

CHAPTER 5

Child-focused Mediation

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5.1 INTRODUCTION

Chapter 2 of the new Children's Act 38 of 2005¹ sets out general principles dealing with the affirmation of children's rights and responsibilities in line with the Constitution of the Republic of South Africa, 1996 and international legal instruments.² Very early in this chapter, the importance of an alternative approach to the settlement of child-centred disputes is underpinned. Section 6(4)(a) provides that in any matter concerning a child an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided.³

It is nowadays generally accepted that the adversarial system of litigation is not designed or developed to deal with the important, intimate, emotional, social and psychological aspects of child-centred or other family disputes.⁴ In traditional court proceedings, disputing parties are pitted against each other throughout the process as the focus is on past negative behaviour of the parties and their opposing legal rights and obligations.⁵ As such the adversarial system has the potential to undermine communication and to create hostility and rigid position-taking by parties.⁶ Quite rightly, the adversarial system of litigation has been accused of escalating conflict, thereby causing parties to incur substantial costs for legal fees and the use of courts.⁷ Other complaints about the system are that it is too lengthy, too formal and too

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1 Sections 6-17.

2 Davel 'General principles' in Davel & Skelton (eds) *Commentary on the Children's Act* (2007) 2-2.

3 Section 6 came into operation on 1 July 2007: *GG* 30030 of 29 June 2007.

4 De Jong 'An acceptable, applicable and accessible family-law system for South Africa—Some suggestions concerning a family court and family mediation' 2005 *TSAR* 33.

5 Pera 'Family mediation in Italy: Bills and ideal model (especially for the 'de facto' couple)' in Wardle & Williams (eds) *Family Law: Balancing Interests and Pursuing Priorities* (2007) 630; Cooper & Brandon 'How can family lawyers effectively represent their clients in mediation and conciliation processes?' 2007 *Australian Journal of Family Law* 288 290-291.

6 Crush 'When mediation fails child protection: Lessons for the future' 2007 *Canadian Journal of Family Law* 55 66.

7 Cooper & Brandon 2007 *Australian Journal of Family Law* 290; Walker 'Family mediation' in MacFarlane (ed) *Rethinking Disputes: The Mediation Alternative* (1997) 58.

intricate.⁸ At a time when people are going through tough family crises, the legal system actually contributes to making matters worse. It is therefore not wrong to say that traditional court proceedings typically end with bitterness, unresolved feelings and irreconcilability between disputing parties, a situation which is particularly detrimental to any children involved.⁹

To obviate the problems caused by traditional court proceedings, a variety of alternative dispute resolution methods have been developed, of which mediation in particular is in great demand for the resolution of child-centred or other family disputes.¹⁰

5.2 FAMILY MEDIATION AS AN ALTERNATIVE TO TRADITIONAL COURT PROCEEDINGS—GENERAL

5.2.1 Description of family mediation

In essence, family mediation is a process in which the mediator, an impartial third party who has no decision-making power, facilitates the negotiations between disputing parties with the object of getting them back on speaking terms and helping them to reach a mutually satisfying settlement agreement that recognises the needs and rights of all family members. In an attempt to achieve this, the mediator uses specific techniques and strategies, such as empathic listening, power balancing or equalising, rephrasing or reframing, refocusing, summarising, clarifying, prioritising, mutualising, neutralising, hypothesising, role reversal, option generation, and reality testing.¹¹

Mediation is sometimes also described as a series of stages,¹² which usually include the following:¹³

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- 8 Payne 'Family conflict management and family dispute resolution on marriage breakdown and divorce: Diverse options' 1999/2000 *Revue Generale de Droit* 663 666; Saccuzzo 'Controversies in divorce mediation' 2003 *North Dakota LR* 425 676; Walker in MacFarlane (ed) *Rethinking Disputes: The Mediation Alternative* 81.
 - 9 Fry 'The role of the family consultant in the less adversarial trial' 2007 *Australian Journal of Family Law* 113; Mowatt 'Are we ready to mediate?' 1988 *SALJ* 314 316; Goldberg 'Family courts in South Africa and the implication for divorce mediation' 1995 *THRHR* 276 277.
 - 10 Van Zyl *Divorce Mediation and the Best Interests of the Child* (1997) 137; Altobelli 'Mediation: Primary dispute resolution 1996: Mandatory dispute resolution in 2000?' 1997 *Australian Journal of Family Law* 55 67; Beyer 'A pragmatic look at mediation and collaborative law as alternatives to family law litigation' 2008 *St Mary's LJ* 303 309; Kronby 'Alternative dispute resolution: Balancing public policies and private interests' in Wardle & Williams (eds) *Family Law: Balancing Interests and Pursuing Priorities* (2007) 566; Koen, Saccuzzo & Johnson 'Custody mediation in violent and nonviolent families: Pitfalls and perils' 2006 *American Journal of Family Law* 253.
 - 11 Charlton & Dewdney *The Mediator's Handbook: Skills and Strategies for Practitioners* (1995) 123-126.
 - 12 Folberg, Milne & Salem (eds) *Divorce and Family Mediation—Models, Techniques, and Applications* (2004) 9.
 - 13 Goldberg 'Practical and ethical concerns in alternative dispute resolution in general and family and divorce mediation in particular' 1998 *TSAR* 748; Rogers & Palmer 'A speaking analysis of ADR legislation for the divorce neutral' 2000 *St Mary's LJ* 871 893; Jessani 'A step-by-step approach to the divorce mediation process: From soup to nuts' 2002 *American Journal of Family Law* 118 119; Beyer 2008 *St Mary's LJ* 312; Walker in MacFarlane (ed) *Rethinking Disputes: The Mediation Alternative* 67-70.

- (a) the orientation and introductory stage, where the parties are engaged in the mediation process, certain ground rules are laid down, and each party gets an opportunity to put his or her case to the mediator;
- (b) the information-analysis or definition stage, where all relevant information is put on the negotiating table, the parties systematically isolate the issues in dispute and an agenda on all issues in dispute is drawn up;
- (c) the negotiation stage, where the parties, with the assistance of the mediator, generate different options for the resolution of all the issues on the agenda;
- (d) the settlement or agreement stage, where all proposals are summarised and clarified, all options are evaluated and reviewed and both parties are expected to make compromises;
- (e) the contracting stage, where the results of the negotiation and settlement phases are put in writing and the parties sign a settlement agreement.

5.2.2 The features of mediation

From the descriptions of mediation, it is apparent that the following important features are inherent in the mediation process:

5.2.2.1 *The mediator must be impartial*

In other words, the mediator does not take sides or favour the position of one party over the other.¹⁴ The mediator must also ensure that one party is not disadvantaged by the other through intimidation or threats.¹⁵ The mediator therefore has to conduct the process in such a way as to redress any power imbalances between the parties. As this might sometimes prove to be a very difficult task, the mediator should terminate the mediation process once it becomes apparent that it will be impossible to redress serious power imbalances.¹⁶

5.2.2.2 *Mediation increases self-determination*

Mediation allows parties greater control over the consequences of their disputes as it is up to them to reach their own joint decisions¹⁷—they formulate their own agreement and make an emotional investment in its success. They are therefore more likely to support the agreement than they would be if the terms were negotiated by their legal representatives or ordered by the court.¹⁸

14 Smith 'Mediating with handkerchiefs: the new model standards for divorce mediation' 2002 *The Colorado Lawyer* 69 72.

15 Draskic 'Family mediation' in Wardle & Williams (eds) *Family Law: Balancing Interests and Pursuing Priorities* (2007) 535.

16 Draskic in Wardle & Williams (eds) *Family Law: Balancing Interests and Pursuing Priorities* 536.

17 McEwen, Rogers & Maiman 'Bring in the lawyers: challenging the dominant approaches to ensuring fairness in divorce mediation' 1995 *Minnesota LR* 1317 1319; Greatbatch & Dingwall 'The marginalization of domestic violence in divorce mediation' 1999 *Int J of Law, Policy and the Family* 174.

18 Folberg, Milne & Salem *Divorce and Family Mediation—Models, Techniques, and Applications* 6, 8; Draskic in Wardle & Williams (eds) *Family Law: Balancing Interests and Pursuing Priorities* 543.

5.2.2.3 Mediation is a multi-disciplinary process

Inherent in mediation is a clear intention to synthesise behavioural sciences and law to improve the psychological functioning of disputing parties in ways that promote their own and their children's best interests.¹⁹ Because mediators are schooled in disciplines such as the social and behavioural sciences, they know what techniques and strategies to use in order to lessen conflict between parties and bridge communication gaps.²⁰ As such, mediation reduces the emotional costs associated with divorce.²¹

5.2.2.4 Mediation is a private and informal process

Mediation is not bound by the rules of procedure that dominate the adversarial system of litigation.²² It is a simple process that people can understand and in which they can fully participate.²³ With the assistance of the mediator, the parties may consider a much broader range of information in determining a settlement outcome than the information that is allowed to be introduced in court.²⁴ The mediation process can further be adapted according to the context of the dispute and the needs of the parties concerned.²⁵ It is also capable of accommodating different cultural value systems and/or religious convictions.²⁶ Further, specific customs, practices and perspectives can easily be built into the mediation process.²⁷ Mediation can therefore achieve a desirable solution that is not within the competence of a court to order. Furthermore, settlements can be reached in noticeably less time than through the traditional court process.²⁸

5.2.2.5 Mediation is a flexible process

The mediation process may take place either early in the proceedings or just before trial, either in one day or over many weeks of shorter sessions.²⁹ Because of its flexibility, various forms of mediation have evolved, namely:

- (a) facilitative or nondirective mediation, where mediators merely facilitate the negotiations or communication between parties;³⁰

19 Bryant & Faulks 'The "helping courts" come full circle: The application and use of therapeutic jurisprudence in the Family Court of Australia' 2007 *Journal of Judicial Administration* 93 96.

20 De Jong 'Judicial stamp of approval for divorce and family mediation in South Africa' 2005 *THRHR* 95 97.

21 Smith 2002 *The Colorado Lawyer* 70.

22 Folberg, Milne & Salem (eds) *Divorce and Family Mediation—Models, Techniques, and Applications* 8.

23 De Jong 2005 *THRHR* 97.

24 Beyer 2008 *St Mary's LJ* 307.

25 Faris *An Analysis of the Theory and Principles of Alternative Dispute Resolution* (1995) 168-170.

26 Goldberg 1998 *TSAR* 755.

27 Moodley 'Mediation: the increasing necessity of incorporating cultural values and systems of empowerment' 1994 *CILSA* 44 46-48.

28 Kronby in Wardle & Williams (eds) *Family Law: Balancing Interests and Pursuing Priorities* 568; Peeples, Reynolds & Harris 'It's the conflict, stupid: An empirical study of factors that inhibit successful mediation in high-conflict custody cases' 2008 *Wake Forest LR* 505 513 528.

29 Beyer 2008 *St Mary's LJ* 311 314.

30 Cooper & Brandon 2007 *Australian Journal of Family Law* 293; Brock & Saks *Contemporary Issues in Family Law and Mental Health* (2008) 9.

- (b) evaluative or directive mediation, where the mediator plays a more active role in the decision-making process;³¹
- (c) transformative mediation, where the emphasis is on changing the dispute from a negative or destructive one into a more positive and growth-oriented approach;³²
- (d) activist mediation, which attempts to ensure that parties are protected in the case of unbalanced power relationships or in the presence of domestic violence;³³
- (e) multi-generational mediation, which entails mediation with the extended family;³⁴
- (f) the settlement model of mediation, where the parties are encouraged to reach agreement within an anticipated range of likely court outcomes as determined by the mediator who will usually be an expert in child law and/or family law.³⁵

5.2.2.6 *Discussions in mediation are confidential to the extent permitted by the law*³⁶

Parties can candidly disclose any facts or information, even if it is of a highly personal nature, without being afraid that any statements or concessions made in the mediation process could later be used against them in litigation that might follow an unsuccessful mediation attempt.³⁷ On the other hand, mediators have a duty to terminate the mediation process immediately and report matters to the relevant authorities where child abuse, child neglect or other criminal behaviour is involved.³⁸

5.2.2.7 *Mediation is future-oriented*³⁹

As it focuses on the future rather than the past and as it establishes principles of future behaviour rather than trying to apportion blame or focusing on past conduct, the mediation process aids disputing parties in resuming workable relationships with each other and enhances the adjustment of their children.⁴⁰ It is apparent that a process of this nature, which helps the parties to reach a mutually satisfying agreement and provides them with a framework for resolving future disputes on their

31 Brock & Saks *Contemporary Issues in Family Law and Mental Health* (2008) 11.

32 Folberg, Milne & Salem (eds) *Divorce and Family Mediation—Models, Techniques, and Applications* 16; Beyer 2008 *St Mary's LJ* 313.

33 Aldana & Saucedo 'The illusion of transformative conflict resolution: mediating domestic violence in Nicaragua' 2008 *Buffalo LR* 1261 1322.

34 Kruk 'Practice issues, strategies, and models: The current state of the art of family mediation' 1998 *Family and Conciliation Courts R* 195 207.

35 Cooper & Brandon 2007 *Australian Journal of Family Law* 292–293.

36 Dewdney 'The partial loss of voluntariness and confidentiality in mediation' 2009 *Australasian Dispute Resolution Journal* 17 18; Smith 2002 *The Colorado Lawyer* 73.

37 Faris *An Analysis of the Theory and Principles of Alternative Dispute Resolution* (1995) 183; Dewdney 2009 *Australasian Dispute Resolution Journal* 20; Folberg, Milne & Salem (eds) *Divorce and Family Mediation—Models, Techniques, and Applications* 8.

38 Goldberg 1998 *TSAR* 751; Rogers & Palmer 2000 *St Mary's LJ* 876 878 881 917.

39 McIsaac 'Focus on family and divorce mediation' 2001 *Family Court R* 405 406.

40 Pearson & Thoennes 'Mediating and litigating custody disputes: a longitudinal evaluation' 1983–1984 *Family Law Quarterly* 497 499; Sullivan 'Parties evaluations of their relationships with their mediators and accomplishments in a court-connected mediation programme' 1997 *Family and Conciliation Courts R* 405 406.

own,⁴¹ cannot fail to cut litigation and court costs for both the parties and the judicial system.⁴²

5.2.2.8 *Mediation operates in the shadow of the law*⁴³

One of the duties of the mediator is to give parties legal information. Preferably, the mediator should also refer the parties to attorneys for independent legal advice. Negotiations between the parties take place against the background of this legal information and advice.⁴⁴

5.2.2.9 *Mediation promotes the best interests of children*

Legal literature often refers to the fact that mediation focuses on the best interests of children.⁴⁵ In the first place, mediation enables those who know the children best, namely their parents, and not some third party or institution, to make decisions about their welfare. Furthermore, section 28(2) of the Constitution of the Republic of South Africa, 1996 and section 9 of the Children's Act 38 of 2005 place an obligation on the mediator, among others, to see to it that disputing or separating parties put the interests of their children first in all negotiations between them. The chances of the interests of children being protected in the mediation process are therefore excellent. Research has shown that upon divorce, for example, the provisions regarding the interests of children are far more advantageous under mediated settlement agreements than under agreements or orders made in terms of the adversarial system.⁴⁶

5.2.2.10 *Mediation fits neatly into the legal process as a whole*

Although it is an objective of mediation to keep parties and children out of court as it were, the mediation process acknowledges the fact that the High Court is the upper guardian of all minor children and that all decisions made in mediation have to be endorsed by an appropriate court. Parties are merely given an opportunity to try to sort out and solve their own private and intimate problems before going to court.

41 Hoening 'Divorce mediation basics' 1997 *The Practical Lawyer* 39 40; Emery et al 'Child custody mediation and litigation: Custody, contact, and coparenting 12 years after initial dispute resolution' 2001 *Journal of Consulting and Clinical Psychology* 323; McIsaac 2001 *Family Court R* 405; Jessani & James 'Mediators and parenting coordinators: comparing and contrasting—20 questions/40 answers' 2006 *American Journal of Family Law* 180 182.

42 McIsaac 2001 *Family Court R* 406.

43 Levy & Mowatt 'Mediation in the legal environment' 1991 *De Jure* 63 64; Clark 'No holy cow—some caveats on family mediation' 1993 *THRHR* 454 459; Cohen 'Mediation: Terminology is important' 1993 *De Rebus* 221 222.

44 Mnookin & Kornhauser 'Bargaining in the shadow of the law: the case of divorce' 1979 *Yale Law Journal* 950 call it '... bargaining in the shadow of the law'.

45 De Jong 2005 *THRHR* 98.

46 Kelly 'Mediated and adversarial divorce resolution processes' 1991 *Family Law Practice* 382 386–387.

5.2.3 Cases that should not be mediated

There are, however, cases that should not go to mediation, but rather directly to the courts. Mediation is generally held to be unsuitable in the following circumstances:⁴⁷

- (a) where there is a substantial power imbalance between the parties, which the mediator is unable to redress;
- (b) where one or both of the parties are totally unassertive or unwilling to participate in the process;
- (c) where there is a risk of child abuse;
- (d) where there is the chance of serious family violence;
- (e) where there are alcohol, drug or mental health problems;
- (f) where large estates are at issue and the formal disclosure of documents is of cardinal importance;
- (g) where very complicated legal issues are involved;
- (h) in very high-level conflict cases, for example those involving allegations of parental unfitness.

5.3 CHILD-FOCUSED MEDIATION

Despite the fact that mediation is not suitable in all cases, it has been shown to be a worthwhile endeavour and to be successful in the majority of situations in which it is attempted.⁴⁸ From the descriptions and features of mediation it is clear that the best interests of children are properly catered for in the mediation process. It is therefore not surprising that both the legislator and the courts have started to incorporate mediation into the procedures of the formal judiciary whenever children's issues are involved.

5.3.1 The Mediation in Certain Divorce Matters Act 24 of 1987

Section 4 of the Mediation in Certain Divorce Matters Act makes provision for an enquiry by the office of the family advocate into matters concerning the custody of, access to and guardianship of children after the institution of a divorce action or other post-divorce applications relating to children. At this enquiry the office of the family advocate has to ensure that the interests of each minor and dependent child of the marriage concerned are protected and upon completion of the enquiry the court must be furnished with a report and recommendation on any matter concerning the welfare of such children. In practice, the function of the office of the family advocate at these enquiries is threefold, namely to monitor, to mediate and to evaluate.⁴⁹

Because the investigation by the family advocate can be initiated by either of the parties involved, the court or the family advocate himself or herself,⁵⁰ it can be

⁴⁷ Cooper & Brandon 2007 *Australian Journal of Family Law* 296, 297; Beyer 2008 *St Mary's LJ* 310; Peebles, Reynolds & Harris 2008 *Wake Forest LR* 529; Koen, Saccuzzo & Johnson 2006 *American Journal of Family Law* 254, 260; Smith 2002 *The Colorado Lawyer* 71 74; De Jong 2005 *TSAR* 44 n 64.

⁴⁸ Beyer 2008 *St Mary's LJ* 315.

⁴⁹ Kaganas & Budlender *Family Advocate* (1996) 4; Van Zyl 'The Family Advocate: 10 years later' 2000 *Obiter* 372 376; Glasser 'Can the family advocate adequately safeguard our children's best interest?' 2002 *THRHR* 74 77.

⁵⁰ Section 4(1) and s 4(2).

argued that the services offered by the office of the family advocate include elements of both voluntary and mandatory mediation. As both family advocates⁵¹ and family counsellors⁵² are involved in the investigation, it can further be said that the office of the family advocate offers an interdisciplinary approach to the resolution of child-centred disputes.⁵³ Lastly, because it is part of the family advocate's function to evaluate the parties concerned and the relevant circumstances at an enquiry in order to make a recommendation to the court, the family advocate would appear to use the evaluative model of mediation.⁵⁴ However, to expect parties to participate in a mediation attempt, knowing full well that the facts and information provided might later be used as part of the evaluation process militates against the idea of mediation.⁵⁵ In view of the official reporting function of family advocates, they should not be regarded as mediators, but rather as advocates for the children.

5.3.2 The Children's Act 38 of 2005

The Children's Act very specifically refers to mediation for the resolution of various child-centred disputes. In some instances the Act expressly mandates mediation and in certain other instances the Act grants the court the discretion to order mediation. There are also several provisions in the Children's Act which do not specifically mention mediation, but where mediation, in my opinion, is definitely implied if the general provisions of the Act regarding procedural matters⁵⁶ are to be taken seriously.

5.3.2.1 Provisions that mandate mediation directly

In two instances the Children's Act provides for the mandatory referral of child-centred disputes to mediation. The first one is to be found in section 21 of the Act, which deals with the parental responsibilities and rights of unmarried fathers and the second in section 33, which deals with parenting plans.⁵⁷ Justification for these provisions can be found in the fact that family mediation offers many advantages to all involved—the parties to the dispute, the children affected by the dispute and the judicial system in general.⁵⁸

In terms of section 21(3)(a) disputes between the child's unmarried biological parents as to whether the father meets the requirements for acquiring full parental responsibilities and rights in terms of section 21(1)(a) or (b) must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person. In the same way, section 33(2) read with section 33(5) provides that the co-holders of parental responsibilities and rights in respect of a child who are experiencing difficulties in exercising their responsibilities and rights must first seek to agree on a parenting plan by attending mediation through a social

51 Appointed in terms of s 2(1) of Act 24 of 1987.

52 Appointed in terms of s 3(1) of Act 24 of 1987.

53 Clark 'Comment on the Magistrates' Courts Amendment Act 120 of 1993' 1994 *THRHR* 636 638.

54 See para 5.2.2.5 above.

55 Van Zyl 2000 *Obiter* 388.

56 See para 5.1 above.

57 Section 21 came into operation on 1 July 2007: *GG* 30030 of 29 June 2007, but s 33 had not yet come into operation when this chapter was completed. See chapter 3 above.

58 See De Jong 2005 *THRHR* 96-99; Goldberg 1995 *THRHR* 277.

worker or other suitably qualified person, or by obtaining the assistance of a family advocate, social worker or psychologist.

It is apparent from both sections 21 and 33 that parties may not approach the court as a first resort for the resolution of their disputes. They must first attend mediation through a family advocate, social worker or other suitably qualified person or, in the case of section 33, obtain the assistance of a family advocate or other social welfare officer. As it is one of the functions of the family advocate in practice to mediate,⁵⁹ I believe that when the assistance of a family advocate is sought, he or she would in any case try to mediate the dispute between the parties as a matter of course. When the assistance of a social worker or psychologist is sought, they would in all probability also try to mediate the dispute between the parties or possibly just try to give the parties some advice. The objective of sections 21 and 33 is nevertheless clear—the parties need the intervention of a mediator or neutral third party to assist them in solving their disputes privately and informally.

If the mediation or intervention by a neutral third party is successful and the parties reach an agreement either on whether the unmarried father qualifies for full parental responsibilities and rights or on an appropriate parenting plan, the agreement may be subjected to judicial approval or review.⁶⁰ In this regard section 21(3)(b) provides that any party to the mediation may have the outcome of the mediation reviewed by a court and section 34(1)(b) determines that a parenting plan may be registered with a family advocate or made an order of court. Section 34(3) further provides that when an application for the registration of a parenting plan or the incorporation of such a plan into a court order is made, the application must be accompanied, *inter alia*, by a statement by a family advocate, social worker or psychologist to the effect that the parenting plan was prepared after consultation with him or her, or by a social worker or other appropriate person to the effect that the plan was prepared after mediation by him or her.

If the mediation or intervention by a neutral third party is unsuccessful, the parties will probably also need some kind of proof that they have indeed attended mediation or consulted a family advocate or other social welfare officer, before they can approach the court with their dispute. In Australia, for example, the Family Law Amendment (Shared Parental Responsibility) Act 46 of 2006 introduced new provisions regarding the sharing of parental responsibilities into the Family Law Act 59 of 1975.⁶¹ These provisions effectively introduced mandatory mediation in parenting matters by preventing a court from hearing an application relating to children unless a certificate from a family dispute resolution practitioner is also filed.⁶² This certificate must state either that the attendees made a genuine effort to resolve the issues in question or that attendance of mediation was inappropriate in the circumstances.⁶³ A certificate is, however, not required in circumstances where a history or threat of family violence or child abuse has been established.⁶⁴ It is

⁵⁹ See para 5.3.1 above.

⁶⁰ See para 5.2.2.10 above.

⁶¹ Section 60I of Act 59 of 1975.

⁶² Section 60I(7).

⁶³ Section 60I(8).

⁶⁴ Section 60I(9).

submitted that in South Africa the mediator or other designated intermediary should also, by regulation, be required to issue such a certificate to the parties after an attempt to mediate a dispute has failed. Although mediators should generally not comment upon the extent to which parties participated in the mediation process, the fact that a party flatly refused to participate in the mediation process or abused the mediation process should be recorded.

5.3.2.2 Provisions that grant the court the discretion to order mediation

There are also a few instances where mediation is mandatory in the discretion of the children's court. They concern lay-forum hearings as contemplated by sections 49, 70 and 71 and pre-hearing conferences in terms of section 69 of the Children's Act.⁶⁵ In both these instances it can be argued that since the court process is an expensive use of public resources, it is acceptable to require the parties to make some effort to settle their cases in a cost-efficient way before being entitled to take up the court's time.⁶⁶

Firstly, in terms of section 49(1) a children's court may, before deciding a matter or an issue in a matter, order a lay-forum hearing in an attempt to settle the matter or issue out of court. These lay-forum hearings may include

- (b) mediation by family advocates, social workers, social service professionals or other suitably qualified persons;⁶⁷
- (c) family group conferences as contemplated in section 70;⁶⁸ and
- (d) mediation in any appropriate lay forum as contemplated in section 71.⁶⁹

Although mediation is not specifically mentioned in connection with the family group conferences, it is clear that mediation is precisely what the legislator had in mind for these conferences. Section 70 envisages that the children's court will appoint a suitably qualified person or organisation to facilitate at a family group conference set up with the parties involved and any other family members of the child in order to find solutions for any problem involving the child. It should be borne in mind that mediation is in fact nothing other than facilitated negotiation.⁷⁰ Multi-generational mediation, which entails mediation with the extended family, is also a well-known and widely used model of intervention today.⁷¹

With regard to the lay forums, section 71(1) provides that a children's court may refer a matter before it to any appropriate lay forum, including a traditional authority, in an attempt to settle the matter by way of mediation out of court. As traditional community-based organisations or institutions such as street committees, community courts, community-based advice centres and traditional leaders still play the most important role in resolving the family disputes of the majority of the South African

⁶⁵ These sections had not yet come into operation when this chapter was completed.

⁶⁶ Klug 'ADR: trends and directions in commercial disputes' 1997 *Australian Dispute Resolution Journal* 172 174.

⁶⁷ Section 49(1)(a).

⁶⁸ Section 49(1)(b).

⁶⁹ Section 49(1)(c).

⁷⁰ See para 5.2.1 above.

⁷¹ See para 5.2.2.5 above.

population,⁷² this provision will contribute significantly to making the formal law more accessible.⁷³ As traditional leaders and the facilitators at street committees, community courts or community-based advice centres are usually not trained mediators, it is understandable that section 71(2) excludes the use of lay forums where there are any allegations of child abuse.

The second instance where mediation is mandatory in the discretion of the court deals with pre-hearing conferences. Section 69(1) determines that when a matter in the children's court is contested, the court may order that a pre-hearing conference be held with the parties in order to mediate or settle disputes between them and to define the issues to be heard by the court. The intention of the legislator regarding these pre-hearing conferences is clearly the mediation of all outstanding disputes. Although the section does not stipulate which individuals or agencies should provide the mediation, section 69(4)(a) provides that the court may prescribe how and by whom the pre-hearing conference should be set up and conducted and by whom it should be attended. In my opinion the court would probably take note of the other prescriptions of the Act in this regard⁷⁴ and refer the pre-hearing mediation to a family advocate or a social worker, social service professional, other suitably qualified person or even a lay forum which would include a traditional authority.

It is also interesting to note that section 69(2) contains a general exclusion clause which prohibits pre-hearing conferences in matters involving the alleged abuse or sexual abuse of a child. Elsewhere in the Act,⁷⁵ this exclusion only applies where mediation is to be conducted in lay-forum hearings. In my opinion such a selective exclusion would have been appropriate in section 69(2) as well, since it is often proposed that properly trained mediators would indeed be able to mediate where there are allegations of abuse or family violence.⁷⁶ It is only untrained mediators who should not be allowed to mediate in the presence of family violence or abuse.

In the case of family group conferences,⁷⁷ appropriate lay forums⁷⁸ and pre-hearing conferences,⁷⁹ the children's court may prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court.⁸⁰ On its mere production such a report will, subject to the decision of the presiding officer, be admissible as evidence of the facts stated therein.⁸¹ The fact that the mediator or facilitator might have to record 'any fact emerging from such conference which ought to be brought to the notice of the court' in addition to any

72 Van der Merwe 'Overview of the South African experience' 1995 (Apr) *Community Mediation Update* 1 3; SALC *Alternative Dispute Resolution* Discussion Document 8, Project 94 (1997) 22-23.

73 De Jong 2005 *TSAR* 41-43.

74 Sections 21(3)(a), 33(5), 49(1)(a), 71(1).

75 Section 71(2).

76 Pearson 'Ten myths about family law' 1993 *Family LQ* 279 288; Goldberg 'Family mediation is alive and well in the United States of America: A survey of recent trends and developments' 1996 *TSAR* 358 366; Greatbatch & Dingwall 1999 *Int J of Law, Policy and the Family* 185-187; Kruk 1998 *Family and Conciliation Courts R* 202.

77 In terms of ss 49(1)(b) and 70.

78 In terms of ss 49(1)(c) and 71.

79 Section 69(1).

80 Sections 69(4)(b), 70(2)(b) and 71(3)(a).

81 Section 63(1).

agreement or settlement reached, may however inhibit parties from being completely honest during these conferences. They might try to conceal certain relevant facts in order to make a good impression on the mediator or facilitator so that nothing negative about them might be reported to the children's court.

Any agreement or settlement reached will, once again, be subjected to judicial review.⁸² In terms of sections 69(3)(c), 70(2)(c) and 71(3)(b) records kept at pre-hearing conferences, family group conferences and lay-forum hearings will be considered by the court when the matter is heard. If no agreement or settlement is reached at these proceedings, the parties will probably, once again, need some kind of proof that they have indeed attended the family group conference, lay-forum hearing or pre-hearing conference, before proceedings in the children's court can be resumed. Here, and in the case of unsuccessful section 49(1)(a) mediations, I would like to repeat my previous proposal⁸³ that the mediator or facilitator should be required to issue a certificate to the parties to the effect that they made a genuine effort to resolve the issues in question, but with no success.

5.3.2.3 Provisions where mediation is implied

Several provisions in the Children's Act encourage parties to try to reach an agreement on certain issues. For instance, in terms of section 22(1) the mother of a child or other person who has parental rights and responsibilities in respect of a child may enter into an agreement with either the unmarried father of the child who does not already have parental rights and responsibilities or another person who has an interest in the child's care, well-being and development in order to confer upon such father or other person the parental rights and responsibilities specified in the agreement.⁸⁴ Likewise, section 30(3) determines that a co-holder of parental rights and responsibilities may enter into an agreement with the other co-holder of parental rights and responsibilities to allow such other co-holder or another person to exercise specified parental rights and responsibilities on the co-holder's behalf.⁸⁵ Furthermore, section 234(1) provides that the parent or guardian of a child may, before an application for the adoption of a child is made,⁸⁶ enter into a post-adoption agreement with a prospective adoptive parent of that child to provide for communication between the child and the parent or guardian and such other person as may be stipulated in the agreement and the provision of information about the child after the application for the adoption is granted.⁸⁷ Lastly, section 292 read with sections 293 and 295 requires that a surrogate mother and her husband or permanent life partner and the commissioning parents or the commissioning parent and his or

⁸² See para 5.2.2.10 above.

⁸³ See para 5.3.2.1 above.

⁸⁴ Section 22 had not yet come into operation when this chapter was completed.

⁸⁵ Section 30 came into operation on 1 July 2007: GG 30030 of 29 June 2007.

⁸⁶ In terms of s 239.

⁸⁷ The whole of chapter 15 dealing with adoption had not yet come into operation when this chapter was completed.

her spouse or permanent life partner may enter into a surrogate motherhood agreement to provide for matters not regulated by the Act.⁸⁸

Although no mention is made of mediation in these sections, mediation can surely play a vital role in facilitating negotiations between the parties in these matters. As pointed out above, the general provisions of the Act regarding procedural matters⁸⁹ underpin the importance of an alternative approach, like mediation, to the settlement of child-centred issues. It would therefore be advisable for parties to seek the assistance of a mediator when trying to reach an agreement on all the issues referred to above.

It is, however, very important that all agreements reached in the mediation process should be judicially reviewed and approved.⁹⁰ In this regard section 72(1) determines in general that all matters that are settled out of court must be submitted to the children's court for confirmation or rejection.⁹¹ In terms of section 72(2) the court must consider the settlement and, if it is in the best interests of the child, may confirm the settlement and make it an order of court, refer the settlement back to the parties for reconsideration of specific issues or reject the settlement. Furthermore, most of the sections that encourage the parties to reach an agreement on certain matters have their own provisions for the judicial review of any agreements reached. For example, in terms of section 22(4), a parental responsibilities and rights agreement only takes effect if it is registered with the family advocate or made an order of the high court, a divorce court or the children's court on application by the parties to the agreement. The agreement will, however, only be registered or made an order of the court if it is in the best interests of the child.⁹² In addition, a post-adoption agreement will only take effect if made an order of the children's court⁹³ and a surrogate motherhood agreement will only be valid if confirmed by the high court.⁹⁴

5.4 CHILD-INCLUSIVE MEDIATION

Research has shown that the separation of families, far from being a single, discrete event in the lives of children, is a process which usually begins years before the separation, and has repercussions that reverberate into adulthood.⁹⁵ It is, therefore, very important that children, as the most vulnerable and most affected, should have a voice in family separation issues. Like parents, children have a fundamental interest in protecting family relationships and working out parenting plans or visitation schedules upon family separation.⁹⁶ As the needs of children are all different, depending upon their age groups,⁹⁷ quite apart from individual differences between

88 The whole of chapter 19 dealing with surrogate motherhood had not yet come into operation when this chapter was completed.

89 See para 5.1 above.

90 See para 5.2.2.10 above.

91 Section 72 had not yet come into operation when this chapter was completed.

92 Section 22(5).

93 Section 234(6)(a).

94 Sections 292(1)(e) and 295.

95 Kiernan 'What about the children?' 1991 *Family Policy Bulletin* 17 21.

96 Sanchez & Kibler-Sanchez 'Empowering children in mediation: an intervention model' 2004 *Family Court Review* 554 556.

97 That is infants, pre-school children, primary school children, adolescents or late teenagers.

children within those groups, parents and our courts simply cannot one-sidedly determine what would be in the best interests of the children without consulting them in some way. For these reasons, and also to comply with its obligations under international instruments such as the United Nations Convention on the Rights of the Child⁹⁸ and the African Charter on the Rights and Welfare of the Child,⁹⁹ the South African legislator included a general child participation clause in section 10 of the Children's Act 38 of 2005.¹⁰⁰ It provides that:

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

It is argued that mediation would be an appropriate way in which children could participate in judicial matters that affect them, since it provides them with a suitable forum in which they can vent their feelings while telling their stories so that they feel that they are being heard and understood.¹⁰¹ It is said that

including children in the mediation process . . . gives them a voice, it gives them rights, it gives them status, and mostly, it gives them a forum of asserting their personal and individual power. The implications of this are quite significant: implicit in the act of empowering children are the assumptions that children are to be heard, that their opinions are valid and valued, that they are esteemed as important persons along with their parents in the process of decision making, and that what they say will have a bearing upon and may influence the final decisions that are to be made.¹⁰²

Subsequently, mediators from around the world have slowly started to include children in the mediation process.¹⁰³ Studies of these child-inclusive family mediation practices delivered results that strongly support the inclusion of children in the mediation process.¹⁰⁴

5.4.1 Factors in determining whether a child should be included in mediation

There are various factors which have to be considered before a decision can be made to include children in the mediation process. In the first place, section 10 of the Children's Act make it clear that only children who are of such an age, maturity and stage of development that they are able to form well-informed views about separation issues should be included. For purposes of legal certainty, the legislator could

98 Art 12. This convention was adopted by the General Assembly of the UN on 20 November 1989 and ratified by SA on 16 June 1995.

99 Art 4(2) read with art 7. This charter came into force on 29 November 1999 and was ratified by SA on 7 January 2000. See chapter 14 below.

100 Section 10 came into operation on 1 July 2007: *GG* 30030 of 29 June 2007.

101 De Jong 'Giving children a voice in family separation issues: A case for mediation' 2008 *TSAR* 785 787 789.

102 Saposnek 'The value of children in mediation: A cross-cultural perspective' 1991 *Mediation Quarterly* 325, 331-332.

103 Kruk 1998 *Family and Conciliation Courts Review* 201; Saposnek 'Working with children' in Folberg, Milne & Salem (eds) *Divorce and Family Mediation—Models, Techniques, and Applications* 155-156; Powell 'Alternative dispute resolution: Family Court Mediation Pilot' 2005 *The New Zealand LJ* 85; Bracken 'Providing a comprehensive view of family mediation—Divorce and family mediation: Models, techniques and applications' 2005 *Journal of Law & Family Studies* 217 218.

104 Editorial 'Bringing children into divorce mediation' 2008 (May/June) *Psychotherapy Networker* 17-18; Sanchez & Kibler-Sanchez 2004 *Family Court Review* 557.

perhaps have determined seven years as the age by which children should be able to formulate meaningful opinions about issues impacting on their lives.¹⁰⁵ This viewpoint is supported by Sanchez and Kibler-Sanchez,¹⁰⁶ who developed an empowerment mediation model which includes school-aged children from seven to seventeen in the mediation process. Saposnek¹⁰⁷ appears to support this line of reasoning by stating that children under the age of five or six generally abide by the joint decisions of their parents and seldom need to be included in the mediation process, and further, that most adolescents should be interviewed because of their cognitive ability to formulate abstract plans, and the relative independence of their lives, and because they usually have clear preferences about how they wish to divide their time. Wolk¹⁰⁸ also feels it is especially important that mediators get the acquiescence of children in their teenage years.¹⁰⁹

As it is sometimes difficult to measure a child's maturity, mediators can use these guidelines regarding the ages of children. However, it is imperative that mediators should realise that the ultimate decision about whether to include children in the mediation process must be made individually, for each specific child in each specific case. This is so because there might be other indicators which either point to the desirability of including children or suggest that this would be completely undesirable. For example, in circumstances where it is clear that a child is struggling with a significant change in a parent's circumstances or that a parent has gained a child's loyalty and allegiance by undermining and sabotaging the child's relationship with the other parent, it would be valuable to include children of all ages in the mediation process.¹¹⁰ On the other hand, in circumstances where the parents are in agreement about their children's needs and share developmentally appropriate ideas as to what type of parenting plan would best suit them or where there is evidence of a prior history of child abuse, sexual abuse or molestation, domestic violence or flight, it would be pointless to include any children in the mediation process.¹¹¹

5.4.2 How to involve children in the mediation process

The emphasis in mediating with children should fall on determining and including their interests in final settlement agreements while limiting their involvement in ongoing conflict.¹¹² It is accordingly not necessary to include children in the mediation process from the beginning to the end. The mediator must decide which parts of the mediation the child should attend,¹¹³ although it appears that the best

105 Robinson & Ferreira 'Die reg van die kind om gehoor te word: Enkele verkennende perspektiewe op die VN Konvensie oor die Regte van die Kind (1989)' 2000 *De Jure* 54 58.

106 Sanchez & Kibler-Sanchez 2004 *Family Court Review* 556.

107 Saposnek in Folberg, Milne & Salem (eds) *Divorce and Family Mediation—Models, Techniques, and Applications* 159 160.

108 Wolk 'Divorce mediation: Today's rational alternative to litigation' 1996 *Dispute Resolution Journal* 39 40.

109 See also Zeps 'Interview: Child custody mediation' 2007 *The Journal of Contemporary Legal Issues* 241 243 who has no objection to older children participating in the mediation process.

110 De Jong 2008 *TSAR* 790.

111 *Ibid.*

112 Bracken 2005 *Journal of Law & Family Studies* 219.

113 Powell 2005 *The New Zealand LJ* 85.

integration of children's input is achieved when it is obtained early in the process.¹¹⁴ It is therefore advisable to schedule an initial meeting with the parents, children, grandparents, stepparents and possibly with new partners, if present, in order to provide them with an orientation to the mediation process and to assess whether it would be appropriate to include the children's perspectives in the procedures to be followed.¹¹⁵ The mediator needs to explain the benefits of family mediation for all involved¹¹⁶ to help reduce the stress that might be present. The mediator must also provide each party with pre-emptive information that addresses potential areas of conflict and educate the family about the concepts of self-determination¹¹⁷ and the best interests of the child.¹¹⁸ From the outset it must be emphasised that if the children are included in the mediation process they will not be required to make any decisions themselves. It will be up to the parents or the court to make the final decisions after considering any input on family separation issues from the children.¹¹⁹

If it appears that the children involved will be able to provide their input and that the parents will be able to deal meaningfully with that input, the children and the parents need to be properly prepared for an interview between the mediator and the children.¹²⁰ Parents must be reassured by the mediator that the interview will be conducted in a sensitive manner and that any preference expressed by a child will be placed in an appropriate developmental context within the particular dynamics of the parents' relationship. Parents must also be taught how to deal with the child's revelations, especially when such revelations are unfavourable to them. They should never criticise, become angry with, or subtly reject children because of their ideas and feelings. Furthermore, they should be made aware of the adverse effects of conflict and negativity on children. On the other hand, the children should, once again, be reassured by their parents and the mediator that they will not be asked to choose between their parents—they will merely be asked about their feelings regarding the arrangements for spending time with both parents.

Children can be interviewed individually where there are big age differences, their preferences vary or one child seems to be dominating the interview. They can also be interviewed with their siblings when they need each other's support or the mediator is faced with time constraints. They may even be interviewed together with one or both parents if it appears that parental presence and encouragement are necessary.¹²¹

Once the views of the children have been established, the mediator must plan the most effective way to convey such views to the parents. This can be done in a session with both parents, either with or without the children, or with each parent

114 Saposnek in Folberg, Milne & Salem (eds) *Divorce and Family Mediation—Models, Techniques, and Applications* (2004) 162.

115 Sanchez & Kibler-Sanchez 2004 *Family Court Review* 560 564.

116 See De Jong 2005 *THRHR* 96-99.

117 See para 5.2.2.2 above.

118 See para 5.2.2.9 above.

119 Bosman-Swanepoel, Fick & Strydom *Custody and Visitation Disputes: A Practical Guide* (1998) 89; Sanchez & Kibler-Sanchez 2004 *Family Court Review* 556.

120 Saposnek in Folberg, Milne & Salem (eds) *Divorce and Family Mediation—Models, Techniques, and Applications* 162-165.

121 Wolk 1996 *Dispute Resolution Journal* 40; Sanchez & Kibler-Sanchez 2004 *Family Court Review* 566; Saposnek in Folberg, Milne & Salem (eds) *Divorce and Family Mediation—Models, Techniques, and Applications* 164.

separately in order to allow face saving for a criticised parent or a parent who has presented erroneous perceptions of a child's views.¹²² After the children's views have been conveyed to them, the parents can proceed to negotiate a more child-sensitive and child-focused parenting plan or settlement.

5.4.3 Benefits of including children in the mediation process

Including children in the mediation process has numerous advantages for parents and children affected by family separation and for the judicial system in general. From research on child-inclusive mediation¹²³ it appears that the involvement of children in the mediation process changed the focus for the parents and helped them to behave like parents. Some parents, mostly fathers, said that feedback from the children had led to a direct change in their behaviours and actions in relation to their children, which they felt would not have occurred had the children not given their own input. Including children in the mediation process could also serve to reinforce parent's roles and direct them away from ongoing marital disputes.¹²⁴

There are also direct benefits for children in being involved in the mediation process. It lessens their stress and gives them a sense that they are able to make some input and exercise limited control when their lives feel totally out of control.¹²⁵ It also helps them to adjust emotionally to the separation and restructuring of the family.¹²⁶ In the research on child-inclusive mediation¹²⁷ the conclusions were that children experienced a sense of relief from 'off-loading', sharing, identifying solutions for coping with their parents' conflict, having their ideas, worries and questions heard and having this information conveyed to their parents. It has further been established that children can cope better with changes if they know and understand the reasons for them.

Advantages for the judicial system of child-inclusive mediation can be found in the fact that this model of mediation significantly dilutes parental conflict in general and consequently contributes to a decrease in the number of court applications on separation issues. Furthermore, as with adults, agreements into which children have had input are likely to work¹²⁸ and there is less chance of parties later requesting the courts to step in where the provisions of a separation order have not been met.¹²⁹ The fact that courts are kept less busy by separating couples saves them a lot of time

122 Bracken 2005 *Journal of Law & Family Studies* 219; Saposnek in Folberg, Milne & Salem *Divorce and Family Mediation—Models, Techniques, and Applications* 174; Sanchez & Kibler-Sanchez 2004 *Family Court Review* 561 568.

123 McIntosh 'Child-inclusive divorce mediation: Report on a qualitative research study' 2000 *Mediation Quarterly* 55 67.

124 Saposnek in Folberg, Milne & Salem (eds) *Divorce and Family Mediation—Models, Techniques, and Applications* 158.

125 Bracken 2005 *Journal of Law & Family Studies* 219.

126 Saposnek in Folberg, Milne & Salem (eds) *Divorce and Family Mediation—Models, Techniques, and Applications* 158.

127 McIntosh 2000 *Mediation Quarterly* 67.

128 Evers 'Children of the 21st century: Are they skilled in the art of negotiation?' 2005 *Alternative Dispute Resolution Journal* 116 122.

129 See De Jong 2005 *THRHR* 98.

and administrative work and allows judges to use their expertise and time to work on more complex cases.¹³⁰

5.5 THE WAY FORWARD

5.5.1 Effective provision of mediation services in different sectors

In terms of the Mediation in Certain Divorce Matters Act 24 of 1987, parties can only be referred to the public or court-connected mediation services offered by the office of the family advocate.¹³¹ However, in terms of the Children's Act, parties may be referred to public, private or community mediation services as provision is made for mediation by a family advocate, a social worker, a social service professional, another suitably qualified person or organisation or a lay forum, which includes a traditional authority.¹³² However, despite these provisions it is my considered opinion that whenever mediation is mandatory, parties should first be referred for private mediation, for which they would have to pay. However, if financial, cultural or other logistical considerations justify it, parties may be referred to state-subsidised community or public mediation services.¹³³ Such an approach acknowledges the principle that parties must accept responsibility for their own actions, and would also avoid unnecessary state expenditure. We must, however, be careful not to allow two competing mediation systems to develop—one for the rich and one for the poor.

5.5.2 Accreditation of mediators from all sectors

Therefore, although mediation should continue to be offered in different sectors, a comprehensive South African approach to mediation in a family law context should be developed. In terms of such an approach, all mediators would have to be accredited by a national regulatory body, such as the recently established umbrella body SANCOM.¹³⁴ The requirements for accreditation should include

- (a) basic training in family mediation of at least forty hours;
- (b) sufficient experience in family mediation, or in lieu thereof, mentoring and supervised opportunities to be arranged for less experienced mediators;
- (c) ongoing training which should include refresher and more advanced courses; and
- (d) regular engagement in self-assessment and participation in programmes of peer consultation.¹³⁵

130 Faris 'Exploiting the alternatives in alternative dispute resolution' 1994 *De Jure* 331 339; Rogers & Palmer 2000 *St Mary's LJ* 875.

131 See para 5.3.1 above.

132 See paras 5.3.2.1 and 5.3.2.2 above.

133 De Jong 2005 *TSAR* 44.

134 The South African National Council of Mediators.

135 Jessani & James 2006 *American Journal of Family Law* 184; Dewdney 2009 *Australasian Dispute Resolution Journal* 23; Pera in Wardle & Williams (eds) *Family Law: Balancing Interests and Pursuing Priorities* 635; Smith 2002 *The Colorado Lawyer* 75; Folberg, Milne & Salem *Divorce and Family Mediation—Models, Techniques, and Applications* 19.

The accreditation requirements should be kept current and responsive to theoretical and methodological developments in the field.¹³⁶ At present, for example, professional qualifications in the behavioural sciences or law should not be made mandatory as such a requirement would disqualify too many community mediators, whose valuable contributions we cannot afford to lose. However, legislation would probably be necessary to get all of these mediators to comply with the accreditation requirements. Furthermore, mediators who do not comply with the accreditation requirements should be prohibited from facilitating negotiations in the midst of family violence or child abuse.¹³⁷

5.5.3 Basic family mediation training courses

It should be acknowledged that mediators come from diverse disciplinary backgrounds, and the basic family mediation training courses should focus on a wide variety of aspects such as:

- (a) family and child development;
- (b) the impact of family conflict on parents, children and other participants;
- (c) family law and divorce procedures;
- (d) the fundamental aspects of family mediation;
- (e) the mediation process, with specific reference to the techniques and strategies to be used by mediators;
- (f) interviewing skills, with special focus on the unique language and thinking patterns of children;
- (g) the ways in which the suitability of family disputes for mediation can be assessed;
- (h) family finances;
- (i) community resources and referral possibilities that might be available to assist parents and children to cope better with the many difficulties of child-centred or other family disputes; and
- (j) issues like multiculturalism and family violence or abuse.¹³⁸

Depending on the specific skills of the mediators in training, the main focus of the training courses would vary from course to course. Lawyer-mediators, for example, would have to spend a lot of time on family and child development, the impact of family conflict on parents, children and other participants and their interviewing skills if they would like to include children in the mediation process.

¹³⁶ English & Neilson 'Certifying mediators' in Folberg, Milne & Salem (eds) *Divorce and Family Mediation— Models, Techniques, and Applications* (2004) 508.

¹³⁷ See para 5.3.2.2 above.

¹³⁸ Folberg, Milne & Salem *Divorce and Family Mediation—Models, Techniques, and Applications* 29-126, Jessani & James 2006 *American Journal of Family Law* 183; Smith 2002 *The Colorado Lawyer* 70; Charlton & Dewdney *The Mediator's Handbook: Skills and Strategies for Practitioners* (1995) 3-118; De Jong 2008 *TSAR* 793; Goldberg 1998 *TSAR* 754; Moodley 1994 *CILSA* 51; Landau 'OAFM, standards for assessing presence of abuse and whether mediation may be appropriate' 1996 (Nov) *SAAM News* 7-8.

5.5.4 Protection of mediators as well as the parties involved in mediation

In order to ensure mediation services of the highest standard and to protect the parties and children concerned as well as the mediator, it is further essential that the national regulatory body should develop uniform minimum standards for the mediation process and the practice of mediation.¹³⁹ As regards the mediation process, guidelines need to be laid down to regulate matters such as the number of sessions over which the process should run, the involvement of children and other relevant players in the mediation process, the way in which agreements reached in the mediation process should be recorded and the way in which mediators are required to report back to the court once the mediation process has run its course. Regarding the practice of mediation, mediators must be required, inter alia, to comply with certain basic rules of fairness and reasonableness, to treat all parties with respect, to act without any sexual, religious or cultural prejudice, to redress any power imbalance between parties by strengthening and supporting the weaker party, to thoroughly investigate all allegations of family violence or child abuse and caucus with parties if necessary, and to ensure that all decisions made about children are always in their best interests. These standards for the mediation process and the practice of mediation should further be re-evaluated from time to time so as to avoid rigidity.¹⁴⁰

To further provide protection for parties and increase public confidence in the evolving family mediation industry it is also essential to have proper grievance procedures in place.¹⁴¹ In terms of such procedures parties should be able to lay complaints with the national regulatory body about alleged violations of the process and practice standards set for mediators. The process of developing a mediator grievance procedure must, however, recognise the various styles and the broad range of applications of the mediation process in various sectors.¹⁴² Furthermore, disciplinary measures that might be taken against mediators should be both corrective and supportive in enhancing mediator skills.¹⁴³

5.5.5 Public education

It is crucial that parties and prospective parties should be informed about the process and practice standards set for mediators¹⁴⁴ and educated about mediation in general. Children also need to be educated about mediation. In this regard, the Africa Centre for Dispute Settlement attached to the Graduate School of Business at Stellenbosch University has recently embarked on the development of a schools mediation project. It entails a programme of peer-mediation training, through which learners, teachers and parents are taught mediation skills. The programme aims to engender an

139 Goldberg 1998 *TSAR* 749; Rogers & Palmer 2000 *St Mary's LJ* 947; Smith 2002 *The Colorado Lawyer* 69; Shepard 'The model standards of practice for family and divorce mediation' in Folberg, Milne & Salem (eds) *Divorce and Family Mediation—Models, Techniques, and Applications* (2004) 516.

140 Goldberg 1998 *TSAR* 750.

141 Levy & Mowatt 1991 *De Jure* 76; Rogers & Palmer 2000 *St Mary's LJ* 946-947; Charlton 'Practical realities in dispute resolution' 2009 *Australasian Dispute Resolution Journal* 10 15.

142 That is the public sector, the private sector and the community sector.

143 Rogers & Palmer 2000 *St Mary's LJ* 947.

144 See para 5.5.4 above.

environment within schools and the communities they serve where mediation would be considered to be the preferred method of handling differences and disputes.¹⁴⁵ The pilot phase of the programme was implemented in Delft in January 2009 and is supported by the Western Cape Education Department. It is sincerely hoped that the national regulatory body will endorse this initiative and see to it that this commendable project is launched nationally at all primary and secondary schools across the country. This project would promote a culture shift regarding the way people set about solving child-centred and other family disputes.

¹⁴⁵ Morris 'Peer-mediation project is talk of the town' 24 August 2009 *Monday Paper* <http://www.uct.ac.za/mondaypaper/archives/?id=7648> (accessed 8 September 2009).