property and maintenance issues, whereas custody evaluation might block settlement of other issues; (xx) After mediation, the written agreement is cleared by the attorney and submitted to court for ratification, whereas custody evaluations, which are privately ordered, might not be submitted to court as evidence; (xxi) In mediation, no information is revealed by the mediator to either the judge or the attorneys, except in rare instances, but in custody evaluation the principle of confidentiality does not apply.

The "no-fault principle" eliminates the necessity of establishing "grounds" for divorce, which implies that divorce strictly no longer needs to be an adversarial process. Nevertheless, fault remains an important principle in custody, maintenance and matrimonial property issues. This is a material departure from the intention of the Divorce Act No. 70 of 1979. The Mediation in Certain Divorce Matters Act No. 24 of 1987 perpetuates this outdated view in the opinion of Mowatt (1988).

Schafer (1988) warned of encroachment by social workers into the field of law, and criticism by social workers and lawyers of each others' professions. He is concerned that independent mediation services might mushroom and exacerbate the suspicion that already exists between them, and he

advocates a service based on that of the National Family Conciliation Council.

## 2.8 CO-MEDIATION

Co-mediation represents a synthesis of the special skills of the social worker and the legal knowledge of the attorney (Wiseman & Fiske 1980). It represents the ideal in collaboration between the two professions. These authors note that the emphasis of the lawyer is one of hurrying towards legal agreement while the therapist may wish to slow down the process. The lawyer-therapist team should first help the couple gain insight into their difficulties, then develop a legal framework with which to plan solutions and alternative approaches. Their model has three distinct stages: (i) the fighting stage, when the lawyer first proposes the idea of putting the couple in control of their future by defining the terms of their own agreement, and the therapist identifies issues and helps the couple to communicate more effectively; (ii) the agreement stage, where the lawyer becomes more active, suggesting alternatives, reminding the couple what a judge might decide and providing legal information; and (iii) "moving onward", when couples decide either to proceed with counselling and a separation agreement, or with a separation agreement leading to divorce, and when some basic understanding has been reached.

Gold (1982) has warned that legal intervention prior to the resolution of emotional issues may retard resolution. Conversely, the greater the emotional resolution, the more likely will subsequent legal intervention be directed towards the long-term needs of two separate families. The benefits of co-mediation identified by Gold were given in Chapter 1, as were the potential disadvantages, pointed out by Folberg and Taylor (1984) and Blades (1985).

In the United Kingdom many solicitors have found it necessary to review their approach to family law. The Solicitors Family Law Association (SFLA), which since its inception in 1982 had acquired more than 1800 members by 1990, has as its focus a conciliatory approach to resolving family disputes. The establishment of the Family Mediators Association and the development of a model of co-mediation has made such an approach feasible (White 1990).

The authority on the co-mediation model in the United Kingdom is Parkinson, the founder and present director of the Family Mediators Association (FMA), an interdisciplinary association founded in 1988 to develop specialist training and practice in comprehensive mediation (Parkinson 1990: 138). Parkinson (1990: 135) writes that when separating or divorcing parents disagree about arrangements for their children, there are often related disputes over money and property. It is inevitable that conciliators with a social work or counselling background have focused on child-related

issues, to which they give the highest priority, and that solicitors deal with financial and property issues. Social workers and solicitors tend to be suspicious of each other's training and conciliation skills. It is difficult for a single mediator to have the range of knowledge and skills necessary to mediate complex emotional, family and financial issues, and there is the danger of knowledge being applied inadequately. In the cross-disciplinary model, each needs to make a transition to the role of mediator. This is easier if they are trained together in a structured process. However, their values are likely to be different - the lawyer believing that individual rights and freedom must be protected, while conciliators may adopt an interactional or family perspective.

The role of the lawyer mediator is described by Parkinson (1989). Mediators do not represent either or both parties, nor do they advise them on their best interests, individually or jointly. Provided it is clear that a solicitor mediator acts in a different role from that of a solicitor, there is no conflict of interest. It is essential that a lawyer mediator should not act, nor have acted in the past, in a legal capacity for either party. Mediators must encourage both parties to obtain legal advice separately from solicitors, whenever necessary during mediation and before finalising any agreement.

### 2.8.1 Co-mediation compared with solo mediation

Blades (1985: 112) has compared co-mediation with solo mediation. She notes that mediators work with partners for many reasons:

(i) The stress level for each is lower; the unengaged mediator can formulate alternative strategies; some couples overwhelm a mediator; lawyers and mental health professionals may gain greater insight into each other's profession.

(ii) Co-mediators can model appropriate behaviour.

(iii) It is possible to have both a male and female mediator, creating a balance and reassurance to couples concerned about gender bias.

(iv) During mediation it is helpful to have the expertise of both an attorney and a mental health professional.

(v) The non-active mediator can attend to the spouse who is not speaking, either by giving moral support, by giving assurance that he or she will get a chance to speak, or by intervening if one spouse interrupts the other.

(vi) The introduction of a fourth party provides an opportunity to try different seating arrangements and other techniques, such as mediators starting their own conversation to distract the couple from an argument.

(vii) Co-mediation supplies a more reliable system of checks and balances. If one mediator becomes personally involved in emotional issues, the co-mediator can restore the focus.

(viii) At times mediators may find it expedient to be tough on one or other party. A second mediator can provide support for the person to whom this is directed.

Some co-mediators claim that co-mediation is twice as efficient as solo mediation. On the other hand, there are good reasons for practising solo mediation. These include:

(i) A single mediator can direct the mediation and develop strategies without being deflected by a partner's intentions.

(ii) It takes time to find a suitable co-mediator and to work out good team responses.

(iii) The cost of mediation is lower for one professional than for two.

(iv) Planning time to be together may be cumbersome for two professionals, particularly if they are in different practices.

(v) Some mediators prefer the demands and excitement of solo mediation.

(vi) Some clients feel that the protection and possibilities that co-mediation provide are unnecessary for them.

A note of warning is sounded by Dingwall and Greatbatch (1991), who have found in face-to-face interaction during mediation that mediators have extensive power to influence both process and outcome, and that this power may be used positively or negatively. They note that although co-mediators can check or counteract any lack of evenhandedness

on the part of their co-workers, when pressure was applied by one worker against one of the parties, the co-worker rarely sought to counteract this. Thus, clients may be put under greater pressure than those in single-worker sessions and they may experience mediation as coercive and intimidating. Parkinson has noted, however, that this research focused on co-conciliation, using two conciliators with a social work or counselling background; it did not study the co-mediation model developed by the Family Mediators Association, where co-mediators are encouraged to counteract such an eventuality (personal communication).

## 2.9 LAWYERS' ATTITUDES TO MEDIATION

Cigler (1986: 443) has pointed out that lawyers may feel threatened and excluded by mediation, and fear for their client's interests. She proposes that meeting with lawyers at the beginning and at the end of the mediation process may go a long way towards dealing with such concerns, but it must be borne in mind that mediation is vulnerable to legal undermining, and it may be worthwhile employing a policy of cooperation.

The report contained in the November 1988 edition of *Inside South Africa*, which highlights the uncompromising preference of the lawyers for the familiar adversarial approach to divorce actions, provides support for the categorisation of

six different lawyer stances described by Kressel et al (1978):

1) "The undertaker": This describes the assumption that the job involved is a thankless, messy business and it assumes that clients are in a state of emotional confusion. There is derogation of the client, a cynicism about human nature, and scepticism that a good or constructive outcome is possible in divorce. Psychological counselling is not considered.

2) "The mechanic": This technically orientated approach assumes that clients are capable of knowing what they want. The lawyer's task is to ascertain the legal feasibility and produce "results" for the client, not to focus on the emotional issues of the divorce.

3) "The mediator": This is oriented towards a negotiated compromise and rational problem-solving, with an emphasis on cooperation between the parties. These attorneys minimise their adversarial role, and a "good outcome" is regarded as a "fair" negotiated settlement that both parties can "live with."

4) "The social worker": This centres around a concern on the part of the lawyer for the client's overall welfare. The involvement of therapists or clergy is welcomed, and a "good" outcome is one in which the client achieves social reintegration.

5) "The therapist": This involves acceptance of the fact that the client is in a state of emotional turmoil, and it

assumes that the legal aspects of divorce can only be dealt with if the emotional component is also handled by the lawyer. These attorneys express the view that the legal system fails to address people's real needs.

6) "The moral agent": In this stance there is an explicit rejection of neutrality. A constructive outcome is regarded as one in which the lawyer's own sense of right and wrong is satisfied.

In the survey of family lawyers in Greater London cited in section 1.3.2. on page 12 (Neilson 1990), in addition to the tendency of family lawyers not to refer their clients to mediation services despite being in favour of mediation as a process, the lawyers revealed some confusion about the methods mediators use. They expressed great interest in providing the service themselves, they failed to endorse family systems theory as a necessary area of study, they stressed the importance of legal and financial knowledge, and they endorsed lengthy training programmes for non-lawyers, and some additional training for lawyers.

Fricker (1990), commenting on the Conciliation Project Unit Report referred to in section 1.3.3 on page 15, notes that about one-half of the solicitors consulted during the project considered that conciliation is more appropriate for difficult or intractable clients than for "reasonable" clients. He also expressed concern that solicitors adopt the traditional attitude that their function is to get the

best result for the client. He feels that family lawyers need to recognise that the best result for a client in a dispute over children is not a legal "win" against the former spouse, but is the reaching of an agreement which the client realises is in the best interests of the children as well as him or herself.

#### 2.10 ADVANTAGES OF CONCILIATION/MEDIATION

The advantages of conciliation over an adversarial divorce have been described by Parkinson (1983), based on the experience at the Bristol Courts Family Conciliation Service:

- (i) The brief and focused process minimises the confusion.
- (ii) Bringing the parties face to face and tackling the issues directly helps to clarify them.
- (iii) Conciliation may open the door to reconciliation.
- (iv) The confidentiality, independence and neutrality inherent in conciliation enable couples to settle disputes out of court.
- (v) Conciliation encourages people to take control of their own affairs and it emphasizes mutual responsibility. Joint decisions are more likely to be of "high quality", and to be kept.
- (vi) Conciliation contains crisis, by opening a "safe" channel of communication.
- (vii) Conciliation relieves the stress of children.

(viii) Conciliation can help alleviate children's fear of being taken into care, or living in a parentless household; it can alert parents to what their children may be experiencing, and it helps them to maintain parental control, despite the ending of the marriage.

(ix) Conciliation enables parents to discuss their grievances directly with each other rather than through their children.

(x) In the case of an emergency involving children, conciliation is available immediately and court proceedings can be avoided. Conciliation at times of crisis can be used as a turning point by involving both parents in working out how to meet their children's needs.

(xi) Conciliation makes it possible for custody arrangements to be fully discussed.

(xii) Early and skilled intervention by a conciliator may be critical in enabling parental access to take place, particularly if children believe that they have been rejected by one parent and if they refuse to meet with that parent.

(xiii) Conciliation can help parents work out arrangements to suit both themselves and their children, according to the specific needs of the individual children.

(xiv) Children may be helped and supported by seeing a conciliator on their own or by being involved in family discussions with both parents and the conciliator.

(xv) Quick contact with a conciliator can ease minor changes in arrangements without the delay and cost of correspondence between solicitors.

(xvi) Conciliation can educate people in the management of conflict and teach them to communicate directly rather than through their children.

(xvii) Conciliation is usually cheaper than litigation, except in cases which fail to settle through conciliation and therefore incur both conciliation and legal costs.

## 2.11 RESEARCH

### 2.11.1 Promoting mediation

Pearson, Thoennes and Vanderkooi (1982) have shown that a substantial number of individuals offered free mediation services to resolve their custody and visitation disputes rejected the opportunity to do so and continued to utilize traditional, adversarial means. It was found that mediation was more attractive to individuals who scored high on socio-economic indicators (that is, who were better educated and had higher occupational status and income). Couples who were more communicative, and men who were ambivalent about divorce were the most willing to try mediation. Both men and women chose to mediate because their attorneys urged them to do so. Women seemed to find mediation less remote and impersonal than the court system, and more akin to their satisfying counselling experiences. For men, the decision to participate in mediation was

influenced inversely by their perceived chances of winning in the adversarial process.

This study suggests that mediation may be attractive to individuals who are ill-suited for the process, such as those interested in reconciliation and ambivalent about the divorce. It may also be preferred by those with long-term disputes, psychological problems and a history of spouse abuse, and this emphasizes the importance of assessing the readiness of couples for mediation and the need to examine the reasons behind those cases that fail to reach agreement.

This study underscores the fact that mediation is strange to most disputants, and that it needs to become more widely known. Although this may now be less true in the USA, it remains the case in South Africa. Pearson et al (1982) noted that most disputants turn to their attorneys for approval before trying mediation: thus, lawyers play an important role in translating the divorce process, including mediation, to divorcing individuals. Mediators require the support and cooperation of attorneys.

#### 2.11.2 Evaluation of mediation

Pearson and Thoennes (1988) conducted two major research projects over a ten-year period, one voluntary and the other court-based, to assess whether the use of mediation to resolve custody and access disputes in divorce makes a difference. It was found that voluntary mediation

programmes fail to attract a substantial number of participants. Low participation appears to be tied to the attitudes of the legal community and lack of public awareness about mediation. The majority of respondents who used court-based mediation services favoured this approach, even though the referral was compulsory.

Individuals whose divorce was mediated were satisfied with the process, whether or not agreement was reached. Mediation was seen to focus on the needs of children, to provide an opportunity to air grievances, and to identify the real issues in a dispute. The process is less rushed and superficial, and it affords a less tense and defensive atmosphere than does the standard court process.

About one-half of the respondents in the court-based project found the sessions tension-filled and unpleasant, and they experienced anger and feelings of defensiveness. There appeared to be misconceptions about the goals of mediation, and between one-quarter and one-third of respondents felt they had been rushed.

The authors conclude that mediation is at least as effective as adjudication and that it is rated more favourably by litigants. Mediation does not generate excessive relitigation, and it is considered less damaging for spousal relations than a court intervention. In the USA, children whose parents' divorce is mediated are more likely to

negotiate joint custody arrangements and to experience more frequent visitation.

Rice and Rice (1986: 31) report similar findings, adding that mediation is most successful within a limited range of cases. The candidates who were best helped by mediation had presented early in the divorce process, with few and uncomplicated issues, adequate finances, low to moderate conflict, desire for cooperation, ability to negotiate for themselves, mutual acceptance of the emotional divorce, and no complications already attributable to adversarial lawyers or other third parties.

Kelly, Gigy and Hausman (1988) examined three questions in their study: (i) Are couples who choose mediation different from those who follow the adversarial route? (ii) Is comprehensive mediation more effective than the adversarial process in reducing the psychological distress and dysfunction experienced by many men and women during the divorce experience? (iii) What factors distinguish those clients who complete the mediation process from those who terminate prior to reaching agreement?

It was found in this study that mediation respondents tended to hold a more positive view of their spouses as individuals. Their recognition of each other as more honest and fair-minded, in association with their higher levels of depression, stress, and guilt about the divorce,

may have led them to choose mediation in the belief that it was the more humane approach. They tended to have the ability to distinguish the conflicts of the marital relationship from parental interactions and responsibilities. It was noted that mediation was not more effective in reducing divorce-related psychological distress than the adversarial process. A reduction in anger, depression, stress and guilt occurred with time in both groups.

Walker (1990) and Walker, McCarthy, Simpson and Corlyon (1990), researchers with the Conciliation Project Unit, found no evidence to suggest that conciliation saves money in relation to cases passing through the legal process. However, 74 per cent of couples who reached agreement in conciliation described themselves as satisfied. The study found that, despite the emphasis placed by conciliators on helping couples to improve communication and reduce conflict, there was little evidence that conciliation did much to improve poor relationships.

Dr John Haynes, during a discussion with the researcher in August 1992, remarked that more research needs to be carried out into the outcome of mediated divorces. He referred to a study which found that 10 per cent of couples drop out of mediation after the first session, and another 10 per cent drop out along the way. Approximately 70 per cent who enter the mediation process will reach some agreement.

Haynes pointed out that there is not enough research regarding those who drop out, but he notes that participating in mediation has an emotional cost to the parties (Haynes 1992: personal communication).

## 2.12 TRAINING OF MEDIATORS

The requirements for the training of divorce mediators have not been fully determined. Parkinson (1989) stresses that even experienced lawyers, social workers or counsellors need training to help them make the transition from their profession of origin to the role of mediator. This involves learning new techniques and skills while discarding familiar assumptions and ways of working.

Dingwall and Greatbatch (1991) stress the need for mediators to have adequate training, especially in understanding the practical implications of divorce, and to ensure that they are accountable.

There is agreement that there is a need for training for mediators. It is suggested that five topics should be included in any training programme; namely, understanding conflict, mediation procedure and assumptions, mediation skills, substantive knowledge, and mediation ethics and standards (Folberg & Taylor 1984: 236-242). Mediators from different backgrounds will learn and utilize skills in different ways.

Robinson and Walker (1990) note that most conciliation training programmes have been divided into three parts: an understanding of the impact of separation and divorce on families, with special attention to children; the law and legal process; and practice skills. They, too, stress the need for professionals to learn skills which are quite different to those previously used. The necessary amount of supervised practice, and the level of comprehensive evaluation to be undertaken prior to any practitioner being able to be recognised as a conciliator need to be determined. It is also necessary that there should be definition of accreditation and lines of accountability.

The Core Skills Training Programme of the NFCC is made up of three components; namely, (A) an induction programme; (B) two national training weekends; and (C) regional skills training. This programme comprises eight days of training (details supplied by Marian Roberts).

Neilson's (1990) research found that Solicitors Family Law Association (SFLA) solicitors in Greater London endorsed training programmes of 120 hours for non-lawyers who would mediate only child issues, one year of graduate-level training for non-lawyers who would also mediate property and financial matters, and additional training, of shorter duration, for lawyers.

Considerable thought is being given to the training of mediators in South Africa. Cigler (1986: 445) recommends that social workers and other mental health professionals be required to have:

- a Master's degree in social work (or allied field) plus 3-5 years' working experience; or
- a Bachelor's degree in social work (or allied field) plus 8-10 years' working experience; plus
- specific training and accreditation in mediation.

She recommends that training in mediation should consist of a minimum participation in a 40-hour training programme, plus participant observation of 10 mediation sessions, and 10 supervised mediation sessions. There also needs to be an authorising body prominent in mediation in order to grant balanced training and recognition, and in order to establish formal links with the judiciary and the legal profession. This is now taking shape in the form of the South African Association of Mediators in Family Matters (SAAM).

Formally approved divorce mediation training enhances both the mediator's credibility and accountability. Accreditation of mediators is receiving increasing attention in South Africa, to protect the public from malpractice (Van der Steege 1991). A new training model is presented by Van der Steege, in an attempt to avoid content overlap experienced when training people from different disciplines, different theoretical backgrounds and different cultures.

Competency Based Training focuses on learning rather than training, and trainees work at their own pace, completing modules and a competency test at the end of each. In contrast to traditional training programmes, where classroom teaching and the number of hours of training form the basis of qualification, and proficiency differs from person to person, competency-based training holds proficiency constant and allows time to vary. Trainees work at their own pace, and are evaluated, graded and certified on their ability to perform, and not on having attended the course.

### 2.13 ETHICAL, PROFESSIONAL AND LEGAL ISSUES

Folberg and Taylor (1984: 244) have warned that the very elements that make mediation appealing compared to the adversarial model also create potential dangers and raise their own professional, ethical and legal issues. They examine the fairness of mediated settlements, which lack the precise checks and balances that are the principal benefit of the adversarial process. Conversely, the consensual process makes the settlement more acceptable and lasting for the parties. Many disputes resolved outside mediation are the result of unequal bargaining power or unequal financial resources to bear the costs of litigation. They may be influenced by the choices of attorneys, or even by the judge. The authors suggest that safeguards relating to the fairness of mediation outcomes are: (i) the presence of a skilled mediator who can protect against intimidation and

undue advantage to one party; (ii) the stage "legal review and processing" whereby the reviewing attorneys assure that all necessary items have been considered; and (iii) mediation, as a cooperative process, which serves as a model for future conflict resolution and adjustment between the participants.

A distinction needs to be made between an ethical code, which is imposed on members of a professional group by its governing organisation or as a condition of certification, and professional standards, which exist outside an ethical code or in its absence, and protect those served from harm and assure the integrity of the process. Ethical limitations exist, since mediators are drawn from different professions, each with their own ethical codes. These do not necessarily fit the mediation setting (for example, the lawyers' code requires that a lawyer should represent one side only). Attorneys have been the most prominent in raising ethical questions about mediation, and they tend to consider dispute resolution to be the territory of lawyers.

Lawyers may not in terms of their professional codes represent conflicting interests, and they are required to function in an adversarial manner. Thus, the role of a lawyer acting as a mediator must be explained to the participants. Joining a clinician with a lawyer as co-mediators presents more ethical issues than if either proceeds alone. A lawyer is required to prevent

unauthorized law practice and he may not split fees with a non-lawyer. Questions arise such as whether a therapist can serve as a mediator before or after providing services to one or both of the parties as a therapist; whether a private mediator may advertise his or her mediation services along with other services; and what is the responsibility of a non-lawyer mediator to know whether a proposed agreement is legally enforceable. These issues are less clear in the codes of the non-legal professions.

Non-lawyer mediators run the risk of engaging in unauthorized practice of law, and they need to be cautious about preparing comprehensive marital settlement agreements. Each participant should be advised to have the agreement reviewed by an attorney before signing it, and the non-legal nature of the document needs to be indicated. Mediation complements legal services, and it must not be confused with the practice of law.

Finally, the issue of confidentiality needs to be thoroughly considered. Mediators are bound not to discuss with others what is revealed to them in mediation unless such divulgence is agreed to by both participants, or enforced by a court order.

These are some of the issues that will affect the practice of mediation in South Africa, and which are presently being considered by supporters and opponents of its practice.

## 2.14 SUMMARY

The essential conclusions that may be deduced from the foregoing literature review are set out below, and they serve as a justification and theoretical basis for the research work that has been undertaken:

(i) There is a high divorce rate reported in each of the countries where divorce has been studied, and the evidence is that this is also the case in South Africa. The extent to which divorce affects contemporary society and the fabric of family life cannot be understated.

(ii) A central concern in any divorce is the influence which it may have on the children of the marriage. Children are inevitably adversely affected, and this may be long-lasting. Their standard of living is likely to fall, and the results may even project into their own marriages. The children of a divorcing couple will, in all probability, be deprived of effective parenting for a period of their childhood.

(iii) The peculiar nature of conflict in divorce needs to be understood by those who offer counsel to divorcing couples. This includes an understanding of the major disruptive influences that the divorce process will have on each of the partners, and the effects on their social as well as their personal lives. Divorce goes well beyond simply the material separation, which traditionally has been

the preoccupation of lawyers when dealing with the matter in the normal adversarial way.

(iv) In general, the perspective of lawyers to the divorce process has not been all-encompassing of the personal and social repercussions of divorce referred to above. For this an understanding of the stages in the divorce process is helpful, but this is unlikely to form part of the normal lawyer's frame of reference. (There are, of course, exceptions amongst the lawyers to this general statement.)

(v) There is growing appreciation, reported from abroad, of the value of mediation/conciliation in dealing comprehensively with the problems of the divorcing couple. To be done successfully the mediator requires an understanding of the principles which guide this special field.

(vi) Of the various models of mediation that may be applicable to divorce, a family systems approach deserves special attention. Whether or not children should be involved in the process is a matter of ongoing debate.

(vii) Recent South African legislation (The Mediation in Certain Divorce Matters Act of 1987) would appear to indicate support for the growth and development of mediation in divorce. However, the retention in the legislation of the concept of fault as a principle for determining issues

of custody, maintenance and division of property remains a serious weakness in the South African system.

(viii) Co-mediation, which in its generally understood form requires a synthesis of the skills and experience of lawyers and counsellors, offers a means of addressing the objections of lawyers who see divorce mediation as encroaching upon their field. Co-mediation allows for the necessary combination of skills and experience to be brought to bear on refractory cases.

(ix) For a social worker adequately to understand the attitudes of lawyers towards divorce, and towards divorce mediation in particular, and to make it possible for substantial arrangements to be made for collaboration between lawyers and social workers to bring this about, it is necessary that research should be done into these matters, and that both the literature and the outcome of such research applicable in South Africa should be critically evaluated. Lawyers and social workers need to understand the limits of their capabilities in dealing with the complex and numerous issues affecting the individuals and their families in divorce. Only in this way is it likely that a level of cooperation might be achieved that will adequately serve the needs of this country.

## CHAPTER 3

### EMPIRICAL RESEARCH

This chapter contains a detailed description of the research methodology that was developed in order to examine the attitudes to and knowledge of the principles and conduct of divorce mediation amongst attorneys working in central Cape Town. The study was directed at 169 attorneys, 148 of whom returned the questionnaire, and 31 of whom attended the follow-up talk. It will be argued that this represented an adequate sample for deriving the conclusions that were reached. The inherent limitations in the research design are also identified and discussed.

#### 3.1 DESIGN

The design was exploratory.

#### 3.2 APPROACH TO THE PROBLEM

In the light of the discussion set out in Chapter 1, and in particular the need to investigate the potential for cooperation between the legal profession and FAMSA with regard to a conciliatory and collaborative approach to dealing with divorce matters, it was felt that research directly involving attorneys was necessary. A social work orientation, concentrating on the emotional needs of clients, is diametrically opposed to the traditional legal approach. The latter is directed at obtaining the best result for one party, often at the expense of the other, and

with little regard to the emotional needs of the participants and of the family.

### 3.3 SAMPLING

The initial study population consisted of all the attorneys in the Attorney's Guide of 1990, published by the Law Society of the Cape of Good Hope, who are listed under CAPE TOWN. By Cape Town is understood the central business district. Those areas listed under individual suburbs were not included for two reasons; namely, (i) the area chosen contained approximately 600 names which it was anticipated would yield an adequate sample, and (ii) it was felt that attorneys whose place of work was near FAMSA would be more willing to make themselves available for the subsequent part of the programme - the proposed talk and videotape. Patent attorneys were excluded, as were those working in the office of the State Attorney, who do not deal with divorce work. Also excluded from the initial study were attorneys identified as working in office branches in the suburbs. The several attorneys who were later found to be working in the suburbs in office branches and who had responded positively to the initial letter of inquiry, were included.

It was anticipated that this population would be predominantly white and male, although not exclusively either, and that the study would be inherently biased and limited by the fact that it was confined to Cape Town and to

attorneys with a central urban practice. The results would therefore not necessarily be reflective of attorneys' attitudes in other large urban areas in South Africa or of attorneys practising in non-urban areas. The clientele of the respondents was likely to be predominantly white, and middle class/ affluent, and the information gathered might not represent the attitudes of lawyers whose practices are mainly concerned with people from the lower socio-economic groups and/ or with blacks (defined here as people who are categorised as "not white").

It was also recognised that only a small proportion of the respondents would be likely to conduct legal aid practice, even in part, and that this may introduce further selection bias. [This is based on the untested assumption that attorneys involved in legal aid are more sympathetic than others to the general concept of mediation.]

Five-hundred and ninety-one (591) initial letters of inquiry were sent out (Appendix A). Of the 328 lawyers (55.5%) who responded, 154 indicated that they did no divorce work, 4 were based in Johannesburg, and a final total of 169 indicated a willingness to participate in the study. Six (6) attorneys initially replied that they did divorce work but did not intend to collaborate. When contacted by telephone, five (5) of the latter agreed to be included when they learned that they would not be expected to grant the

researcher an interview and that they would be able to complete the questionnaire in their own time.

Thus, those who in the end responded positively to both questions formed the final sample, which constituted a non-probability, availability sample of those who declared themselves willing to collaborate. This sample consisted of 169 individuals, or 28.6% of the original number contacted.

#### 3.4 METHOD OF DATA COLLECTION

It was decided to conduct the initial part of this study by mail, for the following reasons:-

- respondents' anonymity would be protected;
- respondents would be able to complete the questionnaire in their own time;
- it would have been an unduly time-consuming process to arrange appointments to interview busy attorneys;
- a postal questionnaire would reach more people and was likely to yield useful information concerning their interest in divorce mediation, and their willingness to respond.

It was recognised that there would also be a number of disadvantages to a mailed questionnaire; specifically:

- lack of flexibility in the way the questions would be asked, so that any misunderstandings could not be corrected. Neither would there be any way of

- mollifying a respondent who disliked a particular question;
- there was likely to be a low response rate;
  - some questions might remain unanswered;
  - spontaneous comments and responses could not be recorded; and,
  - it is difficult to separate wrong addresses from non-responses. (Bailey 1987: 149)

On the other hand, it was noted that Goyder (1985), as discussed by Bailey (1987: 152), had argued that there may not necessarily be a meaningful difference in response rates between mailed questionnaires and face-to-face interviews. According to Goyder, increasing educational levels and other factors make mailed surveys the "optimal" method of surveying in "post-industrial" society. In the present study the response rate proved to be satisfactory using this method of data collection.

### 3.5 THE QUESTIONNAIRE

The Divorce Mediation Collaboration Inquiry (Appendix B) was compiled by the researcher in consultation with a number of colleagues with different but cognate professional backgrounds, and it took into careful consideration the work of Kressel et al (1978), Felner et al (1982) and Neilson (1990). The proposed questionnaire was presented to two experienced attorneys, two clinical psychologists, one

senior social worker and one medical practitioner, all of whom had an interest in and knowledge of divorce mediation. These persons were asked to give their opinion on the relevance of each question and the way in which it had been worded. All responded in detail, and their comments were carefully considered and, where appropriate, incorporated into the final questionnaire. This was either mailed or delivered by hand to the 169 attorneys, with an accompanying letter (Appendix B).

### 3.6 VALIDITY

Validity is regarded as having two parts: the instrument must actually measure the concept in question, and the concept must be measured accurately (Bostwick & Kyte 1985: 161). Several aspects of validity were considered in planning the investigation, as set out below.

#### 3.6.1 Content validity

Two questions are asked in order to determine content validity; namely, (i) is the instrument actually measuring what it is assumed to measure; and (ii) does the instrument provide an adequate sample of items that represent the concepts being measured? (Bostwick & Kyte 1985: 162). Following the critical evaluation of the questionnaire by the six professionals referred to in section 3.5 above, it was concluded that the instrument did measure the knowledge and attitudes of attorneys concerning divorce mediation, and

that an adequate range of questions had been provided. In establishing content validity there is a danger of judgmental and subjective bias, and the researcher attempted as far as possible to avoid her own personal judgments by subjecting the instrument to the opinions of others who are involved in human behavioural issues. It is acknowledged that a researcher's own judgment is likely to have some influence on the evaluation, but this was guided by experience in divorce mediation, by careful attention to the work of others in this field, and by consultation with others.

### 3.6.2 Face validity

Face validity refers to what an instrument appears to measure rather than what it actually measures, and whether it appears relevant to those who will respond to it. As with content validity, it is a subjective assessment, but necessary in order to reduce resistance on the part of respondents (Bostwick & Kyte 1985: 163). Face validity was also addressed by pretesting the questionnaire with other professionals in the manner already referred to.

### 3.6.3 Criterion validity

Criterion validity is established by comparing scores on an instrument with an external criterion either known or believed to measure the concept being studied (Bostwick & Kyte 1985: 164). It is necessary that the instrument should have *concurrent validity*, which is the ability

accurately to evaluate an individual's current status - in this case the attitudes and knowledge of the respondents at the time of their completing the questionnaire.

*Predictive* validity denotes the ability of an instrument to predict future performance or status from present performance or status (Bostwick & Kyte 1985: 165). There are limits to the predictive validity of the questionnaire that was developed. These do not detract from its value, but they have to be taken into account. In the several months prior to the investigation there had been a marked increase in interest on the part of both attorneys and advocates with regard to mediation as an alternative form of dispute resolution. This is similar to what was seen in the United States of America in the mid-1970's, and in the United Kingdom in the early 1980's. For this reason, one cannot assume that what was established at the time of the study will remain true in the future, although the methodology is likely to remain valid.

#### 3.6.4 Construct validity

Construct validity refers to the degree to which an instrument successfully measures a theoretical construct. It involves validation of both the instrument and of the theory underlying it. The current study did not address construct validity.

### 3.7 RELIABILITY

The small number of professional people consulted about the questionnaire, who were asked to rank it and to refine the questions, are likely to have minimised any ambiguity and to have drawn attention to any particularly sensitive questions, and in so doing they would have increased the reliability (that is, the accuracy and consistency) of the instrument. The question was asked of them regarding each section: "Is this the best way I can ask this question, or should I ask it differently? Is the terminology correct?"

The various procedures for establishing reliability, as outlined by Bostwick & Kyte (1985) and described below, were considered:

#### 3.7.1 The test-retest method

This involves the administration of the same instrument to the same group of individuals on two or more occasions in order to establish the stability of the instrument over time. In the present study this was not feasible, for the following reasons:-

(i) There was a likelihood of a carry-over effect; that is, having responded to the first questionnaire, respondents would have been influenced in their responses to subsequent questionnaires.

(ii) Respondents were being examined in a changing situation (refer section 3.6.3), so that there was likely to have been drift over time.

(iii) The chances of the respondents being willing to collaborate with a repeat evaluation were regarded as being small.

Therefore, since the test-retest method is susceptible to extraneous influences and also has several practical and feasibility problems, it was thought unlikely that it would be helpful in this investigation.

### 3.7.2 The alternate-form method

This method involves administering, either in immediate or delayed succession, equivalent forms of the same instrument to the same group of individuals. This, too, was not considered feasible in the present study, for the following reasons:

(i) It would be difficult to compile two parallel and equivalent questionnaires.

(ii) Respondents in the present study were regarded as being unlikely to complete two separate questionnaires.

(iii) Changing the items in the alternate form was thought to be unlikely to eliminate the carry-over effect from the first.

### 3.7.3 The split-half technique

Split-half reliability provides a measure of the instrument's internal consistency. The items are divided into comparable halves, and the two parts are compared for equivalence. Although similar to alternate-form reliability, since each half is treated as a parallel form, respondents do not need to complete two separate instruments.

In order to establish equivalence of the two halves, there needs to be a representative sampling of items. The present instrument does not contain sufficient equivalent questions for split-half reliability to be determined.

In conclusion, the study relied heavily and predominantly on its validity. This is consistent with what has been suggested by Bailey (1987: 67); namely, if the questionnaire is valid, it is also likely to be reliable.

## 3.8 ANALYSIS OF RESULTS

### 3.8.1 Method of evaluation

The results obtained for each respondent for every question were ranked according to six key variables which were precoded on a score of 0 to 3, where

0 = no indicator or not applicable

1 = weak indicator

2 = intermediate indicator

3 = strong indicator

The variables were as follows:-

- A = Respondent understands the concept of divorce mediation;
- B = Respondent is responsive to the emotional needs of clients in the divorce process;
- C = Respondent recognises the need to offer broader assistance than simply legal advice;
- D = Respondent is willing to accept an alternative to the adversarial system of divorce;
- E = Respondent accepts that professionals other than lawyers are capable of mediating divorce;
- F = Respondent accepts that divorce mediation requires special training.

Appendix C shows the numbers allocated to the individual answers to each question for each of the respondents.

### 3.8.2 Scoring

In view of the differing ways in which certain questions were answered, the following rules were adopted when scoring the questionnaire:

- (i) If the answer to question 7 was "no", then questions 7.1 and 7.2 were disregarded.
- (ii) If the answer to question 7.1 was "yes", no score was given to question 7.2, if it was answered.
- (iii) It was assumed that those respondents who answered "yes" to question 8.3 and did not complete the other three options under question 8 understood the concept of divorce mediation. These respondents were credited with a further

9 points, in line with those who completed all four options correctly.

### 3.8.3 Statistical analysis

The statistics that were applied in this study were based on non-parametric methods (Siegel & Castellan 1988). This approach is particularly suited to evaluation of data in the behavioural sciences. In using non-parametric statistics it was not necessary to assume that the data were distributed normally. This was strengthened by confirmation, using the Kolmogorov-Smirnov one-sample test for goodness of fit to a normal distribution with mean and standard deviation estimated from the sample (i.e. distributional symmetry), that the data collected were not symmetrically distributed. (However, as indicated in section 4.6, they did not depart significantly from a normal distribution for any of the criteria examined.)

The data were evaluated using the Statgraphics Version 4.0 computer software package (Statistical Graphics Corporation, 1989, STSC Inc, USA).

Summary statistics were prepared for the responses to each of the six criteria. The Spearman rank correlation coefficient was used to measure the association between the responses to the individual criteria. With this test respondents were ranked for their cumulative score in response to each criterion.

The Kruskal-Wallis analysis of variance was used to generate correlation matrices between all data obtained from the question ratings and the demographic data that were obtained regarding the respondents. In all cases a p value less than 0.05 was regarded as statistically significant.

The returned questionnaires were renumbered, for identification of the respondents, from 1 to 148, to simplify the analysis.

#### 3.8.4 Validation of the questionnaire

The validity of the investigative method was established as follows. The total for the criteria A, B, C, D, E and F for the 43 items tested was determined for each respondent (as indicated in Appendix C, not every criterion was evaluated for each of the questions). Each individual's score for each of the criteria evaluated for every question was then placed in the first, second, third and fourth quartiles, respectively, when compared with the total achieved by the entire group for the same criterion. For example, if a given individual scored "x" for criterion B of, say, item 24, and this score fell in the third quartile of all the responses for this criterion and question, it would be designated as such. When it was clear for a given question that the scoring for all or the majority of the criteria in that question was lowest in those individuals whose aggregate score was highest, and vice versa, and if

this was statistically significant ( $p < 0.05$ ), the result was regarded as an inversion. This was done using the Kruskal-Wallis analysis of variance. The theoretical basis for this method is set out in Anderson (1957). Those questions, the results of which were inverted according to this definition, were removed from the questionnaire and not taken into account in the final evaluation (see Table 4.7). All those questions that were deleted were, in retrospect, either vague or misleading.

### 3.9 FOLLOW-UP TALK AND VIDEOTAPE

All respondents who indicated an interest in attending a talk and videotape demonstration in order to receive information about divorce mediation and a report on the outcome of the analysis of the questionnaire, were invited to one of four sessions held at FAMSA, or two talks given at the offices of firms of attorneys. The content of the talk is given in Appendix D.

The videotape used to illustrate a mediation session is by Dr John Haynes, the noted American mediator and trainer, who is seen in the video to be helping what he describes as a "powerful, competitive couple" negotiate access to their children during their period of separation.

### 3.10 EVALUATION

The 31 individuals who attended the talk and videotape were asked to complete a final evaluation of the project at the conclusion of the same session (Appendix E). Six questions, 1(i) to 1(vi), were designed to evaluate any change in knowledge and acceptance of divorce mediation. The minimum aggregate change was a score of 6, and the maximum achievable was 30. In addition, there were three open questions requesting feedback, and the respondents were also asked if they would be interested in training in co-mediation.

### 3.11 ANALYSIS OF FOLLOW-UP EVALUATION

The total scores of all the respondents ( $n = 148$ ) to each of the 34 items tested in the final questionnaire were calculated, and their quartiles determined according to the total score, using the summary statistics facility in Statgraphics. The quartiles for each of the six key variables of those who came for the follow-up session were then established, as well as the score of change for each as described in section 3.10 above. The chi-square goodness of fit test was applied in order to determine whether the 31 respondents who came for follow-up were randomly distributed by total score amongst the entire original group of 148 respondents.

### 3.12            ADDITIONAL FEEDBACK

The 117 respondents who completed the original questionnaire but who did not attend the follow-up talk, were sent a summary of the findings of the investigation and a print-out showing their quartiles for each of the six key criteria in comparison with the entire group (Appendix F; Table 4.12).

## CHAPTER 4

### RESULTS

#### 4.1 INTRODUCTION

The results presented here reflect a broad perspective of the knowledge of and insight into divorce mediation on the part of the respondents. A substantial number of those attorneys with experience in divorce work who were originally approached participated, and the comprehensive questionnaire and the scoring system that was applied lend themselves to detailed analysis. The results of this analysis, together with the findings from those questions which were evaluated separately and not according to the scoring system, are included. There is also the outcome of the study of those respondents who attended the follow-up talk and videotape presentation, who were further evaluated for possible altered perceptions and understanding of divorce mediation.

It is necessary to repeat here the caveat which has previously been stated. There was in all likelihood significant selection bias, and these results and conclusions cannot be extrapolated to South African attorneys in general. Attorneys whose place of work is in the centre of a city may differ from the general group of attorneys: the former may or may not be more affluent, and the possibility of race and sex bias (white and male) in the selection process cannot be excluded. It is fully

recognised that, even if such bias in selection is not demonstrated, the choice of respondents may have affected the attitudes to and knowledge of divorce mediation that were found. Nevertheless, they are the attorneys located most closely to FAMSA's Cape Town offices and most likely to be drawing on the same clientele as FAMSA. The most important defence of the process that was adopted is that it establishes and tests a method that is generally applicable, and (secondarily) that it provides FAMSA with carefully studied insights which may be useful in developing important interprofessional working relationships.

#### 4.2 DIVORCE MEDIATION COLLABORATION INQUIRY

A total of 148 respondents was evaluated, representing 87,6 per cent of the 169 attorneys who identified themselves in response to the original inquiry as being divorce lawyers and having an interest in cooperating in the study.

#### 4.3 DEMOGRAPHIC DETAILS

The age, sex, years in practice, percentage of work-time spent on divorce matters (by category), divorce status and parental status respectively of each of the 148 respondents are set out in Appendix G.

The respondents fell into the following categories, corresponding to questions 1-4, 29 and 30 in the original questionnaire (Tables 4.1 to 4.6):

TABLE 4.1: AGE OF RESPONDENTS

AGE	NUMBER	PERCENTAGE
20-35	55	37
36-55	78	53
56+	15	10
TOTAL	148	100

TABLE 4.2: SEX OF RESPONDENTS

SEX	NUMBER	PERCENTAGE
Male	126	85
Female	22	15
TOTAL	148	100

TABLE 4.3: YEARS IN PRACTICE AS AN ATTORNEY

YEARS	NUMBER	PERCENTAGE
0-10	68	46
11-20	45	30
21+	35	24
TOTAL	148	100

TABLE 4.4: PERCENTAGE OF WORK DEVOTED TO DIVORCE

PERCENTAGE OF WORK	NUMBER	PERCENTAGE OF RESPONDENTS
0-25	115	78
26-50	28	19
50-75	3	2
76+	2	1
TOTAL	148	100

TABLE 4.5: DIVORCE STATUS OF RESPONDENTS

STATUS	NUMBER	PERCENTAGE
Not divorced	131	88,5
Divorced	17	11,5
TOTAL	148	100,0

TABLE 4.6: PARENTAL STATUS OF RESPONDENTS

STATUS	NUMBER	PERCENTAGE
Parent	100	68
Not a parent	48	32
TOTAL	148	100

#### 4.3.1 Discussion

Tables 4.1 to 4.6 reveal that the majority of the respondents (53%) were aged between 36 and 55 years. 61 women were approached with the original letter of inquiry, of whom 35 responded. Twenty-two (22) women, representing 15 per cent of the total number of respondents, participated in the study. Less than one-half (46%) of the respondents had been in practice for ten years or less: the remaining 54% had been in practice for more than ten years. Only 5 (3.4%) of the respondents spent 50 per cent or more of their time on divorce matters; the majority (78%) spent 25 per cent or less of their time in this way. Seventeen (17) respondents had themselves been divorced, and 100 (68%) were parents.

#### 4.4 VALIDATION OF THE QUESTIONNAIRE

The criteria that were evaluated were:

- A. Understanding of the concept of divorce mediation.
- B. Responsiveness to the emotional needs of clients in the divorce process.
- C. Acceptance of the need to offer broader assistance than simply legal advice to divorcing clients.
- D. Willingness to accept an alternative to the adversarial system of divorce.
- E. Readiness to accept that professionals other than lawyers are capable of mediating divorce.

F. Acknowledgement that divorce mediation requires special training.

Validation of the questionnaire was done as explained in section 3.8.4 (page 111). Those individual questions for which the respondents with the lowest aggregate scores scored the highest to a degree that was statistically significant, and vice-versa, were identified as inverted. The results of analysing each respondent's score for each of the 43 items tested in terms of the criteria are presented in Table 4.7. Those questions for which there was a statistically significant inversion were identified and removed from further analysis. These were items 17, 20, 21, 26, 27, 30, 35, 37 and 39. After each of the questions representing deletions had been removed, the data were reassessed in terms of comparison for the scoring for the individual question with the quartile achieved for that particular criterion by the respondent. The Kruskal-Wallis analysis of variance and the statistical significance for each question was determined in each case. This is presented in Table 4.8.

TABLE 4.7: SIGNIFICANCE LEVEL FOR COMPARISON OF EACH QUESTION WITH THE AGGREGATE RESULT OBTAINED BY EVERY INDIVIDUAL (BY QUARTILE) FOR THE CRITERIA A, B, C, D, E AND F (KRUSKAL-WALLIS ANALYSIS OF VARIANCE)

	A	B	C	D	E	F
1	0.0009	-	0.5143	0.7281	0.0366	0.0031
2	0.0013	-	0.6051	0.5941	0.0070	0.0000
3	0.1033	0.0601	0.0049	0.0021	0.0034	0.0000
4	0.8936	0.0134	0.0000	0.0000	0.0844	-
5	-	-	0.0000	0.0000	-	-
6	-	-	-	-	-	-
7	-	-	0.7329	0.0450	-	-
8	-	-	-	-	-	-
9	0.0000	-	-	-	-	-
10	0.0000	-	-	-	-	-
11	0.0000	-	-	-	-	-
12	0.0000	-	-	-	-	-
13	-	0.0088	-	-	-	-
14	-	-	0.1368	0.0727	-	-
15	-	0.2079	-	-	-	-
16	-	0.1293	-	-	-	-
17	-	*0.0064	*0.0019	-	-	-
18	-	0.0064	0.0019	0.0033	-	-
19	-	0.0005	0.0000	-	-	-
20	-	*0.0024	*0.0005	-	-	-
21	-	*0.0000	*0.0034	-	-	-
22	-	0.0000	0.0015	-	-	-
23	-	0.7940	-	-	-	-
24	-	0.1161	-	-	-	-
25	-	0.0003	0.0018	-	-	-
26	0.5562	*0.7991	*0.4953	-	-	-
27	*0.5562	*0.7991	*0.4954	-	-	-
28	-	-	0.0088	0.0191	-	-
29	-	-	0.0229	0.0003	-	-
30	0.8677	-	*0.4174	-	-	-
31	0.9588	-	0.0183	0.0000	-	-
32	-	0.0004	0.0606	0.7844	-	-
33	-	0.0000	0.0000	0.0000	0.0000	-
34	0.0012	0.0239	0.0008	0.0056	0.0000	0.0000
35	*0.0035	*0.0498	*0.0015	*0.0134	*0.0000	*0.0000
36	0.1971	0.0002	0.0007	0.0067	0.0000	0.0000
37	*0.6535	*0.0040	*0.0097	*0.0540	*0.0005	*0.0106
38	0.1103	-	-	0.6299	-	0.0003
39	*0.1103	-	-	*0.0472	-	*0.0003
40	-	-	-	0.7067	-	0.0000
41	-	-	-	0.0865	-	-
42	0.4043	0.0392	0.0213	0.0146	-	-
43	0.0439	0.1045	0.0007	0.0000	0.0348	0.0151
Ave:	0.2731	0.1320	0.1270	0.1658	0.0167	0.0027

Note: Questions 17, 20, 21, 26, 27, 30, 35, 37 and 39 show an inversion of the general result, and they have been deleted from the final analysis.

TABLE 4.8: SIGNIFICANCE LEVEL FOR COMPARISON OF EACH QUESTION WITH THE AGGREGATE RESULT OBTAINED BY EVERY INDIVIDUAL (BY QUARTILE) FOR THE CRITERIA A, B, C, D, E AND F (KRUSKAL-WALLIS ANALYSIS OF VARIANCE) AFTER DELETION OF THE INVERSIONS

	A	B	C	D	E	F
1	0.0002	-	0.9644	0.5593	0.0597	0.0436
2	0.0146	-	0.5199	0.4707	0.0277	0.0162
3	0.0325	0.2646	0.0780	0.0023	0.0346	0.0021
4	0.9955	0.0159	0.0048	0.0001	0.4552	-
5	-	-	0.0066	0.0004	-	-
6	-	-	-	-	-	-
7	-	-	0.6229	0.5833	-	-
8	-	-	-	-	-	-
9	0.0000	-	-	-	-	-
10	0.0000	-	-	-	-	-
11	0.0000	-	-	-	-	-
12	0.0000	-	-	-	-	-
13	-	0.1391	-	-	-	-
14	-	-	0.2409	0.2606	-	-
15	-	0.4016	-	-	-	-
16	-	0.9640	-	-	-	-
18	-	0.0000	0.0000	0.0466	-	-
19	-	0.0000	0.0000	-	-	-
22	-	0.0000	0.0000	-	-	-
23	-	0.8393	-	-	-	-
24	-	0.0936	-	-	-	-
25	-	0.0002	0.0014	-	-	-
28	-	-	0.0224	0.0038	-	-
29	-	-	0.0263	0.0022	-	-
31	0.6411	-	0.0006	0.0000	-	-
32	-	0.0452	0.2130	0.8721	-	-
33	-	0.0000	0.0000	0.0008	0.0000	-
34	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
36	0.0004	0.0000	0.0000	0.0000	0.0000	0.0000
38	0.1063	-	-	0.4345	-	0.0003
40	-	-	-	0.4957	-	0.0043
41	-	-	-	0.1706	-	-
42	0.0819	0.0346	0.0187	0.0512	-	-
43	0.0076	0.0462	0.0005	0.0008	0.4607	0.0071
Ave:	0.1343	0.1673	0.1360	0.1978	0.1297	0.0092

Statistical significance:  $p < 0.05$

The overall validity of the questionnaire, determined by an aggregate of the overall statistical significance of each of the criteria evaluated in this way, proved to be 0.1291 (on the scale 0 to 1, where 0 represents perfect validity and 1 signifies no validity). That is, the questionnaire, after amendment by deletion of inversions, had 87 per cent validity.

#### 4.5 EXAMINATION OF DEMOGRAPHIC STATUS AGAINST CRITERIA A - F

When the demographic status of each respondent was examined by one-way analysis of variance (Kruskal-Wallis) against his/her aggregate score for each of the criteria A, B, C, D, E and F respectively, no statistically significant association was found between:

- (i) Age and any of the criteria A, B, C, D, E and F.
- (ii) Sex of the respondent and understanding the concept of divorce mediation (criterion A).
- (iii) Number of years in practice and any of the criteria A, B, C, D, E and F.
- (iv) Time spent in the respondents' practices on divorce work and
  - understanding the concept of divorce mediation (criterion A);
  - responsiveness to the emotional needs of clients in the divorce process (criterion B).

- (v) Divorce status and any of the criteria A, B, C, D, E and F.
- (vi) Parental status and any of the criteria A, B, C, D, E and F.

A statistically significant correlation was found between the following (the significance level in each case is indicated in brackets):

- (i) Female sex and responsiveness to the emotional needs of clients in the divorce process  
(criterion B) ( $p = 0.02$ )
- (ii) Female sex and acceptance of the need to offer broader assistance than simply legal advice to divorcing clients (criterion C) ( $p = 0.03$ )
- (iii) Female sex and willingness to accept an alternative to the adversarial system of divorce  
(criterion D) ( $p = 0.02$ )
- (iv) Female sex and willingness to accept that professionals other than lawyers are capable of mediating divorce (criterion E) ( $p = 0.01$ )
- (v) Female sex and acknowledgement that divorce mediation requires special training (criterion F)  
( $p = 0.03$ )
- (vi) Time spent on divorce proceedings as a proportion of total practice time and acceptance of the need to offer broader assistance than simply legal

advice to divorcing clients (criterion C)

( $p = 0.02$ )

- (vii) Time spent on divorce proceedings as a proportion of total practice time and willingness to accept an alternative to the adversarial system of divorce (criterion D) ( $p = 0.01$ ).

#### 4.6 DISTRIBUTION OF THE EVALUATION CRITERIA

Summary statistics describing the criteria A, B, C, D, E and F (after deletion of the inversions) are presented in Table 4.9. The coefficients of skewness and kurtosis, presented as standardised values for each, indicate that the data do not depart significantly from a normal distribution (the standardised coefficient fell within the range -2.0 to +2.0), even though the distribution is not symmetrical.

TABLE 4.9: SUMMARY STATISTICS DESCRIBING RESPONSE CRITERIA  
A, B, C, D, E AND F (AFTER DELETION OF THE  
INVERSIONS)

Variable	A	B	C
Sample size	148	148	148
Average	16.223	21.4189	25.6149
Median	16	22	26
Mode	12	23	26
Geometric mean	14.9024	20.7332	24.8721
Variance	36.1472	25.3879	35.5173
Standard deviation	6.01226	5.03864	5.95964
Standard error	0.494204	0.414174	0.48988
Minimum	2	8	11
Maximum	31	32	43
Range	29	24	32
Lower quartile	12	19	22
Upper quartile	21	25	30
Interquartile range	9	6	8
Skewness	6.82094E-3	-0.377199	-0.0490019
Standardized skewness	0.0338766	-1.87338	-0.24371
Kurtosis	-0.627973	0.133527	-0.146934
Standardized kurtosis	-1.55943	0.331584	-0.364877

Variable	D	E	F
Sample size	148	148	148
Average	22.2297	7.75676	9.66892
Median	22	7	9
Mode	25	6	9
Geometric mean	21.5521	7.00583	8.98281
Variance	29.4026	10.4574	11.7196
Standard deviation	5.42242	3.2338	3.42339
Standard error	0.44572	0.265816	0.281401
Minimum	11	1	3
Maximum	41	17	21
Range	30	16	18
Lower quartile	18.5	5	7
Upper quartile	26	10	12
Interquartile range	7.5	5	5
Skewness	0.274541	0.260994	0.142232
Standardized skewness	1.36352	1.29624	0.706401
Kurtosis	0.242455	-0.559138	-0.0263003
Standardized kurtosis	0.602082	-1.38849	-0.0653109

#### 4.7 CORRELATION OF THE CRITERIA OF EVALUATION

TABLE 4.10: SPEARMAN RANK CORRELATION COEFFICIENTS FOR CRITERIA A, B, C, D, E AND F, AFTER DELETION OF INVERSIONS

Spearman Rank Correlations						
	A	B	C	D	E	F
A	1.0000 (148) 0.0000	0.2828 (148) 0.0005	0.3523 (148) 0.0000	0.4673 (148) 0.0000	0.5651 (148) 0.0000	0.5860 (148) 0.0000
B	0.2828 (148) 0.0005	1.0000 (148) 0.0000	0.9027 (148) 0.0000	0.6695 (148) 0.0000	0.6998 (148) 0.0000	0.5247 (148) 0.0000
C	0.3523 (148) 0.0000	0.9027 (148) 0.0000	1.0000 (148) 0.0000	0.8692 (148) 0.0000	0.7378 (148) 0.0000	0.5956 (148) 0.0000
D	0.4673 (148) 0.0000	0.6695 (148) 0.0000	0.8692 (148) 0.0000	1.0000 (148) 0.0000	0.7888 (148) 0.0000	0.7107 (148) 0.0000
E	0.5651 (148) 0.0000	0.6998 (148) 0.0000	0.7378 (148) 0.0000	0.7888 (148) 0.0000	1.0000 (148) 0.0000	0.8093 (148) 0.0000
F	0.5860 (148) 0.0000	0.5247 (148) 0.0000	0.5956 (148) 0.0000	0.7107 (148) 0.0000	0.8093 (148) 0.0000	1.0000 (148) 0.0000

Coefficient (sample size) significance level

In Table 4.10, nonparametric Spearman rank correlation coefficients are presented, with statistical significance, of the criteria A, B, C, D, E and F after the deletions were made for inversions. The results, which relate to all respondents, indicate the following (the level of statistical significance is indicated in brackets):

(i) Understanding of the concept of divorce mediation (criterion A) is significantly correlated in the respondents with: responsiveness to the emotional needs of clients in the divorce process (criterion B) ( $p = 0.0005$ ); acceptance of the need to offer broader assistance than simply legal advice to divorcing clients (criterion C) ( $p = 0.0000$ ); willingness to accept an alternative to the adversarial system of divorce (criterion D) ( $p = 0.0000$ ); readiness to accept that professionals other than lawyers are capable of mediating divorce (criterion E) ( $p = 0.0000$ ); and acknowledgement that divorce mediation requires special training (criterion F) ( $p = 0.0000$ ).

(ii) Responsiveness to the emotional needs of clients in the divorce process (criterion B) is highly statistically significantly associated with the following ( $p = 0.0000$  in each case): acceptance of the need to offer broader assistance than simply legal advice (criterion C); willingness to accept an alternative to the adversarial system of divorce (criterion D); readiness to accept that professionals other than lawyers are capable of mediating divorce (criterion E); and acknowledgement that divorce mediation requires special training (criterion F).

(iii) Acceptance of the need to offer broader assistance than simply legal advice to divorcing clients (criterion C) is highly statistically significantly associated with the following ( $p = 0.0000$  in each case):

willingness to accept an alternative to the adversarial system of divorce (criterion D); readiness to accept that professionals other than lawyers are capable of mediating divorce (criterion E); and acknowledgement that divorce mediation requires special training (criterion F).

(iv) Willingness to accept an alternative to the adversarial system of divorce (criterion D) is highly statistically significantly associated with the following ( $p = 0.0000$  in both cases): readiness to accept that professionals other than lawyers are capable of mediating divorce (criterion E); and acknowledgement that divorce mediation requires special training (criterion F).

(v) Readiness to accept that professionals other than lawyers are capable of mediating divorce (criterion E) is highly statistically significantly associated with acknowledgement that divorce mediation requires special training (criterion F) ( $p = 0.0000$ ).

4.8 CORRELATION OF THE CRITERIA OF EVALUATION -  
WOMEN RESPONDENTS ONLY

TABLE 4.11: SPEARMAN RANK CORRELATION COEFFICIENTS FOR  
CRITERIA A, B, C, D, E AND F, AFTER DELETION  
OF INVERSIONS (WOMEN ATTORNEYS ONLY: N = 22)

Sample Correlations						
	A	B	C	D	E	F
A	1.0000 (22)	0.2762 (22)	0.3111 (22)	0.3488 (22)	0.5347 (22)	0.4143 (22)
	1.0000	0.2057	0.1540	0.1100	0.0143	0.0577
B	0.2761 (22)	1.0000 (22)	0.8520 (22)	0.6270 (22)	0.6847 (22)	0.5989 (22)
	0.2057	1.0000	0.0001	0.0041	0.0017	0.0061
C	0.3111 (22)	0.8520 (22)	1.0000 (22)	0.8821 (22)	0.7735 (22)	0.7332 (22)
	0.1540	0.0001	1.0000	0.0001	0.0004	0.0008
D	0.3488 (22)	0.6270 (22)	0.8821 (22)	1.0000 (22)	0.8155 (22)	0.7367 (22)
	0.1100	0.0041	0.0001	1.0000	0.0002	0.0007
E	0.5347 (22)	0.6847 (22)	0.7735 (22)	0.8155 (22)	1.0000 (22)	0.7978 (22)
	0.0143	0.0017	0.0004	0.0002	1.0000	0.0003
F	0.4143 (22)	0.5989 (22)	0.7332 (22)	0.7367 (22)	0.7978 (22)	1.0000 (22)
	0.0577	0.0061	0.0008	0.0007	0.0003	1.0000
	Coefficient	(sample size)	significance level			

In Table 4.11, nonparametric Spearman rank correlation coefficients are presented, with statistical significance, of the criteria A, B, C, D, E and F, respectively, after the deletions have been made for inversions, in respect of the 22 female respondents. The results indicate the following (the level of statistical significance is indicated in brackets):

(i) Understanding the concept of divorce mediation (criterion A) is significantly correlated in the respondents with readiness to accept that professionals other than lawyers are capable of mediating divorce (criterion E) ( $p = 0.0143$ ).

(ii) Responsiveness to the emotional needs of clients in the divorce process (criterion B) is statistically significantly correlated with the following: acceptance of the need to offer broader assistance than simply legal advice to divorcing clients (criterion C) ( $p = 0.0001$ ); willingness to accept an alternative to the adversarial system of divorce (criterion D) ( $p = 0.0041$ ); readiness to accept that professionals other than lawyers are capable of mediating divorce (criterion E) ( $p = 0.0017$ ); and acknowledgement that divorce mediation requires special training (criterion F) ( $p = 0.0061$ ).

(iii) Acceptance of the need to offer broader assistance than simply legal advice to divorcing clients (criterion C) is highly significantly associated with: willingness to accept an alternative to the adversarial system of divorce (criterion D) ( $p = 0.0001$ ); readiness to accept that professionals other than lawyers are capable of mediating divorce (criterion E) ( $p = 0.0004$ ); and acknowledgement that divorce mediation requires special training (criterion F) ( $p = 0.0008$ ).

(iv) Willingness to accept an alternative to the adversarial system of divorce (criterion D) is highly statistically associated with: readiness to accept that professionals other than lawyers are capable of mediating divorce (criterion E) ( $p = 0.0002$ ); and acknowledgement that divorce mediation requires special training (criterion F) ( $p = 0.0007$ ).

(v) Readiness to accept that professionals other than lawyers are capable of mediating divorce (criterion E) is significantly correlated with acknowledgement that divorce mediation requires special training (criterion F) ( $p = 0.0003$ ).

The most notable difference between the findings for the women compared with the findings for the whole group is that understanding the concept of divorce mediation (criterion A) does not correlate with the other criteria for the women to the extent that this is true for the whole group.

#### 4.9 INDIVIDUAL RESULTS

Each respondent's individual score for each criterion, expressed as a quartile in comparison with the whole group, is presented in Table 4.12. Of special interest is the identification of those respondents who scored consistently in the top quartile for each of the six criteria. There were 10 respondents in this category. The demographic details of these individuals and the statistical

significance of their comparison with others in the entire group of respondents are presented in Table 4.13.

TABLE 4.12: INDIVIDUAL SCORES OF EACH RESPONDENT FOR EACH CRITERION EXPRESSED AS A QUARTILE IN COMPARISON WITH THE WHOLE GROUP

row	a	b	c	d	e	f	row	a	b	c	d	e	f	row	a	b	c	d	e	f
1	3	1	1	1	1	1	51	4	4	3	2	4	2	101	1	2	2	3	2	1
2	4	2	2	4	4	4	52	3	1	1	2	2	2	102	1	2	2	2	2	2
3	2	4	4	4	2	2	53	1	4	4	2	1	1	103	4	3	4	4	4	2
4	2	3	3	2	4	2	54	2	3	4	4	2	2	104	2	4	4	4	4	4
5	4	3	2	3	4	4	55	4	1	2	4	4	4	105	4	4	4	4	4	2
6	2	3	3	2	2	4	56	2	4	4	4	4	4	106	2	4	4	4	3	4
7	2	3	3	3	2	2	57	1	1	1	1	1	1	107	1	2	1	1	2	1
8	1	2	2	1	1	1	58	1	1	1	1	1	1	108	2	4	4	4	4	4
9	4	1	1	1	2	2	59	2	2	3	3	2	4	109	3	4	4	4	3	2
10	1	3	2	1	3	2	60	1	1	1	1	1	1	110	3	4	4	2	2	1
11	1	1	1	1	1	1	61	1	3	2	2	3	2	111	4	4	4	4	4	4
12	1	1	2	2	1	1	62	1	3	3	4	2	2	112	1	1	1	2	1	1
13	4	4	3	2	2	2	63	1	4	2	1	1	1	113	2	2	1	1	2	2
14	3	1	1	1	1	1	64	2	1	1	1	1	1	114	1	1	1	1	1	1
15	2	4	4	4	4	2	65	4	1	1	1	3	4	115	4	1	1	2	1	2
16	2	2	3	3	4	4	66	4	1	1	2	1	1	116	2	1	1	1	1	1
17	2	1	1	1	1	1	67	3	2	1	1	2	1	117	4	3	3	4	4	4
18	4	3	2	2	4	2	68	4	4	4	4	3	4	118	4	4	3	4	4	4
19	4	4	4	3	4	2	69	1	1	1	1	1	1	119	1	4	4	2	1	2
20	2	4	4	3	2	2	70	3	1	1	1	1	1	120	1	1	1	1	1	1
21	2	4	4	4	4	4	71	1	2	2	2	1	1	121	2	1	1	1	1	1
22	4	3	3	3	4	2	72	2	3	4	3	2	2	122	1	2	2	4	2	2
23	4	1	1	2	2	2	73	3	3	3	2	2	4	123	4	3	2	2	2	2
24	2	1	1	1	2	2	74	2	1	1	2	2	2	124	2	3	3	4	4	4
25	4	4	4	4	4	4	75	3	4	2	2	3	2	125	3	3	3	2	2	2
26	4	3	3	4	3	4	76	1	2	3	3	2	1	126	3	1	2	2	2	1
27	4	2	3	4	4	4	77	4	4	3	3	4	2	127	4	2	2	4	4	4
28	1	1	1	2	1	1	78	3	4	4	4	2	2	128	4	2	4	4	2	2
29	2	3	2	1	1	1	79	3	2	2	2	2	3	129	1	1	1	3	1	1
30	2	3	2	2	2	2	80	1	1	1	1	1	1	130	4	3	3	4	4	4
31	2	4	4	4	4	2	81	1	2	2	2	1	1	131	3	2	2	3	3	2
32	2	2	3	2	2	1	82	4	2	1	1	2	2	132	2	1	1	1	1	1
33	2	4	4	4	4	4	83	1	1	1	1	1	2	133	1	4	4	2	1	1
34	3	2	2	2	3	4	84	4	4	4	4	4	4	134	2	4	4	4	3	2
35	2	2	2	1	1	1	85	4	4	3	2	3	2	135	4	4	4	4	4	4
36	3	4	4	4	3	4	86	4	1	2	3	2	2	136	2	4	2	1	1	1
37	4	4	4	3	4	4	87	4	1	2	3	2	1	137	4	1	1	1	2	1
38	2	3	3	3	2	4	88	1	3	2	1	1	1	138	4	2	3	4	3	4
39	3	2	4	4	1	2	89	1	2	2	3	2	1	139	2	1	1	1	1	1
40	1	2	3	3	2	4	90	1	2	1	1	1	1	140	4	4	3	3	4	4
41	3	4	4	4	4	4	91	2	4	4	4	4	4	141	4	3	2	2	4	4
42	1	2	3	3	3	1	92	4	2	2	2	2	2	142	1	2	2	1	1	1
43	4	2	2	4	2	4	93	4	3	2	2	2	2	143	1	1	1	1	1	1
44	2	4	4	4	3	2	94	3	4	4	4	4	4	144	2	1	1	1	1	1
45	1	2	1	1	2	1	95	1	2	1	1	1	1	145	1	2	3	3	3	4
46	4	2	3	4	4	2	96	3	2	2	2	1	1	146	1	2	2	2	1	1
47	3	2	3	4	2	1	97	4	4	4	4	4	4	147	1	1	1	1	1	1
48	3	4	4	4	4	4	98	3	4	4	4	3	4	148	1	2	2	2	1	2
49	2	4	4	4	3	2	99	4	4	4	4	4	4							
50	4	1	1	2	2	2	100	2	4	4	4	4	4							

TABLE 4.13: RESPONDENTS SCORING IN THE FIRST QUARTILE FOR EACH OF THE SIX CRITERIA TESTED: DEMOGRAPHIC DETAILS, AND THE STATISTICAL SIGNIFICANCE OF THEIR COMPARISON WITH OTHERS IN THE ENTIRE GROUP OF RESPONDENTS (CHI-SQUARE GOODNESS OF FIT)

Demographic detail	Category	Observed number	Expected number	Chi-square	Significance
Age	20-35	3	3.7	0.14	
	36-55	6	5.3	0.10	
	56+	1	1.0	0.00	
	Overall			0.24 (2df)	0.89 (NS)
Sex	Male	8	8.5	0.03	
	Female	2	1.5	0.17	
	Overall			1.96 (1df)	0.65 (NS)
Years in practice	0-10	3	4.6	0.56	
	11-20	5	3.0	1.33	
	21+	2	2.4	0.07	
	Overall			1.96 (2df)	0.38 (NS)
Percent devoted to divorce	0-25	7	7.8	0.08	
	26-50	1	1.9	0.43	
	51-75	0	0.0	-	
	76+	2	0.1	36.1	
	Overall			36.61 (2df)	0.00 (S)

No particular profile emerges from the analysis presented in Table 4.13.

#### 4.10 QUESTIONS NOT INCLUDED IN THE STATISTICAL EVALUATION

These questions did not lend themselves to the same statistical treatment, and were evaluated separately.

4.10.1 Question 15 of the original questionnaire:

135 respondents (91.2%) believed that their legal training did not equip them at all to understand and handle the psychological and interpersonal issues in divorce;

12 respondents (8.1%) felt that their legal training equipped them adequately to understand and handle the psychological and interpersonal issues in divorce; and

1 respondent (0.7%) felt that his legal training equipped him well to understand and handle the psychological and interpersonal issues in divorce.

The chi-square goodness of fit statistic for these results is presented in Table 4.14.

TABLE 4.14: CHI-SQUARE GOODNESS OF FIT FOR QUESTION 15 OF THE ORIGINAL QUESTIONNAIRE

Response	Observed response	Expected response	Chi-square	p
Legal training does not equip at all	135	49.3	149.0	
Legal training equipped adequately	12	49.3	28.2	
Overall			224.5	0.00

A statistically significant proportion ( $p = 0.00$ ) of the respondents were of the view that their legal training did not equip them at all, or at the best adequately but not

well, for handling the psychological and interpersonal issues of divorce.

#### 4.10.2 Question 19 of the original questionnaire

Eleven (11) respondents (7.4%) felt that the level of personal interaction between the opposing attorneys does not at all influence the outcome of a divorce case; 110 (74.3%) felt that the level of personal interaction between the opposing attorneys sometimes influences the outcome; 26 (17.6%) felt that the level of personal interaction between the opposing attorneys invariably influences the outcome; and 1 (0.7%) did not respond to this question.

The chi-square goodness of fit statistic for these results is presented in Table 4.15. A significant proportion of the respondents indicated their belief that the level of personal interaction between the opposing attorneys either sometimes or invariably influences the outcome of the divorce process ( $p = 0.00$ ).

TABLE 4.15: CHI-SQUARE GOODNESS OF FIT FOR QUESTION  
19 OF THE ORIGINAL QUESTIONNAIRE  
(N = 147)

Response	Observed response	Expected response	Chi-square	p
No influence on outcome	11	49	29.8	
Outcome is sometimes influenced	110	49	74.7	
Invariably influences the outcome	26	49	11.0	
Overall			115.5 (2df)	0.00

One respondent commented fully on this question, as follows:

- " 1. Every divorce case is capable of being settled.
2. An attorney has substantial influence over his client.
3. Divorce is fertile ground for making money, just as all family law or emotive issues are.
4. Different attorneys have different approaches.
5. Regrettably, attorneys and advocates make outlandish claims on behalf of their clients and create litigation. Divorce proceedings become a tactical and expensive game.
6. Attorneys are often the unreasonable party to a divorce and certainly affect the course of a divorce action.
7. An attorney wishing to develop a reputation for being "tough" with the other party and the other party's attorney will affect the course of a divorce action as it will result in the other party having to defend

their rights and it can affect the outcome certainly to the extent that both parties are poorer to the extent of the legal costs and are scarred from the battle. A party who is poorly represented can suffer irreparable harm.

8. In my opinion a good divorce lawyer can and should bring the parties to the table to (i) explain and discuss their rights; (ii) hear both sides; (iii) obtain a full picture of property and financial situation; (iv) propose a fair, practical and workable solution; (v) advise on what the likely bottom line would be in court; (vi) inform both parties of costs of litigation and the effect on the family; (vii) settle the matter.
9. Two opposing attorneys with the right approach along lines set out in 8 above can, through good personal interaction, settle every matter in the interests of all concerned, which most importantly includes the children.
10. A good divorce lawyer can "force"/persuade his client to accept settlement proposals which the attorney knows to be reasonable, and to abandon unreasonable and impracticable claims.
11. Good personal interaction between attorneys results in good and quick settlements."

#### 4.10.3 Question 23 of the original questionnaire

The outcome of the response to this question is presented in Table 4.16. Respondents were more willing to entrust the mediation of child-related issues to a broader range of individuals than they were property and financial issues. In the main, they felt that the latter should be handled only by lawyers or accountants.

TABLE 4.16: PEOPLE TO WHOM RESPONDENTS WOULD BE PREPARED TO REFER CLIENTS FOR MEDIATION

	CUSTODY AND ACCESS	PROPERTY AND FINANCE
Psychologists	119 (80%)	14 (9%)
Social workers	106 (72%)	26 (18%)
Marriage counsellors	81 (55%)	25 (17%)
Attorneys/advocates	69 (47%)	124 (84%)
Ministers of religion	51 (34%)	4 (3%)
Suitable lay person	45 (30%)	35 (24%)
Doctors	22 (15%)	0 (0%)
Probation officers	16 (11%)	4 (3%)
Registrars	3 (2%)	1 (1%)
Accountants	1 (1%)	101 (68%)
<b>TOTAL RESPONSES</b>	<b>513</b>	<b>334</b>

#### 4.10.4 Question 26.4 of the original questionnaire

Eighteen (18) respondents (12%) indicated that they would not recommend to clients that they make use of a specialised

mediation service, and a further 26 (17.6%) were unable to suggest which clients they might refer. Notable responses included the following:

- |   |              |
|---|--------------|
| - Difficult cases/cases in deadlock         | 28 responses |
| - Those who would benefit/request it        | 27 "         |
| - Child-related matters                     | 19 "         |
| - All/most clients                          | 17 "         |
| - Where reconciliation is a possibility     | 10 "         |
| - Ambivalent clients                        | 7 "          |
| - Those who cannot afford litigation        | 4 "          |
| - Those whose emotions get in the way       | 3 "          |
| - Those who cannot settle financial matters | 2 "          |

Other individual responses included

- Clients who have lived apart for less than six months;
- Those divorcing for selfish reasons: married too young and still immature, or emotionally confused;
- With problems that can be overcome, such as infidelity and alcohol abuse;
- Those with no major property claims;
- Those concerned about the stress and harm of an opposed trial; and
- Where issues are not purely legal.

Some of the above responses reveal a lack of knowledge and understanding of divorce mediation. For example, responses such as "where reconciliation is a possibility", "clients who have lived apart for less than six months" and "those

divorcing for selfish reasons" would appear to have as their goal reconciliation rather than divorce mediation. (Although mediation does sometimes result in reconciliation, this is not the primary goal.) It has been recognised that couples with excessive conflicts and a history of domestic violence or alcohol abuse are resistant to mediation (Johnston 1991).

#### 4.11 QUESTIONS REQUIRING ADDITIONAL COMMENT

Numbers allocated for scoring purposes are given in brackets (see Appendix C, page 167).

4.11.1 Question 7 (4): Have you ever mediated a divorce? The scoring allotted to this question recognised that a positive response does not imply knowledge of mediation, and the question was significant only for criteria C (acceptance of the need to offer broader assistance than simply legal advice to divorcing clients) and D (willingness to accept an alternative to the adversarial system of divorce). Many respondents answered "no" to this question, and then proceeded to answer questions 7.1 and 7.2 (5-8), which were consequently disallowed. The correct responses to both 7.1 and 7.2 from the point of view of a mediator would have been in the negative. No respondent answered this question as would a mediator. Although potentially a very useful cross-check, the validity of this question has not been

established. It is possible that the words "act for" would have been more appropriate than "represent".

4.11.2 Question 16 (26-27): Do you inquire of your clients as to the best interests of the children in terms of the divorce settlement?

The responses to this question were inverted and therefore regarded as invalid, and the question was deleted. However, it did have face and content validity, and it was originally considered as likely to be useful.

4.11.3 Question 17 (28): Do you carry out your client's instructions even if these may in your view not be in the best interests of the children?

This question was intended to separate the attorneys with a traditional adversarial approach to divorce from those with a more mediatory approach to divorce work. It evoked several comments explaining that it is the attorney's function to carry out clients' instructions. There was an almost equal division, with 71 of the former category and 77 taking a more mediatory view. It is noted that the Conciliation Project Unit report stated that solicitors tend to adopt the traditional attitude that their function is to get the best result for the client (Fricker 1990).

4.11.4 Question 18 (29): Does the present legal system in South Africa make appropriate allowance for resolving custody disputes?

Ninety-five (95) respondents (64%) felt that the present legal system does not make appropriate allowance for resolving custody disputes. Here it should be noted that the questionnaire was administered shortly before the inauguration of the family advocate's office in Cape Town.

#### 4.12 REQUESTS FOR ADDITIONAL INPUT

Altogether 107 individuals (72%) indicated that they would be interested in knowing more about divorce mediation by way of a talk and a videotape, and 46 (not consistently the same persons) felt that their firm as a whole would benefit. Sixty (60) (40.5%) expressed an interest in attending a special course in divorce mediation training, and a further 63 (42.6%) replied "maybe" to this question.

#### 4.13 FOLLOW-UP EVALUATION

Details of the follow-up process are set out in Appendices D and E (pages 169-181).

Thirty-one (31) of the 148 respondents (21%) attended the talk, watched the video, and completed the final evaluation. Eleven (11) others who booked for the follow-up subsequently cancelled, and several of those who did attend brought colleagues, such as articled clerks, with them. Table

4.17, which appears in section 4.13.1, provides a summary of the quartiles into which these 31 individuals fell in relation to the overall response of the 148 respondents to the original questionnaire.

The chi-square goodness of fit test for these results indicates that the null hypothesis is not rejected; that is, the 31 respondents who came for follow-up were randomly distributed by total score amongst the entire original group of 148 respondents (chi-square = 3,71 with 3 degrees of freedom; significance level 0.29, not statistically significant).

## 4.13.1 Questions 1(i) to 1(vi)

TABLE 4.17: SCORING OF CHANGE AS A RESULT OF THE INTERVENTION (RANGE 6-30)

No.	Original total score	Quartile	Score of change
11	161	1	22
12	125	1	30
14	119	2	28
21	70	4	24
22	80	4	20
26	84	4	23
30	107	2	25
37	80	4	26
38	97	3	22
44	81	4	23
54	98	3	13
57	176	1	25
61	111	2	21
64	133	1	26
68	60	4	21
73	93	3	25
74	114	2	23
75	102	2	18
80	145	1	24
83	129	1	21
84	63	4	27
85	91	3	17
90	132	1	24
120	146	1	22
123	98	3	15
140	80	4	21
143	138	1	23
144	146	1	26
145	102	2	25
146	132	1	19
147	138	1	13

Kruskal-Wallis analysis of variance revealed that the participants' score of change in the follow-up evaluation was not influenced by the original total score ( $p = 0.31$ ).

TABLE 4.18: SUMMARY STATISTICS FOR QUESTIONS 1 (i) to 1 (iv):

	i	ii	iii	iv	v	vi
Average	3.7	3.7	3.3	3.8	4.1	3.7
Median	4	4	3	4	4	4
Mode	3	4	3	4	4	4

From Table 4.18 it can be seen that question 1(iii), rating participants' willingness to accept the role of the social worker in divorce, showed the smallest shift, and question 1(v), revealing an awareness of the services offered by FAMSA, showed the greatest shift. This seems to imply that, despite a greater awareness of the services offered, the attorneys concerned are unwilling to refer their divorcing clients for social work services or for mediation.

However, in the light of Table 4.16, it may be deduced that by mediation is meant the financial and property aspects of divorce rather than child-related matters. A further question that is raised is the meaning to the respondents of the designation "social worker".

The study design does not allow for comparison of this finding with criterion E (readiness to accept that professionals other than lawyers are capable of mediating divorce). The problem is that those who scored highest for this particular criterion in the initial questionnaire are least likely to have changed. It follows, therefore, that a positive correlation between the initial score for this

criterion and the score of change after intervention for the same criterion may be spurious. (In calculating the influence of the independent variable, which was the score achieved for criterion E by each of the respondents who attended for follow-up, and the dependent variable, which was the total score reflecting change, as set out in Table 4.17, the correlation coefficient was 0.08; R-squared = 0.61% - not significant).

4.13.2 Question. 2: What has been the most useful thing you have learnt from this project?

This was answered by all the follow-up participants. Responses included the following:

- The value of mediation (15);
- That in the South African context mediation and the practice of divorce law are still very largely on a "collision course" (1);
- The role of FAMSA and the range of services offered, including mediation (5);
- The role of the social worker (1);
- The fact that there are mediators outside of the legal and psychiatric professions (1);
- Underlying issues need to be resolved (2);
- Communication between two conflicting parties can solve problems, and at the very least define the issues (1);
- Mediation is available to parties in custody and access disputes (3);

- That someone is working progressively towards taking fights out of our courts and is willing to render an affordable alternative (1).

4.13.3 Question 3: What difficulties do you have with the concept of divorce mediation?

Twenty-one (21) participants answered this question. Eleven (11) said they had no difficulties with the concept of divorce mediation. Others referred to the competence of mediators; the conflict between the attorney's role and that of mediator; "selling" the concept to clients; knowing when the parties are ready for mediation; safeguarding the weaker spouse's rights; the possible difficulty for the mediator in remaining neutral, and the need for adequate training; and the need for the parties to be well informed of the legal situation before commencing mediation.

4.13.4 Question 4: Have your ideas about divorce mediation in any way changed, other than what is indicated above, since our first approach to you?

Twelve (12) participants responded "no" to this question. Other responses included the following:

- Yes, because respondents previously knew little about the concept of divorce mediation, the role of the mediator, and the potential benefits (11)
- I am more receptive to the concept (1).
- Yes. I now think it can work in practice (1).

- I would be more willing to accept social workers' role in mediation (1).
- Yes. Mediation is not arbitration (1).
- Yes. It could help to achieve a more "moral" solution to a matrimonial impasse (1).
- No. I think mediation is still in its infancy but will grow to take up its rightful place (1).
- I have realised more and more that there are many methods of mediation, none of which is ideal or better than others, and many levels at which mediation may be employed (1).
- Have had confirmation that this is the only (and affordable) solution for a very real problem in our society (1).

4.13.5 Question 5: Would you be interested in receiving specialised training in co-mediation next year, if this can be arranged at reasonable cost, with Lisa Parkinson of the Family Mediators Association in England?

Twenty-five (25) individuals responded 'yes', four (4) 'possibly', and two (2) 'no'.

As a direct result of these findings, contact was made with Mrs Parkinson, and a co-mediation training course was arranged for 12 attorneys and 12 non-attorneys in Cape Town. The course took place from 24 to 27 June 1992. Mrs Parkinson was joined by her co-trainer, Henry Brown, who is

a solicitor practising in London. A three-day course was also held in Johannesburg.

## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

In this chapter the conclusions to be drawn from the study, the extent to which the objectives were met and the hypotheses supported, the relevance of the study to social work practice, and the recommendations for further study and research are considered.

#### 5.1 CONCLUSIONS

##### 5.1.1 Objectives

(i) The first objective of the investigation was to study and describe the concept of mediation as it pertains to the divorcing process. The entire concept of divorce mediation, from the perspectives of both social work and legal practice, has been reviewed. If FAMSA is to hope for a collaborative relationship with attorneys, it is essential that this broad perspective should be understood.

(ii) The second objective of the investigation was to examine the understanding and attitudes of attorneys to divorce mediation, with particular reference to (a) the emotional needs of clients, (b) the role of the attorney in divorce suits, (c) their willingness to accept an alternative to the traditional adversarial method, and (d) their ideas as to who might be acceptable in the role of mediator.

Insofar as the participants in the study were likely, by reason of the basis for their inclusion in the study, to be those who favour a conciliatory approach to divorce and a financial saving to their clients, measurement of responsiveness to the emotional needs of clients cannot be generalised to the total attorney population, which includes those who, although doing divorce work, decided not to participate in the investigation. There was little doubt from this study that responsiveness to the emotional needs of divorcing clients correlates with all the other criteria that were measured. The findings of Neilson (1990) that attorneys, even if supportive of mediation as a process, are likely to refer only a small number of their clients for mediation, appears also to be the case in South Africa. This is likely to change only when mediation is more widely accepted as a viable alternative approach to the traditional adversarial legal handling of divorce.

(iii) The third objective was to develop and evaluate an educational programme for those attorneys interested in knowing more about divorce mediation and its potential for reducing the trauma of divorce for clients in respect of the emotional aspects of the process, and the need to preserve the ongoing parenting role of the individuals after termination of their marriage. Mediation offers a means of providing some balance in the divorce process, bearing in mind the comment of Johnston (1991) that attorneys have long

been implicated in the escalation of family conflicts because of their role within an adversarial legal system.

This objective was met, but it is unfortunate that comparatively few of the original respondents were reached. The best remedy achievable was to send a summary of the main findings of the research to those participants who did not participate in the follow-up.

(iv) The fourth objective was to ascertain whether, as a result of the intervention described in section 1.5.3, the attitudes of the attorneys might be influenced in favour of mediation and referring their clients for divorce mediation to non-lawyers.

The finding that lawyers feel that they themselves are best suited for mediating property and financial issues is already reflected by the numbers who are presently being trained as mediators, through courses run by the Law Society and the Alternative Dispute Resolution Association of South Africa (ADRASA), established by and for lawyers. Although it has been shown among the small group who participated in the follow-up study that attorneys' attitudes did change somewhat in favour of mediation, and that they had become more aware of the services offered by FAMSA, the smallest shift in attitude that was noted was in their willingness to accept the role of the social worker in divorce. Since completion of the study, there has been a

marked increase in the number of referrals of clients by attorneys to FAMSA, mainly for divorce counselling. When asked if they object to mediation taking place, only one attorney (who participated in the study to the end) indicated resistance to this suggestion. The study has revealed that many of the attorneys had misconceptions about the definition and nature of divorce mediation.

(v) The fifth and final objective was to develop and validate an investigative method aimed at examining the attitudes and knowledge of attorneys towards divorce mediation. As has been indicated in Chapters 4 and 5, this objective has been met. (With certain minor adjustments, this research approach could equally usefully be applied to other professional groups, such as doctors and clergymen.)

It had been hoped that it might have been possible to identify a particular set of characteristics and attitudes amongst attorneys which would indicate individuals with a particular interest in divorce mediation. This would have made the instrument a useful one in screening attorneys for their willingness to collaborate with a social work agency in providing divorce mediation. No such clear pattern emerged.

### 5.1.2 Hypotheses

(i) Planned information and education programmes, initiated from a social work agency, have the potential to influence positively the attitudes of attorneys in favour of divorce mediation.

This hypothesis is confirmed by the results of the small follow-up study. The apparently representative nature of this sample, compared with the entire group of respondents, suggests that it is likely that this finding may be applicable overall.

(ii) Attorneys with a "caregiver attitude are likely to be more interested in referring their clients for divorce mediation than those concerned strictly with the legal process.

There was good correlation between the responsiveness of attorneys to the emotional needs of clients in the divorce process and the other criteria tested. In all probability this correlation was influenced by the inclusion process, since attorneys favouring a more adversarial approach, with little attention to the emotional needs of divorcing clients, were less likely to have participated in the study.

Felner's finding (1982) that 50 per cent of attorneys see caregiver functions as an important part of their role has been confirmed by the present study, although it was not possible to quantitate this. It may be concluded that those attorneys who regard themselves as caregivers more

readily appreciate mediation as an approach to divorce than others.

In the South African context it is important to note Felner's contention that, with no-fault divorce, the attorney's legal role in family law is changing, and that there is an increasing need for greater interdisciplinary collaboration in practice and in research. This has been supported in South Africa by Scott-Macnab (1988).

### 5.3 RECOMMENDATIONS

1. Understanding the concept of divorce mediation appears to be the key to influencing the attitudes of attorneys in favour of this approach. It is suggested that educating lawyers in the concepts of divorce mediation creates improved prospects of their acceptance of this approach as a viable alternative to the traditional adversarial method. Efforts need to be made to continue to involve attorneys actively in this way. It is anticipated that Neilson's experience (1990) will also initially be experienced in South Africa; that is, that even family lawyers who are in favour of mediation will refer only a small number of their clients to mediation services. At the same time, the observation of Pearson, Thoennes and Vanderkooi (1982) that it is likely to be lawyers who will play a critical role in translating the divorce process, including mediation, to the divorcing population, needs to

be carefully heeded. A mediation service such as is offered at FAMSA depends on the cooperation of attorneys.

2. At the same time, there is a need to take note of the warning of Pruhs, Paulsen and Tysseling (1984) of possible resistance from lawyers to divorce mediation services, and for social workers to avoid creating competitive relationships with legal professionals.

3. Training needs to be interdisciplinary, with lawyers and mental health professionals being trained together. The co-mediation model, representing "the ideal in collaboration between these two professions" (Wiseman & Fiske 1980), is particularly relevant for achieving this end, and organisations such as ADRASA (The Alternative Dispute Resolution Association of South Africa) should be urged not to confine their training courses in family mediation to lawyers.

4. In the South African context care should be taken to avoid repeating the experience reported by Pearson, Thoennes and Vanderkooi (1982) that mediation was more attractive to divorcing individuals scoring high on socio-economic indicators. There is a need to expand these ideas into the wider community and to make divorce mediation readily available at reasonable cost, so that it does not become a service available only to a small number who can afford it. Attention should be given by groups such as

FAMSA to including education about the benefits of using divorce mediation services.

5. With wider acceptance of divorce mediation, and the participation of a family advocate and a family counsellor in co-mediation training in Cape Town, the Family Advocate's office is likely to provide a court-based mediation service in South Africa. This in turn would give greater credibility to the title of the Mediation in Certain Divorce Matters Act No. 24 of 1987. This is a development that should be strongly supported and encouraged.

6. Attention needs to be paid to the long-term results of these efforts to promote a collaborative approach, with a view to maintaining such collaboration beyond the immediate effects of a concentrated study such as this has been.

7. It would be useful to look at attitudes of attorneys in other centres in South Africa where there has been no attention to a collaborative approach, and therefore no back-up service to complement the legal services.

8. The strongest indicator issuing from this study is the need for legal training which will enable lawyers better to understand and to address the psychological and emotional issues of divorce.

9. There is a need for the training of divorce and family mediators to be systematically coordinated, and for criteria for accreditation to be established. Parkinson's comments (1989) need to be taken seriously: namely, that even experienced lawyers, social workers or counsellors require training to help them make the transition from their profession of origin to the role of mediator.

10. The study indicates the need for further research regarding the outcome of divorce mediation, and in particular the extent to which agreements reached are adhered to, the level of postdivorce conflict from a mediated settlement, the possible effect of mediation on the ability to parent, and the reasons for dropping out of the mediation process.

11. It is suggested, on the basis of the results presented in this dissertation, that the social worker is potentially able to stress the importance to other professionals of looking beyond the purely legal aspects of divorce, and to focus on the interpersonal issues that are so important for reaching a settlement that enables divorced individuals to continue to function adequately as parents.



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APPENDIX A

10 May 1991

Dear

### DIVORCE MEDIATION

FAMSA is seeking to develop its divorce and family mediation services, and we have an interest in promoting closer collaboration with attorneys.

I am therefore writing to request you to respond to this letter. Your response will assist us in the planning and development of this programme, and will be included in a research report to be submitted to the University of South Africa and to the Human Sciences Research Council.

Please respond in the space provided to the following:-

- (1) Do you yourself handle divorce work? [yes] [no]
- (2) If yes, would you be prepared to assist with a questionnaire for twenty minutes? [yes] [no]

If you have answered "no" to (2), would you be prepared to spend five minutes on the telephone as a follow-up? Please indicate the most convenient time and day of the week for such a call:-

Your participation will be treated in strict confidence. In due course I shall send you a report on the outcome of the study.

In order to use the information, it will be necessary for me to have your answer by 24 May. Please respond even if your answer to both questions is negative.

Yours faithfully

MRS SUE FOLB  
SOCIAL WORKER pp MRS F VAN DER WALT (DIRECTOR)



**FAMSA**

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APPENDIX B

24 June 1991

Dear

**DIVORCE MEDIATION**

I am very grateful to you for having responded to my preliminary inquiry and for indicating your willingness to fill in the attached questionnaire.

The response from attorneys has been gratifying, and it appears probable that the data that will be collected from the completed questionnaires will provide considerable assistance in the planning and development of this research, aimed at promoting closer collaboration between FAMSA and attorneys.

Completion of this questionnaire should not take you more than 10-15 minutes. An early response would be very helpful and much appreciated.

Yours sincerely

MRS SUE FOLB  
SOCIAL WORKER

pp MRS F VAN DER WALT  
DIRECTOR



10. Are you inclined to accept your own client's account, having heard only one side?

- 10.1 Never [ ]  
 10.2 Sometimes [ ]  
 10.3 Always [ ]

11. Do you respond with care and concern when emotional issues not relating to the legal problems are raised?

- 11.1 Never [ ]  
 11.2 Sometimes [ ]  
 11.3 Always [ ]

11.4 Is this a role which you willingly assume?  
 Yes [ ] No [ ]

12. What percentage of your time in a divorce case is spent listening to personal and emotional problems raised by your client?

- 12.1 1 - 25 % [ ]  
 12.2 over 25 % [ ]

13. How effective are you at handling clients' personal and emotional problems?

- 13.1 not at all effective [ ]  
 13.2 effective [ ]  
 13.3 very effective [ ]

14. How important do you consider it is for you to provide personal and emotional support to your client in a divorce case?

- 14.1 not important [ ]  
 14.2 important [ ]

15. Did your legal education equip you adequately to understand and handle the psychological and interpersonal issues in divorce? (this does not refer to experience since qualifying)

- 15.1 not at all [ ]  
 15.2 adequately [ ]  
 15.3 well [ ]

16. Do you inquire of your client as to the best interests of the children in terms of the divorce settlement?

- 16.1 yes, routinely [ ]  
 16.2 sometimes [ ]  
 16.3 no [ ]

17. Do you carry out your client's instructions even if these may in your view not be in the best interests of the children? Yes  No

18. Does the present legal system in South Africa make appropriate allowance for resolving custody disputes? Yes  No

19. Does the nature of the personal interaction between the opposing attorneys influence the outcome of a divorce case?

19.1 not at all

19.2 sometimes

19.3 invariably

20. When no progress is being made in divorce proceedings, do you advise a meeting between both parties to the dispute?

20.1 never

20.2 sometimes

20.3 always

21. Do you accept that a couple who are locked in conflict and making no progress towards settlement may be helped by a psychologist, social worker, medical practitioner, or minister? Yes  No

22. Do you normally refer couples locked in conflict for help to a psychologist, social worker, medical practitioner or minister? Yes  No

23. To whom of the following would you be prepared to refer your clients for mediation in the areas specified:  
Please tick all groups you feel would be acceptable

a. For custody and access issues:

<input type="checkbox"/> Social workers	<input type="checkbox"/> Probation officers
<input type="checkbox"/> Marriage counsellors	<input type="checkbox"/> Psychologists
<input type="checkbox"/> Registrars of the court	<input type="checkbox"/> Doctors
<input type="checkbox"/> Attorneys or advocates	<input type="checkbox"/> Ministers of religion
<input type="checkbox"/> Accountants	<input type="checkbox"/> A suitable lay person

b. For property and financial/maintenance issues:

<input type="checkbox"/> Social workers	<input type="checkbox"/> Probation officers
<input type="checkbox"/> Marriage counsellors	<input type="checkbox"/> Psychologists
<input type="checkbox"/> Registrars of the court	<input type="checkbox"/> Doctors
<input type="checkbox"/> Attorneys or advocates	<input type="checkbox"/> Ministers of religion
<input type="checkbox"/> Accountants	<input type="checkbox"/> A suitable lay person

24. Which of the following are, in your opinion, necessary for mediating the various issues connected to divorce?

	(a) Essential	(b) Helpful	(c) Not relevant
24.1 Special knowledge of the psychological effects of divorce on the family	[ ]	[ ]	[ ]
24.2 Special training in counselling skills	[ ]	[ ]	[ ]
24.3 Knowledge of the areas of law relevant to divorce	[ ]	[ ]	[ ]
24.4 A university degree	[ ]	[ ]	[ ]

25. Is there a need for divorce/family mediation services in this country? Yes [ ] No [ ]

26. Would you recommend clients to make use of a specialised mediation service, if accessible?

26.1 Yes [ ]  
26.2 No [ ]  
26.3 Uncertain [ ]

26.4 If yes, which clients would you refer?

27. Would you be interested in knowing more about divorce mediation by way of a talk and a video?

27.1 as an individual Yes [ ] No [ ]

27.2 for members of your firm Yes [ ] No [ ]

28. If FAMSA were to offer a 40-hour course in divorce mediation training, would you be interested in attending?

Yes [ ] No [ ] Maybe [ ]

29. Have you ever been divorced? Yes [ ] No [ ]

30. Are you a parent? Yes [ ] No [ ]

THANK YOU FOR YOUR TIME

APPENDIX C DIVORCE MEDIATION COLLABORATION INQUIRY  
SCORING

-----  
Scale for responses:     0 = no indicator or not applicable  
                          1 = weak indicator  
                          2 = intermediate indicator  
                          3 = strong indicator

Key to headings:

A = Respondent understands the concept of divorce mediation.  
B = Respondent is responsive to the emotional needs of clients in the divorce process.  
C = Respondent recognises the need to offer broader assistance than simply legal advice.  
D = Respondent is willing to accept an alternative to the adversarial system of divorce  
E = Respondent accepts that professionals other than lawyers are capable of mediating divorce.  
F = Respondent accepts that divorce mediation requires special training.

Notes:

1. Each section of each question has been evaluated independently.
2. Where a particular response (yes or no as the case may be) has no indicator value for any of the six questions asked, the subsection of the question concerned has not been included in the scoring table below.
3. Questions 1-4, 15, 19, 23, 26.4, 27, 28, 29 and 30 will be evaluated independently of the scoring system below.

Question number:			A	B	C	D	E	F	Total
1	5	[y]	2	0	1	1	1	1	6
2	6.1	[y]	2	0	1	2	2	2	9
3	6.2	[y]	3	1	2	3	2	3	14
4	7	[y]	1	1	2	2	1	0	7
5	7.1	[y]	0	0	1	2	0	0	3
6	7.1	[n]	3	0	1	3	0	0	7
7	7.2	[y]	0	0	2	3	0	0	5
8	7.2	[n]	3	1	3	3	0	0	10
9	8.1	[n]	3	0	0	0	0	0	3
10	8.2	[n]	3	0	0	0	0	0	3
11	8.3	[y]	3	0	0	0	0	0	3
12	8.4	[n]	3	0	0	0	0	0	3
13	9	[y]	0	2	0	0	0	0	2

14	10.1 [y]	0	0	1	1	0	0	2
15	10.2 [y]	0	1	0	0	0	0	1
16	10.3 [y]	0	(1)	0	0	0	0	1
17	11.2 [y]	0	(2)	(2)	0	0	0	4
18	11.3 [y]	0	3	3	2	0	0	8
19	11.4 [y]	0	3	3	0	0	0	6
20	11.4 [n]	0	(2)	(2)	0	0	0	4
21	12.1	0	(1)	(1)	0	0	0	2
22	12.2	0	3	3	0	0	0	6
23	13.2	0	(2)	0	0	0	0	2
24	13.3	0	2	0	0	0	0	2
25	14.2	0	3	3	0	0	0	6
26	16.1	2	2	2	0	0	0	6
27	16.2	(1)	(1)	(1)	0	0	0	3
28	17 [n]	0	0	1	1	0	0	2
29	18 [n]	0	0	1	3	0	0	4
30	20.2	(1)	0	(2)	0	0	0	3
31	20.3	2	0	2	3	0	0	7
32	21 [y]	0	3	3	2	2	0	10
33	22 [y]	0	3	3	2	2	0	10
34	24.1a	3	3	3	3	3	3	18
35	24.1b	(2)	(2)	(2)	(2)	(2)	(2)	12
36	24.2a	3	3	3	3	3	3	18
37	24.2b	(2)	(2)	(2)	(2)	(2)	(2)	12
38	24.3a	3	0	0	2	0	3	8
39	24.3b	(1)	0	0	(1)	0	(2)	4
40	24.4a	0	0	0	2	0	3	5
41	24.4b	0	0	0	(2)	0	0	2
42	25 [y]	1	1	3	3	0	0	8
43	26 [y]	1	1	3	3	1	3	12

Maximum possible score

41      36      50      49      17      21      214

Maximum score after deletion of inversions, namely nos. 17, 20, 21, 26, 27, 30, 35, 37 and 39

39      34      48      49      17      21      208



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APPENDIX D

25 October 1991

Dear

**DIVORCE MEDIATION**

Further to my investigation into collaboration between attorneys and FAMSA in the field of divorce mediation, and the interest you expressed in a talk and video on this subject, I am now in a position to provide you with some interesting feedback on my findings, and to invite you to a talk on one of the following days, from 12 30 to 14 00h:

Friday 15 November  
Tuesday 19 November  
Wednesday 20 November  
Friday 22 November

May I ask you to phone the above number and to let us know which time would be convenient. We are keeping the groups small in order to facilitate discussion. Tea, coffee and sandwiches will be served.

A number of people have expressed interest in a talk for their firm. Should this apply to you, and if video facilities are available, I would be happy to arrange to come to you at your convenience.

Yours sincerely

Sue Folb  
Social worker

pp Mrs F Van Der Walt  
Director

## ATTORNEYS' TALK

I would like to thank you for your interest in what I believe to be an important alternative to the traditional adversarial approach to handling divorce matters. My plan today is to discuss the concept of divorce mediation, with specific reference to the questionnaire that you so kindly completed, and to discuss with you possible ways in which you and FAMSA might collaborate. I am also going to show you a video made by John Haynes, to illustrate how divorce mediation is conducted.

Let me first briefly introduce you to FAMSA. You may not be aware of the scope of the services which we offer. These consist of marriage guidance for couples contemplating marriage, marriage counselling when a marriage runs into difficulties, divorce counselling (which is not legal advice), divorce mediation, divorce adjustment groups for people grappling with the emotional difficulties associated with divorce, and we also have a family therapy team that sees complete families - often stepfamilies adjusting to a second marriage.

Some months ago FAMSA staff were addressed by an attorney, who remarked that by the time an individual or a couple visit an attorney with a view to divorcing, they are as good as divorced. I know what he meant, but our experience is quite different. Many couples in crisis don't really want to divorce, and may rather first need counselling in order

to reach a more rational decision. Couples who present at FAMSA specifically for mediation are often not ready for the mediation process. All are assessed in order to determine whether they are in need of marriage counselling, divorce counselling or divorce mediation, on the grounds that they are often unaware of which of these would in fact suit them best.

Divorce is more than the breaking of a legal marriage contract. It is a lengthy process, which starts when problems begin to arise in the marriage and which may take months or even years to work through.

As you well know, legal proceedings tend to be instituted at a time when tension has increased, feelings are extreme, and the individuals are most vulnerable. It is often a time for fighting and giving vent to a wish for punishment and revenge, rather than for reaching a workable agreement in a more cooperative way.

No matter how much a person wants out of a marriage, there is no doubt that divorce is traumatic for everyone involved. Feelings of anger, bitterness and resentment are further aggravated when two lawyers, each representing their client's so-called "best interests", and by implication also the children's best interests, fight a battle which inevitably ends in a feeling of having won or lost.

Advising clients not to talk to (or sleep with) the other spouse, making extreme demands to increase the bargaining advantage, and filing motions that characterize the other in a negative light, all add fuel to the fire. It isn't difficult to see how this type of adversarial divorce can leave the couple on bad terms, and it is the children who remain in the middle of the conflict, bearing the brunt of what may be a divorce in legal, but not in emotional terms.

The aim of divorce mediation is to turn a win-lose situation, with each partner striving to be the winner, into one where both parties feel that they have received a fair deal and have emerged from the negotiations with positive gains, while recognising the right and need of the other also to have gains. In the presence of an impartial third party, husband and wife sit down together and negotiate their own divorce agreement. This requires cooperation rather than competition, and helps the couple to establish a new, more productive relationship, which will help them in their future contact over the children. The focus is on the future rather than the past.

Contrary to what many of you believed, the role of the mediator is to manage the process, not the outcome, empowering the couple to find solutions which will work for them. So, a mediator is not an arbitrator who prescribes the outcome, neither is he there to give advice - only information in an objective manner. His role is that of a

neutral facilitator. Although it is important to ascertain that divorce is the only option remaining for the couple, it is not the primary task of the mediator to work towards a reconciliation - this should already have been handled by a counsellor or, in case of any doubt, the couple should be referred to a counsellor before continuing. If one partner wants out and the other wants in, the partner trying to hang on to the marriage may well sabotage mediation.

Anything from one to six sessions may be required if all the issues of divorce are to be dealt with, and I find it virtually impossible not to combine child-related issues with property and financial matters. Clients are at all times advised to consult with their attorneys, and it is made clear that we are not lawyers. Indeed, the biggest problem for attorneys who want to act as mediators is to discard the lawyer role and act as a mediator. Virtually all the respondents, even those with a great deal of knowledge about mediation, answered as attorneys and not as mediators. A lawyer mediator cannot act for a couple or for an individual, but must refer to another attorney for the legal work.

There are many different models of mediation. We use a problem-solving model to look at options and negotiate mutually acceptable agreements, along the lines which you will see on the video, but as trained family therapists we focus much attention on parenting after divorce and on the

needs of the children. Our agreements are written up very informally, using first names, and submitted to an attorney for review and incorporation into the final consent paper.

There may be value in including children in the negotiations. Research has shown that children get most upset when they don't know what is going on. The mediator can make sure that they understand the reason for the divorce, the permanence of the decision, and the neutrality of their own role. Once the fears caused by ignorance of what is happening in the talks, the lack of control over their own lives, and the imagined responsibility for the divorce are addressed, the children can focus on negotiating an arrangement with both parents that is in their mutual interest. However, whether or not to include children depends largely on the preference of the mediator, as well as on the wishes of the children.

Including children tends to be anxiety-raising for everyone. At a conference I attended last year in England, I found that although in principle mediators felt that children should be included, few actually practised what they preached. John Haynes used always to have one session with the children, but he now prefers to leave it to the parents to talk to them. Others always invite the children to one or more sessions.

It has to be stressed that mediation is an alternative to contested court proceedings, not a substitute for legal

advice and assistance, and couples are advised to seek legal advice. It is obvious that the issues that arise in divorce have major legal and financial implications, and neutral mediators without legal qualifications cannot adequately safeguard the interests of each party. It is for this reason that lawyers make good mediators. Lawyer mediators are useful when it comes to complicated property and financial issues, whereas mental health professionals are best suited for handling custody and access disputes and dealing with power struggles and emotions. In England, the Family Mediators Association trains lawyer/counsellor teams who work together as co-mediators, and this is something that I would like to discuss with you in more detail afterwards.

Let me summarise some of the advantages of divorce mediation:

- 1) It gives the couple some control over their future and reduces the anxiety experienced when that control is given to someone else.
- 2) The insight gained from looking carefully at their present circumstances and needs prevents unreasonable demands being made.
- 3) Mediation is available at short notice before legal proceedings are instituted, and it works well for couples who wish to avoid a fight.

- 4) An opportunity is provided for reassurances of goodwill in solving doubts or lack of trust, which leaves both parties feeling more secure and confident.
- 5) The mediator is trained to help the couple deal with emotional issues while negotiating the financial and child-related issues.
- 6) Mediation cuts down considerably on the time spent by attorneys, and consequently on the costs of the divorce. If the couple can reach agreement, it only remains for a consent paper to be prepared.
- 7) Successful mediation leaves the partners better able to communicate after the divorce, and this has important implications for the children.

However, mediation is not necessarily the answer for every divorcing couple. The "failures of mediation" have been described as highly conflicted and enmeshed divorcing couples, many of whom appear to have significant unresolved psychological conflicts and personality disorders. It has also been recognised that divorce mediation is not appropriate for couples where there has been domestic violence and child abuse. Emotions may be too high to allow the couple to sit in the same room, let alone work things out rationally. Moreover, for those who want a public display, a good fight, or validation as "winner", this method is not satisfying. Lastly, if the balance of

power between the couple is too unequal, mediation may be impossible.

Mr Justice Nigel Fricker in England, commenting last year on the Conciliation Project Unit Report into conciliation (mediation) in England and Wales, noted that about half the solicitors consulted consider that mediation is more appropriate for difficult or intractable clients than for reasonable clients. My own findings are similar, which possibly reflects a preference amongst attorneys to hand over difficult clients. Like Judge Fricker, I prefer the opinion of those who consider that reasonable clients are more suitable for mediation than intractable clients, although I have seen wonders happen when difficult clients sit face to face and reach agreement, after previously being in deadlock.

Fricker notes with concern that the CPU Report provides evidence of attorneys adopting the traditional attitude that their function is to get the best result for the client. He feels that where a problem emerges over custody or access, clients should whenever possible be encouraged and enabled to work the problem out directly with each other. This is based on his belief that mediators with appropriate skills and training are better facilitators than attorneys who represent only one party. Where clients fail to reach agreement in mediation, negotiations between attorneys may still be useful.

It is important that family lawyers should recognise that the best result for a client in a dispute over children is not a legal "win" against the former spouse, but is the reaching of an agreement which the client realises is in the best interests of the children.

Let me say a little bit more about my research. A total of 148 respondents was evaluated, representing 87.6 per cent of the 169 attorneys who identified themselves as doing divorce work and having an interest in cooperating in the study. The questionnaire itself was analysed statistically using six criteria, namely:

- A. Understanding the concept of divorce mediation;
- B. Responsiveness to the emotional needs of clients;
- C. Recognising the need to offer broader assistance than simply legal advice;
- D. Willingness to accept an alternative to the adversarial system of divorce;
- E. Acceptance that professionals other than lawyers are capable of mediating divorce; and
- F. Acceptance that divorce mediation requires special training.

I have prepared a summary of the main findings for you, together with a print-out of each respondent's position on each of the criteria according to quartiles. No-one is

identifiable, but you might be interested to have an idea of where you fall compared with the group.

It is of interest that 91 per cent of respondents felt that their legal training did not equip them at all to understand and handle the psychological and interpersonal issues of divorce. Maybe this is something that needs to be addressed in training programmes.

You may be interested to know to whom you would be prepared to refer clients for mediation! You are happy to refer custody and access issues to other professionals, but feel that lawyers and even accountants would be best able to mediate property and financial matters. Here again, I think it is important to differentiate between acting as a mediator and giving advice, and to reiterate that advice has to be sought from experts during the mediation process.

Let me sum up by saying that research has shown that mediation on its own does not necessarily resolve the conflict, and therefore it should not be practised in isolation. Backup counselling or therapy to alleviate the emotional stresses of divorce is often called for. We believe that cooperation between lawyers and ourselves is essential. Unless the legal profession supports our mediatory approach, whatever we do to establish cooperation between couples will be undermined at the point when clients

are referred either for the first time, or back to their respective lawyers.

The video we are about to see is a session with Michael and Debbie, whom Haynes describes as a powerful, competitive couple. I am not going to comment on the techniques and skills he uses, but I suggest that you use this as a means of examining your reactions to the concept of mediation in family matters. Perhaps you may then consider whether it would be advantageous to utilize mediation facilities for your divorcing clients, whether at FAMSA or elsewhere.

## APPENDIX E

## EVALUATION

Not at all    1    2    3    4    5    to a considerable extent

1. Have you, as a result of my original and subsequent approaches to you, including the completion of the questionnaire and today's follow-up session, become:

- |       |  |   |   |   |   |   |
|-------|--|---|---|---|---|---|
| (i)   | more aware of the value of mediation to divorcing couples?       | 1 | 2 | 3 | 4 | 5 |
| (ii)  | more willing to collaborate with other professionals?            | 1 | 2 | 3 | 4 | 5 |
| (iii) | more willing to accept the role of the social worker in divorce? | 1 | 2 | 3 | 4 | 5 |
| (iv)  | more likely to refer clients for mediation than previously?      | 1 | 2 | 3 | 4 | 5 |
| (v)   | more aware of the services offered by FAMSA?                     | 1 | 2 | 3 | 4 | 5 |
| (vi)  | more interested in this aspect of your professional work?        | 1 | 2 | 3 | 4 | 5 |

2. What has been the most useful thing you have learnt from this project?

3. What difficulties do you have with the concept of divorce mediation?

4. Have your ideas about divorce mediation in any way changed, other than what is indicated above, since our first approach to you? *Please be specific.*

5. Would you be interested in receiving specialised training in co-mediation next year, if this can be arranged at reasonable cost, with Lisa Parkinson of the Family Mediators Association in England?

Thank you very much for your cooperation over the past months.

RAMS  
Practice No.  
Praktyknr. 9011072

182  
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## APPENDIX F

Dear

### DIVORCE MEDIATION

I am writing to give you some feedback on the research in which you were kind enough to participate last year. Its purpose was to examine the understanding and attitudes of attorneys to divorce mediation, with particular reference to the emotional needs of clients.

The questionnaire was analysed statistically using six criteria. These are given on the enclosed print-out showing your position on each of the criteria according to quartiles in relation to the group as a whole. This gives you some idea of how you scored in comparison with the group. Also enclosed is a brief summary of the main findings.

It was noted that there was some confusion as to the meaning of mediation, and I would like to clarify that the role of the mediator is to manage the process, not the outcome, enabling the couple to find appropriate solutions that will work for them. A mediator is not an arbitrator who prescribes the outcome, neither is he/she there to give advice - only objective information. He/she acts as a neutral facilitator. It is not the primary task of the mediator to work towards reconciliation; where it seems that a marriage might be saved, the couple should be referred for counselling.

The result of this study, which will be published in due course, suggests that there are promising opportunities for collaboration in this area between attorneys and FAMSA. I am very grateful to you for your participation and help, which made this work possible. I hope you will agree that the results are useful and of interest.

Yours sincerely

(Mrs) Sue Folb  
Social worker

pp (Mrs) F Van der Walt  
Director

## A SYNOPSIS OF THE MAIN FINDINGS OF THE RESEARCH

1. A total of 148 respondents was evaluated, representing 87.6 per cent of the 169 attorneys who had expressed their interest in participating in response to the initial inquiry
2. The validity of the study, once it had been corrected for inversions, was 87 per cent (range 80-99 per cent for the six criteria that were assessed).
3. Understanding of the concept of divorce mediation, the responsiveness of the attorneys to the emotional needs of their clients in the divorce process, and willingness to accept an alternative to the adversarial system of divorce were not influenced by the following: (i) the number of years in practice as an attorney, and (ii) the personal experience of the respondents of divorce and/or parenthood.
4. Women attorneys who spend more than 25 per cent of their total practice time on divorce are the most likely to accept the need to offer broader assistance than simply legal advice to divorcing clients, and to accept an alternative to the adversarial system of divorce.
5. In general, women attorneys as a group were found to be more responsive to the emotional needs of clients in the divorce process, and to be more ready than male attorneys to offer broader assistance than simply legal advice and an adversarial approach,
6. Those attorneys who were found in the questionnaire to have the greatest understanding of the concepts underlying divorce mediation were also most likely to respond to the emotional needs of their clients and to accept an alternative approach to the adversarial one.
7. 100 per cent of respondents, even if they had a good understanding of the concept of divorce mediation, responded as attorneys. None identified the difference between the role of the attorney and the neutral role of the mediator. Specifically, no-one identified the fact that the attorney acting as mediator may not act for either individual or the couple.
8. 91 per cent of the respondents felt that their legal training did not equip them at all to understand and handle the psychological and interpersonal issues of divorce.
9. Although attorneys were prepared to refer the mediation of custody and access issues to other professionals, they tended to feel that lawyers and accountants would be best able to mediate property and financial matters.

Individual scores for each criterion expressed as a quartile.

row	a	b	c	d	e	f	row	a	b	c	d	e	f
1	3.	1.	1.	1.	1.	1.	58	1.	1.	1.	1.	1.	1.
2	4.	2.	2.	4.	4.	4.	59	2.	2.	3.	3.	2.	4.
3	2.	4.	4.	4.	2.	2.	60	1.	1.	1.	1.	1.	1.
4	2.	3.	3.	2.	4.	2.	61	1.	3.	2.	2.	3.	2.
5	4.	3.	2.	3.	4.	4.	62	1.	3.	3.	4.	2.	2.
6	2.	3.	3.	2.	2.	4.	63	1.	4.	2.	1.	1.	1.
7	2.	3.	3.	3.	2.	2.	64	2.	1.	1.	1.	1.	1.
8	1.	2.	2.	1.	1.	1.	65	4.	1.	1.	1.	3.	4.
9	4.	1.	1.	1.	2.	2.	66	4.	1.	1.	2.	1.	1.
10	1.	3.	2.	1.	3.	2.	67	3.	2.	1.	1.	2.	1.
11	1.	1.	1.	1.	1.	1.	68	4.	4.	4.	4.	3.	4.
12	1.	1.	2.	2.	1.	1.	69	1.	1.	1.	1.	1.	1.
13	4.	4.	3.	2.	2.	2.	70	3.	1.	1.	1.	1.	1.
14	3.	1.	1.	1.	1.	1.	71	1.	2.	2.	2.	1.	1.
15	2.	4.	4.	4.	4.	2.	72	2.	3.	4.	3.	2.	2.
16	2.	2.	3.	3.	4.	4.	73	3.	3.	3.	2.	2.	4.
17	2.	1.	1.	1.	1.	1.	74	2.	1.	1.	2.	2.	2.
18	4.	3.	2.	2.	4.	2.	75	3.	4.	2.	2.	3.	2.
19	4.	4.	4.	3.	4.	2.	76	1.	2.	3.	3.	2.	1.
20	2.	4.	4.	3.	2.	2.	77	4.	4.	3.	3.	4.	2.
21	2.	4.	4.	4.	4.	4.	78	3.	4.	4.	4.	2.	2.
22	4.	3.	3.	3.	4.	2.	79	3.	2.	2.	2.	2.	3.
23	4.	1.	1.	2.	2.	2.	80	1.	1.	1.	1.	1.	1.
24	2.	1.	1.	1.	2.	2.	81	1.	2.	2.	2.	1.	1.
25	4.	4.	4.	4.	4.	4.	82	4.	2.	1.	1.	2.	2.
26	4.	3.	3.	4.	3.	4.	83	1.	1.	1.	1.	1.	2.
27	4.	2.	3.	4.	4.	4.	84	4.	4.	4.	4.	4.	4.
28	1.	1.	1.	2.	1.	1.	85	4.	4.	3.	2.	3.	2.
29	2.	3.	2.	1.	1.	1.	86	4.	1.	2.	3.	2.	2.
30	2.	3.	2.	2.	2.	2.	87	4.	1.	2.	3.	2.	1.
31	2.	4.	4.	4.	4.	2.	88	1.	3.	2.	1.	1.	1.
32	2.	2.	3.	2.	2.	1.	89	1.	2.	2.	3.	2.	1.
33	2.	4.	4.	4.	4.	4.	90	1.	2.	1.	1.	1.	1.
34	3.	2.	2.	2.	3.	4.	91	2.	4.	4.	4.	4.	4.
35	2.	2.	2.	1.	1.	1.	92	4.	2.	2.	2.	2.	2.
36	3.	4.	4.	4.	3.	4.	93	4.	3.	2.	2.	2.	2.
37	4.	4.	4.	3.	4.	4.	94	3.	4.	4.	4.	4.	4.
38	2.	3.	3.	3.	2.	4.	95	1.	2.	1.	1.	1.	1.
39	3.	2.	4.	4.	1.	2.	96	3.	2.	2.	2.	1.	1.
40	1.	2.	3.	3.	2.	4.	97	4.	4.	4.	4.	4.	4.
41	3.	4.	4.	4.	4.	4.	98	3.	4.	4.	4.	3.	4.
42	1.	2.	3.	3.	3.	1.	99	4.	4.	4.	4.	4.	4.
43	4.	2.	2.	4.	2.	4.	100	2.	4.	4.	4.	4.	4.
44	2.	4.	4.	4.	3.	2.	101	1.	2.	2.	3.	2.	1.
45	1.	2.	1.	1.	2.	1.	102	1.	2.	2.	2.	2.	2.
46	4.	2.	3.	4.	4.	2.	103	4.	3.	4.	4.	4.	2.
47	3.	2.	3.	4.	2.	1.	104	2.	4.	4.	4.	4.	4.
48	3.	4.	4.	4.	4.	4.	105	4.	4.	4.	4.	4.	2.
49	2.	4.	4.	4.	3.	2.	106	2.	4.	4.	4.	3.	4.
50	4.	1.	1.	2.	2.	2.	107	1.	2.	1.	1.	2.	1.
51	4.	4.	3.	2.	4.	2.	108	2.	4.	4.	4.	4.	4.
52	3.	1.	1.	2.	2.	2.	109	3.	4.	4.	4.	3.	2.
53	1.	4.	4.	2.	1.	1.	110	3.	4.	4.	2.	2.	1.
54	2.	3.	4.	4.	2.	2.	111	4.	4.	4.	4.	4.	4.
55	4.	1.	2.	4.	4.	4.	112	1.	1.	1.	2.	1.	1.
56	2.	4.	4.	4.	4.	4.	113	2.	2.	1.	1.	2.	2.
57	1.	1.	1.	1.	1.	1.	114	1.	1.	1.	1.	1.	1.

row	a	b	c	d	e	f
---	-	-	-	-	-	-
115	4.	1.	1.	2.	1.	2.
116	2.	1.	1.	1.	1.	1.
117	4.	3.	3.	4.	4.	4.
118	4.	4.	3.	4.	4.	4.
119	1.	4.	4.	2.	1.	2.
120	1.	1.	1.	1.	1.	1.
121	2.	1.	1.	1.	1.	1.
122	1.	2.	2.	4.	2.	2.
123	4.	3.	2.	2.	2.	2.
124	2.	3.	3.	4.	4.	4.
125	3.	3.	3.	2.	2.	2.
126	3.	1.	2.	2.	2.	1.
127	4.	2.	2.	4.	4.	4.
128	4.	2.	4.	4.	2.	2.
129	1.	1.	1.	3.	1.	1.
130	4.	3.	3.	4.	4.	4.
131	3.	2.	2.	3.	3.	2.
132	2.	1.	1.	1.	1.	1.
133	1.	4.	4.	2.	1.	1.
134	2.	4.	4.	4.	3.	2.
135	4.	4.	4.	4.	4.	4.
136	2.	4.	2.	1.	1.	1.
137	4.	1.	1.	1.	2.	1.
138	4.	2.	3.	4.	3.	4.
139	2.	1.	1.	1.	1.	1.
140	4.	4.	3.	3.	4.	4.
141	4.	3.	2.	2.	4.	4.
142	1.	2.	2.	1.	1.	1.
143	1.	1.	1.	1.	1.	1.
144	2.	1.	1.	1.	1.	1.
145	1.	2.	3.	3.	3.	4.
146	1.	2.	2.	2.	1.	1.
147	1.	1.	1.	1.	1.	1.
148	1.	2.	2.	2.	1.	2.

#### KEY TO CRITERIA

- A Understanding of the concept of divorce mediation;
- B Responsiveness to the emotional needs of clients in the divorce process;
- C Acceptance of the need to offer broader assistance than simply legal advice to divorcing clients;
- D Willingness to accept an alternative to the adversarial system of divorce;
- E Readiness to accept that professionals other than lawyers are capable of mediating divorce;
- F Acknowledgement that divorce mediation requires special training

## APPENDIX G DEMOGRAPHIC DETAILS OF THE 148 RESPONDENTS

row	age	sex	yea	tim	div	par	row	age	sex	yea	tim	div	par
1	1	2	1	1	1	2	51	2	1	3	1	1	1
2	1	1	1	1	1	1	52	1	2	1	1	1	2
3	1	1	1	1	1	2	53	1	1	1	1	1	2
4	2	1	1	1	1	1	54	2	1	1	1	1	2
5	2	1	3	1	1	1	55	2	1	3	2	1	1
6	1	1	1	1	1	2	56	2	1	2	1	1	1
7	2	1	2	1	2	2	57	2	1	2	4	1	1
8	2	1	1	3	1	1	58	2	1	2	1	1	1
9	1	1	1	1	1	1	59	1	1	1	1	1	2
10	2	1	2	1	1	1	60	1	1	1	1	1	1
11	2	1	2	2	1	1	61	3	1	3	1	2	1
12	1	2	1	2	1	2	62	2	1	3	1	1	1
13	2	2	1	1	2	1	63	2	1	3	2	1	1
14	2	1	2	1	1	1	64	2	1	2	1	1	1
15	2	1	2	1	1	2	65	2	1	1	1	1	1
16	1	1	2	1	1	1	66	1	2	1	1	2	1
17	3	1	3	1	1	2	67	2	2	1	2	2	1
18	1	1	1	1	1	2	68	3	1	3	1	1	1
19	2	1	1	1	1	1	69	2	2	1	1	1	2
20	2	1	2	1	1	1	70	2	2	2	2	1	1
21	2	2	3	1	1	1	71	2	1	1	1	1	1
22	2	1	2	1	1	1	72	1	2	1	1	1	2
23	2	1	2	1	1	1	73	1	2	1	1	1	1
24	2	1	2	2	1	2	74	1	2	1	2	1	2
25	2	1	1	2	1	2	75	2	1	3	2	1	1
26	2	1	2	2	1	2	76	1	1	1	2	1	1
27	2	1	3	1	1	1	77	2	1	2	1	1	1
28	2	1	1	1	1	1	78	2	1	1	1	1	1
29	1	1	1	2	1	2	79	2	1	2	2	1	1
30	2	1	3	1	1	1	80	1	2	2	4	1	1
31	1	2	1	1	1	2	81	1	1	1	1	1	2
32	1	1	1	2	1	2	82	2	1	2	2	1	1
33	2	1	2	1	1	2	83	2	1	3	1	1	1
34	2	1	3	1	1	1	84	2	1	2	1	1	1
35	2	1	3	1	1	1	85	3	1	3	1	2	1
36	2	1	2	1	2	1	86	2	1	2	1	2	1
37	1	2	1	1	1	2	87	1	1	1	1	1	2
38	1	1	1	1	1	1	88	1	1	1	1	1	2
39	3	2	3	1	1	2	89	2	2	2	2	1	2
40	2	1	1	1	1	1	90	1	1	1	1	1	1
41	1	1	1	2	2	2	91	3	1	3	1	1	1
42	2	1	2	1	1	1	92	3	1	3	1	1	1
43	1	1	1	1	1	1	93	2	1	3	1	1	1
44	2	1	2	1	1	1	94	2	1	2	1	1	1
45	1	1	1	1	1	2	95	1	2	2	2	1	2
46	1	1	1	1	1	2	96	2	1	3	1	2	1
47	2	1	2	1	2	1	97	2	1	2	1	1	1
48	1	1	1	2	1	2	98	1	1	2	1	1	1
49	1	1	1	1	1	2	99	1	1	1	1	1	2
50	2	1	2	1	1	1	100	1	1	1	1	1	2

row	age	sex	yea	tim	div	par
101	2	1	2	1	1	1
102	1	1	1	1	1	1
103	1	1	1	1	1	2
104	3	1	3	1	2	1
105	2	1	2	1	1	1
106	1	1	1	1	1	1
107	2	1	2	3	2	1
108	2	1	1	1	1	1
109	1	1	1	1	1	2
110	2	1	3	2	1	1
111	3	1	3	1	1	1
112	1	2	1	1	1	1
113	2	1	3	1	1	1
114	3	1	3	1	1	1
115	1	1	1	1	1	2
116	2	1	2	1	2	1
117	3	1	1	1	2	1
118	1	1	1	3	1	2
119	1	1	1	1	1	2
120	2	1	2			
121	2	1	2			
122	2	1	2			
123	3	1	3			
124	2	1	2			
125	2	1	1			
126	2	1	3			
127	1	1	1			
128	1	1	1			
129	2	1	2			
130	2	1	3			
131	3	1	3			
132	2	1	3	1		
133	1	1	1	1		
134	2	1	2	1		
135	1	1	1	1		
136	1	2	1	2		
137	1	2	1	1		
138	3	1	3	1		
139	2	1	1	2		
140	1	1	1	1		
141	3	1	3	1		
142	1	1	1	1		
143	1	1	1	1		
144	1	2	1	1		
145	2	1	2	1		
146	2	1	3	1		
147	2	1	3	1		
148	2	1	2	1		

## KEY

Age:           1 = 20-35  
                   2 = 36-55  
                   3 = 56+

Sex:            1 = male  
                   2 = female

Years in  
 practice:      1 = 0-10  
                   2 = 11-20  
                   3 = 21+

Time spent  
 on divorce  
 work:          1 = 0-25 %  
                   2 = 26-50 %  
                   3 = 51-75 %  
                   4 = 76-100%

Divorce  
 status:        1 = never been divorced  
                   2 = has been divorced

Parental  
 status:        1 = parent  
                   2 = not a parent

## APPENDIX H NFCC Conciliation Skills List (1990)

- A PROCESS SKILLS
- B VALUES IN ACTION
- C KNOWLEDGE (sometimes called CONTENT SKILLS)
- D PROFESSIONAL DEVELOPMENT SKILLS
- E AGENCY RESPONSIBILITY
- F CONCILIATION TRANSITION

### A PROCESS SKILLS

These skills are divided into stages: some of the skills are used throughout, so a choice has been made as to where to place them.

#### Stage 1 Setting up the process

##### 1.1 *Engaging*

Contact with individuals without bias  
 Convening both partners  
 Dealing with any 'secrets' of the referral  
 Dealing with inappropriate use of service

##### 1.2 *Setting scene*

Introducing yourself, establishing trust and rapport  
 Explaining structure, process and roles  
 Explaining confidentiality, privilege and voluntariness  
 Creating calm and informal atmosphere  
 Making a contract for work

#### Stage 2 Exploring the issues

##### 2.1 *Separating people from the problem*

Asking questions in a neutral way  
 Active listening  
 Acknowledging feelings  
 Using crisis skills to ensure support

##### 2.2 *Structuring, ie managing pace and content*

Identifying and ordering issues in dispute  
 Distinguishing/clarifying issues which cannot be conciliated  
 Agreeing, planning and prioritising an agenda  
 Identifying criteria of fairness for decisions  
 Setting pace and keeping time boundaries

##### 2.3 *Facilitating communication*

Clarifying/correcting perceptions of other  
 Focusing on what is relevant  
 Picking up misunderstandings  
 Enhancing mutual understanding  
 Attending to the positive in exchanges  
 Ensuring full and equal participation

## 2.4 *Ensuring both partners are properly informed*

- (a) Re legal process
- (b) Re Children Act (when in force)
- (c) Re research into children's needs (if appropriate)
- (d) Re negotiation process

## 2.5 *Helping parties make an analysis*

Developing mutual problem definition  
 Estimating style/level of conflict  
 Openly estimating mutuality re end of marriage  
 Openly estimating children's involvement  
 Acknowledging constituent factors/problems  
 eg poverty, new partners, lawyers, etc

## 2.6 *Managing conflict*

Allowing each to speak without interruption  
 Controlling verbal attacks and bullying  
 Defusing tensions: pre-empting conflict  
 Judging whether to expose/control conflict  
 If devising a control strategy, agreeing it  
 Managing exits and eruptions

## 2.7 *Power balancing*

Recognising power imbalances  
 Identifying their source  
 Devising appropriate strategy

## Stage 3 *Developing options*

### 3.1 *Generating creativity*

Engendering ideas/options from the parties  
 Contributing own ideas without pressure  
 Restating differences positively  
 Focusing on future, not past

### 3.2 *Assisting joint problem-solving*

Examining strengths/weaknesses of options  
 Examining their consequences  
 Actively assisting their negotiation  
 Focusing on common ground  
 Clarifying and summarising positions reached

### 3.3 *Dealing with impasses*

Identifying site of impasse  
 Devising appropriate strategy

### 3.4 *Focusing on children*

Tuning to parental feeling/experience  
 Inviting sharing of views re children  
 Questioning about children's responses  
 Sensitivity re children's involvement  
 Using metaphor and stories

### 3.5 *Drawing up parenting plans*

Identifying elements of a plan  
 Helping short-term planning  
 Helping long-term planning

### 3.6 *Preliminary discussion of finance/property*

Understanding its place in the problem-solving  
 Working in this area within Code of Practice  
 Working within limits of own knowledge  
 Ability to liaise closely with solicitors

## Stage 4 *Securing agreement*

### 4.1 *Getting agreement*

Gauging key time for choice of options  
 Help with bargaining a settlement  
 Clarifying what agreed  
 Dealing with disagreed factors  
 Assessing agreement against previously set criteria  
 Writing it down unambiguously in neutral language

### 4.2 *Helping implementation*

Deciding how agreement will be implemented  
 Setting tasks, if appropriate  
 Deciding on any review

### 4.3 *Dealing with disagreement*

If no agreement, plan action  
 If necessary to withdraw, give reasons

## Stage 5 *Involvement of children/others*

### 5.1 *Structuring of inclusion*

Having a clear reason for inclusion  
 Clarifying terms/consent of both parents

### 5.2 *Children seen alone or with siblings*

Clarifying terms/consent with both parents  
 Clarifying terms/consent with children  
 Planning format for meeting children  
 Clarifying confidentiality of content  
 Use of age-appropriate methods  
 Ability to communicate with children  
 eg under-fives, school-age, teenagers

### 5.3 *Managing family meetings*

Beforehand - clarifying terms with parents  
 Beforehand - clarifying terms with children  
 During session - clarifying function/roles  
 Ability to handle family process  
 Ability to render experience helpful

#### 5.4 *Involvement of step/grandparents*

Before - clarifying terms

During session - clarifying function/roles

Ability to handle group process

Ability to render experience helpful

#### Stage 6 *Solicitor contact*

Impartial discussion with solicitors

Brief, clear letters to solicitors

Engaging appropriate help from solicitors

#### Stage 7 *Co-working and team-work*

##### 7.1 *Co-working (if used by the agency)*

- Ability to work within model and role

- Flexibility in sessions

- Ability to tackle divergences

- Ability to 'share' work

- Ability to take front and side roles

- Jointly setting and checking strategy

##### 7.2 *Team-work*

- Good collaboration with colleagues

- Good use of supervision

- Good use of consultation

- Good use of/help given in case discussion

- Contributing to team development

## B *VALUES IN ACTION*

### 1 *Principles*

(a) Even-handedness

(b) Respecting parties' points of view

(c) Not imposing own views

(d) Remaining in control of process not outcome

### 2 *Anti-discriminatory practice*

Readiness to recognise discrimination

Courage to address it

Preparedness to challenge it

### 3 *Ethnic sensitivity*

Sufficient awareness of own values and culture

Readiness to learn culture from parties

Judgement about asking for cultural help

### 4 *Gender awareness*

Awareness of impact of gender elements

Handling gender power conflicts

Separating own gender views from issues

5 *Ethical practice*

Awareness of ethical issues  
 Ability to think them through  
 Ethical reliability in action

6 *Self-awareness*

Empathy  
 Self-monitoring  
 Asking for support when needed  
 Ability to act as a professional person

## C KNOWLEDGE

1 *Human development and family process*

Child development and family process  
 Attachment theory and separation experience  
 Couple process and dynamics  
 Family development and transition (from intact to two households, to second families)

2 *Divorce process*

In couples  
 In children  
 In family  
 Wider family

3 *Family law*

Current matrimonial legislation  
 Current divorce procedures  
 Familiarity with court procedures  
 Proposed legislation changes  
 Knowledge of child protection law  
 Knowledge of local child protection procedure  
 Adequate knowledge of family finances  
 - maintenance  
 - property and other assets (eg pensions)  
 - welfare benefits  
 - council house eligibility  
 Knowledge of domestic violence procedures

4 *Familiarity with NFCC Code of Practice*5 *Community resources*

Knowledge of local services  
 Knowledge of local social/economic environment

6 *Mediation knowledge*

Knowledge of mediation process  
 Understanding of negotiation  
 Familiarity with conflict theory

**D PROFESSIONAL DEVELOPMENT**

Readiness to expose need to learn  
Ability to change habits  
Training needs identified  
Preparedness to take up training opportunities

**E AGENCY RESPONSIBILITY**

1 *Liaison with other agencies*  
Educating other agencies about conciliation  
Appropriate co-operation with others  
Referring skills  
Familiarity with NFCC guide-lines  
(Relate/Child Protection/DCWO)

2 *Administration*  
Ability to work accountably  
Record-keeping (regularity, clarity)  
'Open' recording in neutral language  
Ability to word agreements  
Ability to write letters/reports for solicitors

**F PROFESSIONAL TRANSITION - the key question**

Has the transition been made from previous role and competence to conciliation role and competence?

(Fisher 1990c: 165)

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