

A pragmatic look at mediation as an alternative to divorce litigation*

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1 Background

Marriages in South Africa are breaking up at an alarming rate. According to the latest divorce statistics released by Statistics South Africa, approximately 31 000 divorces were recorded in 2006.¹ The implications are that over 60 000 adults and approximately 31 000 children² were directly affected by divorce in that year. But these statistics only reflect half the picture. It should be borne in mind that many people in South Africa choose not to get married in terms of the Marriage Act,³ the Recognition of Customary Marriages Act⁴ or the recently enacted Civil Union Act,⁵ preferring instead to cohabit informally for an indefinite period. Then there are those who “marry” in terms of religious systems not recognised by our law. Many of these unions break down as well, but they are not included in the official divorce statistics. It would therefore be true to say that virtually everybody is affected by divorce or family breakdown – either we have experienced its trauma first hand or we have shared it with a close friend, family member or colleague.

From time to time the news media carry reports on new studies on the levels of stress caused by various life events and divorce or family separation is always near the top of the list.⁶ During the divorce process parties experience extreme emotional and physical distress, which often manifests as insomnia, depression, weight loss and panic attacks.⁷ Much of this stress comes from the need to reorganise daily tasks and parental responsibilities, the loss of significant relationships and possessions, and the need to establish a new identity as an individual.⁸

The fact is that divorce or family breakdown is a multidimensional occurrence which requires psychological no less than legal intervention.⁹

* This article is based on the author’s inaugural lecture presented on 4 August 2009 at Unisa.

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¹ Statistics South Africa *Stats in brief 2008* (2008) 10 (Table 2.2).

² Statistics South Africa (n 1) 11 (Table 2.3).

³ 25 of 1961.

⁴ 120 of 1998.

⁵ 17 of 2006.

⁶ *Divorce Stinks* <http://divorceinfo.com/divorcestinks.htm> (14-06-2009); Wikipedia *Holmes and Rahe stress scale* http://en.wikipedia.org/wiki/Holmes_and_Rahe_stress_scale (14-06-2009); see also Bryant and 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* 93 108 which states that family litigation can be extremely emotionally distressing.

⁷ Bryant and Faulks (n 6) 95.

⁸ National Network for Child Care *Divorce Matters Coping with Stress and Change* <http://www.nncc.org/Parent/copestress.html> (14-06-2009).

⁹ Bryant and Faulks (n 6) 95; Folberg, Milne and Salem *Divorce and Family Mediation – Models, Techniques, and Applications* (2004) 5; McEwen, Mather and Maiman “Lawyers, mediation and the management of divorce practice” 1994 *Law and Society Review* 149 169.

2 *Negative effects of the adversarial system of litigation in family matters*

The problem is, however, that attorneys are often caught in the trap of viewing divorce solely as a legal event.¹⁰ As attorneys and advocates are schooled in the adversarial system of litigation, when they deal with divorces it is all about tactics, representing only their client's best interests and subscribing to a "winner-takes-all" mentality.¹¹

One of the speakers at a recent seminar on divorce presented by the Law Society of South Africa, without batting an eyelid, instructed attendees that their first advice to new male divorce clients should be to dissipate their assets as soon as possible, and that their advice to female clients should be to make copies of every document in the household without delay. Recently, I also attended a workshop on the new Children's Act¹² at an attorneys' firm, where another renowned attorney, upon being asked why his clients are so emotionally battered after a divorce, bluntly answered: "I'm sorry, but the blood must flow."

Understandably, many writers in this field claim that some spouses or family members use the court room as a battleground.¹³ In adversarial litigation, divorcing 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.¹⁴ As such the adversarial system of litigation has the potential to undermine communication and to create hostility and rigid position-taking by parties.¹⁵ 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.¹⁶ Other complaints about the system are that it is too lengthy, too formal and too intricate.¹⁷ At a time when people are going through a very rough period in their lives, 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 divorcing parties, a situation which is particularly detrimental to any children involved.¹⁸

Children often become the centre of their parents' disputes over everything, ranging from medical treatment to the Christmas holidays.¹⁹ It is generally accepted that

¹⁰ Folberg, Milne and Salem (n 9) 4; Lind "The changing face of divorce (1): background" 1989 *Businessman's Law* 149 152; Grobler "The Mediation in Certain Divorce Matters Act, 1987" 1990 *Consultus* 133.

¹¹ Schäfer "The role of the attorney in the divorce process" 1984 *De Rebus* 16 18; Bryant and Faulks (n 6) 97; Folberg, Milne and Salem (n 9) 4.

¹² 38 of 2005.

¹³ 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 Law Review* 425 426.

¹⁴ Pera "Family Mediation in Italy: Bills and ideal model (especially for the 'de facto' couple)" in Wardle and Williams (eds) *Family Law Balancing Interests and Pursuing Priorities* (2007) 630; Cooper and Brandon "How can family lawyers effectively represent their clients in mediation and conciliation processes?" 2007 *Australian Journal of Family Law* 288 290-291.

¹⁵ Crush "When mediation fails child protection: lessons for the future" 2007 *Canadian Journal of Family Law* 55 66.

¹⁶ Cooper and Brandon (n 14) 290; Walker "Family mediation" in MacFarlane (ed) *Rethinking Disputes The Mediation Alternative* (1997) 58.

¹⁷ Payne (n 13) 676; Walker (n 16) 81.

¹⁸ 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.

¹⁹ Beyer "A pragmatic look at mediation and collaborative law as alternatives to family law litigation" 2008 *St Mary's Law Journal* 303 304.

the nature and intensity of these disputes can heavily undermine parenting abilities and cause significant stress to children.²⁰

In addition, as people want more freedom and autonomy today, they are increasingly dissatisfied with paternalistic decisions that are forced upon them by our courts – they would like to make their own decisions on matters that directly affect them.²¹ Because of their intimate knowledge of the relevant circumstances, the parties themselves are in fact best equipped to make decisions about these issues.²²

3 *The mediation alternative*

3.1 Introduction

The time has come for a new or alternative approach to the resolution of divorce and other family disputes.²³ To obviate the problems caused by divorce litigation, a variety of alternative dispute resolution methods have been developed, of which mediation in particular is in great demand.²⁴

Mediation is said to be a way of helping parties to negotiate agreements and re-negotiate relationships in a more adaptive way than adversarial procedures,²⁵ since the mediation process attempts to unite the parties in seeking solutions and in recognising that the responsibility of caring for their children may require them to have ongoing contact for some years to come.²⁶

3.2 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 separating parties with the object of getting them back on speaking terms and helping them to reach a mutually satisfactory 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, pri-

²⁰ Draskic “Family mediation” in Wardle and Williams (n 14) 533.

²¹ Scott-Macnab and Mowatt “Mediation and arbitration as alternative procedures in maintenance and custody disputes in the event of divorce” 1986 *De Jure* 313 322, 324; Cohen “Mediation: giving law a human face” 1992 *De Rebus* 126; Moodley “Mediation: the increasing necessity of incorporating cultural values and systems of empowerment” 1994 *CILSA* 44; Mnookin and Kornhauser “Bargaining in the shadow of the law: the case of divorce” 1979 *Yale Law Journal* 950 952-958.

²² Mnookin and Kornhauser (n 21) 957-958; Hoffman “Divorce mediation: an approach to family conflict resolution” 1987 *Social Work Practice* 8 10; Jessani “A step-by-step approach to the divorce mediation process: from soup to nuts” 2002 *American Journal of Family Law* 118 119.

²³ Mowatt “The Mediation in Certain Divorce Matters Act 1987: news, but nothing new” 1987 *De Rebus* 611 612; Scott-Macnab “Mediation – the procedure of the future” 1989 *De Rebus* 211 213.

²⁴ 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 (n 19) 309; Kronby “Alternative dispute resolution: Balancing public policies and private interests” in Wardle and Williams (n 14) 566; Koen, Saccuzzo and Johnson “Custody mediation in violent and nonviolent families: pitfalls and perils” 2006 *American Journal of Family Law* 253.

²⁵ 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.

²⁶ Hoening “Divorce mediation basics” 1997 *The Practical Lawyer* 39 40; Koen, Saccuzzo and Johnson (n 24) 254.

orienting, mutualising, neutralising, hypothesising, role reversal, option generation, and reality testing.²⁷

Mediation is sometimes also described as a series of stages,²⁸ which usually include the following:²⁹

- i 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;
- ii 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;
- iii 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;
- iv 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; and
- v the contracting stage, where the results of the negotiation and settlement phases are put in writing and the parties sign the settlement agreement.

3.3 The features of mediation

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

3.3.1 The mediator must be impartial

The mediator does not take sides or favour the position of one party over the other.³⁰ The mediator must also ensure that one party is not disadvantaged by the other through intimidation or threats.³¹ 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.³²

Furthermore, to ensure impartiality, a mediator should only give the parties legal information as opposed to legal advice,³³ and should never try to act as a therapist by analysing past behaviour.³⁴

²⁷ Charlton and Dewdney *The Mediator's Handbook Skills and Strategies for Practitioners* (1995) 123-126.

²⁸ Folberg, Milne and Salem (n 9) 9.

²⁹ Goldberg "Practical and ethical concerns in alternative dispute resolution in general and family and divorce mediation in particular" 1998 *TSAR* 748; Rogers and Palmer "A speaking analysis of ADR legislation for the divorce neutral" 2000 *St Mary's Law Journal* 871 893; Jessani (n 22) 119; Beyer (n 19) 312; Walker (n 16) 67-70.

³⁰ Smith "Mediating with handkerchiefs: the new model standards for divorce mediation" 2002 *The Colorado Lawyer* 69 72.

³¹ Draskic (n 20) 535.

³² Draskic (n 20) 536.

³³ Draskic (n 20) 536.

³⁴ Folberg, Milne and Salem (n 9) 8.

3.3.2 Mediation increases self-determination

Mediation allows divorcing parties greater control over the consequences of their divorce, as it is up to them to reach their own joint decisions³⁵ – 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.³⁶

3.3.3 Mediation is a multi-disciplinary process characterised by a co-operative relationship between law and psychology

Inherent in mediation is a clear intention to synthesise behavioural sciences and law to improve the psychological functioning of separating couples in ways that promote their own and their children's best interests.³⁷ 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.³⁸ As such, mediation reduces the emotional costs associated with divorce.³⁹

In addition, mediators should always advise parties to seek independent information and advice from a variety of professionals, such as attorneys, advocates, accountants, therapists or counsellors, during the mediation process.⁴⁰

3.3.4 Mediation is a private and informal process

Mediation is not bound by the rules of procedure that dominate the adversarial system of litigation.⁴¹ It is a simple process that people can understand and in which they can fully participate.⁴² 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.⁴³ The mediation process can further be adapted according to the context of the dispute and the needs of the parties concerned.⁴⁴ It is also capable of accommodating different cultural value systems and/or religious convictions.⁴⁵ Further, specific customs, practices and perspectives can easily be built into the mediation process.⁴⁶ Mediation can therefore achieve a desirable solution that is not within the competence of a court to

³⁵ McEwen, Rogers and Maiman "Bring in the lawyers: challenging the dominant approaches to ensuring fairness in divorce mediation" 1995 *Minnesota Law Review* 1317 1319; Greatbatch and Dingwall "The marginalization of domestic violence in divorce mediation" 1999 *International Journal of Law, Policy and the Family* 174.

³⁶ Folberg, Milne and Salem (n 9) 6-8; Draskic (n 20) 543.

³⁷ Bryant and Faulks (n 6) 96.

³⁸ De Jong "Judicial stamp of approval for divorce and family mediation in South Africa" 2005 *THRHR* 95 97.

³⁹ Smith (n 30) 70.

⁴⁰ Smith (n 30) 70-71; Draskic (n 20) 536.

⁴¹ Folberg, Milne and Salem (n 9) 8.

⁴² De Jong (n 38) 97.

⁴³ Beyer (n 19) 307.

⁴⁴ Faris *An Analysis of the Theory and Principles of Alternative Dispute Resolution* (1995 thesis SA) 168-170.

⁴⁵ Goldberg (n 29) 755.

⁴⁶ Moodley (n 21) 46-48.

order. Furthermore, settlements can be reached in noticeably less time than through the traditional court process.⁴⁷

3.3.5 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.⁴⁸ Because of its flexibility, various forms of mediation have evolved, namely:

- i facilitative or non-directive mediation, where mediators merely facilitate the negotiations or communication between parties;⁴⁹
- ii evaluative or directive mediation, where the mediator plays a more active role in the decision-making process;⁵⁰
- iii transformative mediation, where the emphasis is on changing the dispute from a negative or destructive one into a more positive and growth-oriented approach;⁵¹
- iv activist mediation, which attempts to ensure that parties are protected in the case of unbalanced power relationships or in the presence of domestic violence;⁵²
- v multi-generational mediation, which entails mediation with the extended family;⁵³
- vi 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 family law.⁵⁴

3.3.6 Discussions in mediation are confidential to the extent permitted by the law⁵⁵

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.⁵⁶ 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.⁵⁷

⁴⁷ Kronby (n 24) 568; Peeples, Reynolds and Harris “It’s the conflict, stupid: an empirical study of factors that inhibit successful mediation in high-conflict custody cases” 2008 *Wake Forest Law Review* 505 513, 528.

⁴⁸ Beyer (n 19) 311, 314.

⁴⁹ Cooper and Brandon (n 14) 293; Brock and Saks *Contemporary Issues in Family Law and Mental Health* (2008) 9.

⁵⁰ Brock and Saks (n 49) 11.

⁵¹ Folberg, Milne and Salem (n 9) 16; Beyer (n 19) 313.

⁵² Aldana and Saucedo “The illusion of transformative conflict resolution: mediating domestic violence in Nicaragua” 2008 *Buffalo Law Review* 1261 1322.

⁵³ Kruk “Practice issues, strategies, and models: the current state of the art of family mediation” 1998 *Family and Conciliation Courts Review* 195 207.

⁵⁴ Cooper and Brandon (n 14) 292-293.

⁵⁵ Dewdney “The partial loss of voluntariness and confidentiality in mediation” 2009 *Australasian Dispute Resolution Journal* 17 18; Smith (n 30) 73.

⁵⁶ Faris (n 44) 183; Dewdney (n 55) 20; Folberg, Milne and Salem (n 9) 8.

⁵⁷ Goldberg (n 29) 751; Rogers and Palmer (n 29) 876 878 881 917.

3.3.7 Mediation is future-oriented⁵⁸

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.⁵⁹ It is apparent that a process of this nature, which helps the parties to reach a mutually satisfactory agreement and provides them with a framework for resolving future disputes on their own,⁶⁰ cannot fail to cut litigation and court costs for both the parties and the judicial system.⁶¹

3.3.8 Mediation operates in the shadow of the law⁶²

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.⁶³

It is therefore clear that it is by no means the intention to side-step attorneys in the mediation process. In all different forms of mediation attorneys still have an important role to play, albeit a less adversarial role.⁶⁴ Besides giving legal advice to their clients, it is very important for the attorneys representing the divorcing parties to review any agreement reached in the mediation process.⁶⁵ The attorneys should, however, be mediation-friendly attorneys who are sensitive to mediated agreements and who follow an interest-based instead of a positional approach.⁶⁶ Attorneys could also themselves engage in family mediation as they look for less adversarial ways to practise family law.⁶⁷

3.3.9 Mediation promotes the best interests of children

Legal literature often refers to the fact that mediation focuses on the best interests of children.⁶⁸ 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 Africa⁶⁹ and section 9 of the Children's Act⁷⁰ place an obligation on the

⁵⁸ McIsaac "Focus on family and divorce mediation" 2001 *Family Court Review* 405 406.

⁵⁹ Pearson and 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 Review* 405 406.

⁶⁰ Hoening (n 26) 40; Emery *et al* (n 25) 323; McIsaac (n 58) 405; Jessani and James "Mediators and parenting coordinators: comparing and contrasting – 20 questions/40 answers" 2006 *American Journal of Family Law* 180 182.

⁶¹ McIsaac (n 58) 406.

⁶² Levy and 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.

⁶³ Mnookin and Kornhauser (n 21) 950 call it "bargaining in the shadow of the law".

⁶⁴ Cooper and Brandon (n 14) 288.

⁶⁵ Smith (n 30) 73; Jessani and James (n 60) 181; Folberg, Milne and Salem (n 9) 9 295 297 305.

⁶⁶ Jessani and James (n 60) 182; Cooper and Brandon (n 14) 305.

⁶⁷ Folberg, Milne and Salem (n 9) 12.

⁶⁸ De Jong (n 38) 98.

⁶⁹ of 1996.

⁷⁰ 38 of 2005.

mediator, among others, to see to it that 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, 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.⁷¹ As mediation teaches divorced spouses to get along better, it also improves the likelihood of children maintaining a meaningful relationship with both parents after the divorce and consequently minimises potential psychological injury to children.⁷²

3.3.10 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.

3.4 Exceptions and cautions

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:⁷³

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

Although mediation has been shown to be a worthwhile endeavour and to be successful in the majority of situations in which it is attempted,⁷⁴ one should be careful not to exaggerate the advantages of mediation and to oversell the process on the basis of a win/win situation.⁷⁵ It must be recognised that the majority of cases in which a settlement is reached involve compromises with which neither side is completely happy.

⁷¹ Kelly "Mediated and adversarial divorce resolution processes" 1991 *Family Law Practice* 382 386-387.

⁷² Draskic (n 20) 533-534.

⁷³ Cooper and Brandon (n 14) 296 297; Beyer (n 19) 310; Peebles, Reynolds and Harris (n 47) 529; Koen, Saccuzzo and Johnson (n 24) 254 260; Smith (n 30) 71, 74; 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 44 n 64.

⁷⁴ Beyer (n 19) 315.

⁷⁵ Charlton "Practical realities in dispute resolution" 2009 *Australasian Dispute Resolution Journal* 10 11.

3.5 Worldwide trend towards making mediation mandatory in family matters

Despite the fact that mediation is not suitable or completely satisfactory in all cases, there is an ever-increasing awareness worldwide of the vital role it plays in the resolution of family disputes. From a brief survey of various legal systems across the globe, it appears that the trend is towards making mediation mandatory.⁷⁶

3.5.1 Anglo-American legal systems

Anglo-American legal systems have been most aggressive in their embrace of family mediation in the past few decades.

In Australia, for example, mandatory mediation in parenting matters was recently introduced into the Family Law Act on 1 July 2007.⁷⁷ In terms of section 60(I) of this act a court is prevented from hearing an application relating to children unless a certificate from a family dispute resolution practitioner is also filed.⁷⁸ 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.⁷⁹ A certificate is, however, not required in circumstances where a history or threat of family violence or child abuse has been established.⁸⁰

In New Zealand, a form of mandatory mediation has been in existence in divorce and children's matters since the early eighties. In terms of section 10 of the Family Proceedings Act⁸¹ parties who have already applied for a divorce, maintenance or the custody of a child can be compelled by the court against their will to undergo counselling with a court-appointed counsellor. Counselling in New Zealand, however, is really a form of mediation rather than counselling in the traditional sense of the word.⁸² In other words, counselling not only relates to the improvement of communication and/or relationships between spouses or between spouses and children, but also specifically has to do with resolving or reducing the issues in dispute between the parties. The presence of domestic violence is apparently not regarded as a bar to mandatory referral to mediation. However, under such circumstances the caucus method of mediation⁸³ may be utilised.⁸⁴

In the United States of America thirty-nine of fifty states have already enacted mediation statutes that either mandate mediation or grant the court the discretion to order mediation in divorces, most notably when custody or support issues are involved.⁸⁵ Mediation is rapidly becoming a required step in divorce proceedings to help reduce the time and tensions associated with the process.⁸⁶ In most states that

⁷⁶ Ayrapetova "Mandatory divorce mediation program passed in Utah" 2005 *Journal of Law and Family Studies* 417 419; Tondo "Mediation trends – a survey of the states" 2001 *Family Court Review* 431 432; Draskic (n 20) 533.

⁷⁷ The Family Law Amendment (Shared Parental Responsibility) Act 46 of 2006 *inter alia* introduced s 60I in the Family Law Act 59 of 1975. See also Charlton (n 75) 14.

⁷⁸ s 60(I)(7).

⁷⁹ s 60(I)(8).

⁸⁰ s 60(I)(9).

⁸¹ 84 of 1980.

⁸² De Jong "International trends in family mediation – are we still on track?" 2008 *THRHR* 454 461; New Zealand Law Commission *Family Court Dispute Resolution* (2002) 75-76.

⁸³ Where the parties are seen separately by the mediator.

⁸⁴ New Zealand Law Commission (n 82) 24. See also s 12A of the Family Proceedings Act 94 of 1980.

⁸⁵ Saccuzzo (n 13) 426 429; Tondo (n 76) 433; Folberg, Milne and Salem (n 9) 5; De Jong (n 82) 463-464.

⁸⁶ Ayrapetova (n 76) 417; Hoenig (n 26) 40.

have mediation statutes, mediation is, however, still used at the court's discretion⁸⁷ and there seems to be a national trend towards making it mandatory to consider alternative dispute resolution, specifically mediation.⁸⁸ Although most states will not refer cases to mediation in which domestic violence has as much as been alleged,⁸⁹ there are a few states, of which California is the prime example, that mandate mediation in custody disputes, but have no provision for exclusion in the presence of domestic violence.⁹⁰

3.5.2 European-continental legal systems

Since the beginning of the new millennium the European Union has been very supportive of mediation in civil and commercial matters⁹¹ and this enthusiasm for mediation, especially family mediation, has permeated through to member states.

In Austria and Belgium general acts regulating mediation were enacted. The Austrian Federal Act on Mediation in Civil Matters⁹² came into operation on 1 March 2004⁹³ and established the legal framework for mediation in all private law areas, including family law. The Belgian Judicial Code⁹⁴ was amended in February 2005⁹⁵ so as to introduce mediation into the Judicial Code as an all-purpose tool for the resolution of all civil and commercial disputes. These acts deal with aspects such as the training, qualifications and certification of mediators, the confidentiality of mediation proceedings, the transformation of mediation agreements into enforceable agreements and the suspension of periods of prescription related to the rights and duties which are dealt with in mediation proceedings,⁹⁶ but they do not mandate mediation.

In Norway, however, mediation has been mandatory for a number of years. In terms of the Marriage Act,⁹⁷ spouses with children under the age of 16 years must attend mediation before a separation or divorce case can go forward.⁹⁸ In the same way, the Children Act⁹⁹ provides that parents or cohabiting couples with children under the age of sixteen years must attend mediation before an action concerning parental responsibility, daily care or right of access can be brought.¹⁰⁰ The purpose of the mandatory mediation is to assist spouses, parents or cohabiting couples to arrive at an agreement concerning parental responsibility, access rights and the permanent residence of children.¹⁰¹ However, spouses, parents or cohabiting couples may be excused from mediation where compelling reasons prevent them from at-

⁸⁷ Tondo (n 76) 433.

⁸⁸ Hoenig (n 26) 41.

⁸⁹ Becker "Representing parties in private divorce mediation" 2001 *Trial* 59 63; Tondo (n 76) 433.

⁹⁰ Saccuzzo (n 13) 433-434.

⁹¹ Welsh "The future of mediation: court-connected mediation in the U.S. and the Netherlands compared" 2007 *Forum voor Conflictmanagement Binnenwerk* 19.

⁹² *Bundesgesetz über Mediation in Zivilrechtssachen* (BGBl 6 Jun 2003, Nr 29).

⁹³ Casals "Divorce mediation in Europe: an introductory outline" 2005 *Electronic Journal of Comparative Law* par 2.4.4.1 <http://www.ejcl.org/92/art92-2.html> (12-11-2009).

⁹⁴ *Code Judiciaire*.

⁹⁵ Casals (n 93) par 2.4.4.2.

⁹⁶ Casals (n 93) par 2.4.4.1 and 2.4.4.2.

⁹⁷ 27 of 4 July 1991.

⁹⁸ s 26.

⁹⁹ 7 of 8 April 1981.

¹⁰⁰ s 51.

¹⁰¹ Sverdrup "Norway Report concerning the CEFL questionnaire on grounds for divorce and maintenance between former spouses" <http://www.law.uu.nl/prov/cefl> (9-11-2009). See also s 26 of Act 27 of 4 July 1991 and s 52 of Act 7 of 8 April 1981.

tending.¹⁰² Such reasons include circumstances where a divorce is being sought on the grounds of abuse or where a marriage is dissolved because it was entered into by close relatives or because of bigamy.¹⁰³ When an attempt at mediation has been made, the mediator will issue a certificate of mediation,¹⁰⁴ which must be enclosed with documents initiating formal court proceedings.

Another European country where mediation seems to have become mandatory quite recently is the Netherlands. Following various court-encouraged mediation experiments which were conducted under the guidance of the ministry of justice and which offered state-subsidised voluntary mediation before or during divorce proceedings,¹⁰⁵ mandatory mediation in divorce and parenting matters was effectively introduced into the Dutch Civil Procedural Code¹⁰⁶ on 1 March 2009.¹⁰⁷ In terms of section 815(2) of the Dutch Civil Procedural Code, a divorce summons must contain a parenting plan¹⁰⁸ in which spouses should set out their agreed-upon arrangements with regard to their children.¹⁰⁹ In the parenting plan they should also set out the matters on which agreement could not be reached.¹¹⁰ In addition, section 818(2) now provides that a judge may refer spouses to a mediator to enable them to reach agreement on one or more of the consequences of their divorce if this appears to be necessary from the divorce summons or the proceedings in court. If such a referral is made where spouses, for example, indicated in their parenting plan that they could not agree on certain aspects, they would have no choice but to attend mediation. A logical interpretation of the new provisions of the Dutch Civil Procedural Code is therefore that mediation has become mandatory in the discretion of the court.

3.5.3 Far Eastern legal systems

In many Far Eastern countries, the mediation process is the cornerstone of the entire legal system. Disputes, including family disputes, are to be resolved in such a way as to preserve harmonious relationships and to restore peace and tranquillity.¹¹¹

In Japan, for example, court-connected mediation is an integral part of the judicial process. Court-connected mediation in family court cases¹¹² is mandatory in terms

¹⁰² Sverdrup (n 101).

¹⁰³ s 26 of Act 27 of 4 July 1991.

¹⁰⁴ s 26 of Act 27 of 4 July 1991 and s 54 of Act 7 of 8 April 1981.

¹⁰⁵ Niemeijer "Court-based mediation in the Netherlands research, evaluation, and future expectations" (paper presented at the annual meeting of The Law and Society Association on 27-05-2004) http://www.allacademic.com/meta/p117443_index.html (10-11-2009); Boele-Woelki, Cherednychenko and Coenraad "The Netherlands Report concerning the CEFL questionnaire on grounds for divorce and maintenance between former spouses" <http://www.law.uu.nl/prov/cefl> (9-11-2009).

¹⁰⁶ *Wetboek van Burgerlijke Rechtsvordering*.

¹⁰⁷ *Wet van 27 november 2008 tot wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering in verband met het bevorderen van voortgezet ouderschap na scheiding en het afschaffen van de mogelijkheid tot het omzetten van een huwelijk in een geregistreerd partnerschap*. This act introduced new subsections, *inter alia*, in s 815 and 818 of the Dutch Civil Procedural Code.

¹⁰⁸ Referred to as an *ouderschapsplan*.

¹⁰⁹ s 815(3).

¹¹⁰ s 815(4).

¹¹¹ Huang "Court mediation in China, past and present" 2006 *Modern China* 275 278; Leving *Fathers' Rights* (1998) 93.

¹¹² Referred to as *kaji chotei*.

of articles 17 and 18 of Japan's Code of Civil Procedure.¹¹³ It involves a compulsory pre-litigation procedure where the family court appoints a mediation committee, comprising a judge and two non-judge mediators, to assist the parties to devise their own solutions for the issues in dispute.¹¹⁴ Mediators may, however, declare a matter unsuitable for court-connected mediation where it would be improper to mediate or where a party has requested court-connected mediation unreasonably.¹¹⁵ A party who fails to attend the mediation without being officially excused can be penalised by the imposition of a fine of up to 50 000 Yen.¹¹⁶

Very similarly in China, article 32 of the Marriage Law¹¹⁷ stipulates that “[i]n dealing with a divorce case, the people’s court should carry out mediation between the parties”. Mediation in China is essentially court-based and judges play a substantial role in bringing opposing spouses to agreement.¹¹⁸ It appears that judges have sole discretion to decide whether to mediate first or proceed to adjudication immediately.¹¹⁹

3.5.4 African legal systems

On the African continent, mediation has always been an essential part of the historic tradition of African families and society.¹²⁰ In African culture mediation is mandatory and upon family breakdown negotiations between families are mandatory.¹²¹ It is therefore not really a question of moving towards mandatory mediation in family matters in African countries. Rather, the trend is towards formally recognising the variety of traditional dispute resolution mechanisms that have already existed for centuries and still coexist with the official state law that was introduced into these countries under colonial occupation.¹²² In Benin in West Africa and the Republic of Congo in Central Africa, for example, traditional dispute resolution methods have been integrated into the procedures of the formal judiciary through specialised conciliation tribunals.¹²³ And in Kenya in East Africa a court-mandated mediation scheme has been developed, which is currently with the attorney-general for enactment.¹²⁴

¹¹³ Funken “Comparative dispute management: court-connected mediation in Japan and Germany” 2002 *German Law Journal* 1 3; IBLs Editorial Board *Mediation in Japan* <http://www.ibls.com/members/docview.aspx?doc=2676> (1-02-2010).

¹¹⁴ Funken (n 113) 4.

¹¹⁵ Funken (n 113) 6.

¹¹⁶ the equivalent of R4 137.

¹¹⁷ The Marriage Law of the People’s Republic of China was passed in 1980 and came into operation on 1 Jan 1981.

¹¹⁸ Huang (n 111) 303.

¹¹⁹ Huang (n 111) 306.

¹²⁰ South African Law Commission *Alternative Dispute Resolution* Discussion Doc 8, Project 94 (1997) 5-6; Mowatt (n 18) 318; Kohlhaagen “Alternative dispute resolution (ADR) and mediation: the experience of French-speaking countries” 1, 6 <http://www.dhdi.free.fr/recherches/etudesdiverses/articles/kohlhaagenmediation.pdf> (8-07-2009).

¹²¹ Du Rand “Prospects for mandatory mediation in South Africa” (unpublished summary notes from the debate “Justice for the poor? Could mandatory mediation offer better access to justice and the protection of the law to all citizens?” on 12 Jun 2004) 15.

¹²² Kohlhaagen (n 120) 6.

¹²³ Kohlhaagen (n 120) 9.

¹²⁴ Chartered Institute of Arbitrators *Profile Kenya Branch* <http://www.ciarb.org/branches/africa/kenya-branch/> (8-07-2009).

3.6 Legislative drive towards mandatory family mediation in South Africa

In line with the experiences in most of the countries referred to above, South Africa also witnessed a direct official move towards mandatory mediation in family matters. In terms of section 4 of the Mediation in Certain Divorce Matters Act¹²⁵ parties can be forced to submit to limited court-connected mediation by the office of the family advocate before being granted a divorce order. As in most other public mediation models, the activities of the office of the family advocate are confined to issues relating to the custody of, guardianship over and access to children.¹²⁶

Furthermore, the Children's Act¹²⁷ very specifically refers to mediation for the resolution of various child-centred disputes. In two instances the Children's Act expressly mandates mediation. In terms of section 21(3)(a) disputes between a child's unmarried biological parents as to whether the father meets the requirements for acquiring full parental responsibilities and rights in terms of the Act must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.¹²⁸ 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 worker or other suitably qualified person, or by obtaining the assistance of a family advocate, social worker or psychologist.¹²⁹ 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.

There are also a few instances where the Children's Act grants the court the discretion to order mediation. In terms of sections 49, 70 and 71 the children's court may refer a matter or an issue in a matter to a lay-forum hearing in an attempt to settle the matter before deciding on it.¹³⁰ And in terms of section 69, when a matter is contested, the children's court may order that a pre-hearing conference be held with the parties in order to mediate or settle disputes between parties and to define the issues to be heard by the court.¹³¹ The intention of the legislator regarding these lay-forum hearings and pre-hearing conferences is clearly that all outstanding disputes should be mediated.¹³²

Several provisions of the Children's Act also encourage parties to try to reach an agreement on issues such as the conferment of parental rights and responsibilities on third parties,¹³³ or the reaching of post-adoption¹³⁴ and surrogate motherhood agreements.¹³⁵ Although mediation is not pertinently mentioned, it could undoubtedly play a vital role in facilitating negotiations between the parties in these matters.

¹²⁵ 24 of 1987.

¹²⁶ s 4(1)(b) and 4(2)(b).

¹²⁷ 38 of 2005.

¹²⁸ S 21 came into operation on 1 Jul 2007: *GG* 30030 of 27 Jun 2007.

¹²⁹ S 33 had not yet come into operation in Feb 2010 when this article was completed.

¹³⁰ These sections had not yet come into operation in Feb 2010 when this article was completed.

¹³¹ This section had not yet come into operation in Feb 2010 when this article was completed.

¹³² De Jong "Opportunities for mediation in the new Children's Act 38 of 2005" 2008 *THRHR* 630 634.

¹³³ s 22(1) and 30(3). Of these two sections only s 30 came into operation on 1 Jul 2007: *GG* 30030 of 29 June 2007.

¹³⁴ s 234(1). The whole of ch 15 dealing with adoption had not yet come into operation in Feb 2010 when this article was completed.

¹³⁵ s 292 read with ss 293 and 295. The whole of ch 19 dealing with surrogate motherhood had not yet come into operation in Feb 2010 when this article was completed.

3.7 Judicial drive towards mandatory family mediation in South Africa

In addition to the legislative drive towards mandatory mediation, our courts have also started to mandate mediation in certain family matters. In *Van der Berg v Le Roux*,¹³⁶ for example, the court ordered the parties to privately mediate all future disputes with regard to their ten-year-old daughter before either of them would be permitted to approach a court which has jurisdiction to decide the matter. And in *Townsend-Turner v Morrow*,¹³⁷ the court made a similar decision when confronted with an access dispute between the father of a seven-year-old boy and the boy's maternal grandmother. The parties were ordered to attend mediation offered by private mediators of their own choice or those proposed by the office of the family advocate in an effort to resolve the issues of conflict between them. The court ordered that the mediation was to commence within two weeks of the granting of the order and that it should continue for a period of at least three months or for the duration of at least four mediation sessions. The parties were also ordered to share the costs of the mediation.

3.8 Providers of family mediation services in South Africa

In South Africa, family mediation is practised in many different forms by various organisations, institutions and individuals. First, we have the public or court-connected mediation services rendered by the office of the family advocate in terms of the Mediation in Certain Divorce Matters Act or the Children's Act, which focus on certain children's issues.

In addition, there is a network of private mediators in all the big cities across the country.¹³⁸ Private mediators are mostly attorneys, psychologists or social workers who have at least forty hours' training in family mediation.¹³⁹ They usually engage in comprehensive mediation and charge professional fees for the services they offer, either individually or as an interdisciplinary team. Although affiliation is not compulsory, private mediators are generally affiliated to local mediation organisations such as SAAM¹⁴⁰ in Gauteng, MISA¹⁴¹ in KwaZulu-Natal and FAMAC¹⁴² in the Western Cape.

There are also various non-governmental and community-based organisations and institutions, such as street committees, traditional leaders, community courts, community-based advice centres, Family Life and FAMSA,¹⁴³ that offer family mediation services free of charge or at a minimal cost to the indigenous or poorer sections of the population.¹⁴⁴ These community mediation services are very popular among the majority of the South African population.¹⁴⁵ They are generally perceived as accessible and responsive to community concerns. It should be noted that media-

¹³⁶ 2003 3 All SA 599 (NC).

¹³⁷ 2004 1 All SA 235 (C).

¹³⁸ SA Law Commission (n 120) 22; Van der Merwe "Overview of the South African experience" 1995 (Apr) *Community Mediation Update* 1 3; Bosman "Mediation: an alternative to divorce litigation" 1996 *Career Success* 21.

¹³⁹ Goldberg "Family mediation is alive and well in the United States of America: a survey of recent trends and developments" 1996 *TSAR* 358 359-360; Mowatt "Alternative dispute resolution: some points to ponder" 1992 *CILSA* 44 50.

¹⁴⁰ The South African Association of Mediators in Divorce and Family Matters.

¹⁴¹ The Mediation Institute of South Africa.

¹⁴² The Family Mediators Association of the Cape.

¹⁴³ The Family and Marriage Society of South Africa.

¹⁴⁴ Van der Merwe (n 138) 3-4.

¹⁴⁵ De Jong (n 73) 41-42.

tion is an essential part of the historic tradition of African families and, in fact, has its roots in Africa.

4 *The way forward*

4.1 Significant role of mediation despite current stumbling blocks

Despite its demonstrable value, family mediation has not achieved anything like its full potential in South Africa. As far as public mediation is concerned, many of the sections of the Children's Act providing for mediation have not yet come into operation. It also appears that the present operations of the office of the family advocate are seriously hampered by a lack of funds and human resources.¹⁴⁶ Furthermore, as the general public is still uninformed about the advantages of private mediation,¹⁴⁷ it appears that only a very small percentage of the more prosperous section of the population makes use of these services at present.¹⁴⁸ It is also a fact that community mediation services are totally understaffed and underfunded.¹⁴⁹

When the whole of the Children's Act comes into operation and when as it is hoped something comes of the South African law reform commission's current project on the contact and care of minor children,¹⁵⁰ mediation, whether mandatory, in the discretion of the court, or voluntary at the request of the parties, will play an increasingly important role in the resolution of family disputes.

4.2 Effective provision of mediation services in different sectors

Whenever mediation is mandatory, it is my considered opinion that parties should first be referred for private comprehensive 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.¹⁵¹ 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.

4.3 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.¹⁵² The requirements for accreditation should include:

- i basic training in family mediation of at least forty hours;

¹⁴⁶ Glasser "Can the family advocate adequately safeguard our children's best interests?" 2002 *THRHR* 74 84-86; Van Zyl "The Family Advocate: 10 years later" 2000 *Obiter* 388.

¹⁴⁷ Bosman (n 138) 21.

¹⁴⁸ Van der Merwe (n 138) 3.

¹⁴⁹ Van der Merwe (n 138) 3.

¹⁵⁰ South African Law Reform Commission *Review of Family Law and the Law of Persons Aspects Related to the Contact and Care of Minor Children* Project 100.

¹⁵¹ De Jong (n 73) 44.

¹⁵² The South African National Council of Mediators.

- ii sufficient experience in family mediation, or in lieu thereof, mentoring and supervised opportunities to be arranged for less experienced mediators;
- iii ongoing training, which should include refresher and more advanced courses; and
- iv regular engagement in self-assessment and participation in programmes of peer consultation.¹⁵³

The accreditation requirements should be kept current and responsive to theoretical and methodological developments in the field.¹⁵⁴ 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.

4.4 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:

- i family and child development;
- ii the impact of family conflict on parents, children and other participants;
- iii family law and divorce procedures;
- iv the fundamental aspects of family mediation;
- v the mediation process, with specific reference to the techniques and strategies to be used by mediators;
- vi the ways in which the suitability of family disputes for mediation can be assessed;
- vii family finances and community resources;
- viii issues like multiculturalism and family violence or abuse.¹⁵⁵

Depending on the specific skills of the mediators in training, the main focus of the training courses would vary from course to course. It is, however, imperative that all existing training courses should be evaluated and approved by the national regulatory body to ensure standardised mediation training programmes across the country.

4.5 Other important matters

To increase public confidence in the evolving family mediation industry and to provide guidance for its practitioners, it is further essential that the national regulatory body develops:

¹⁵³ Jessani and James (n 60) 184; Dewdney (n 55) 23; Pera (n 14) 635; Smith (n 30) 75; Folberg, Milne and Salem (n 9) 19.

¹⁵⁴ English and Neilson "Certifying mediators" in Folberg, Milne and Salem (n 9) 508.

¹⁵⁵ Folberg, Milne and Salem (n 9) 29-126; Jessani and James (n 60) 183; Smith (n 30) 70; Charlton and Dewdney (n 27) 3-118; Goldberg (n 29) 754; Moodley (n 21) 51; Landau "OAFM, standards for assessing presence of abuse and whether mediation may be appropriate" 1996 (Nov) *SAAM News* 7 7-8.

- i uniform minimum standards of practice for all mediators;¹⁵⁶
- ii complaints and disciplinary procedures; and possibly
- iii a charter of rights for mediators in view of the myriad of responsibilities that they are expected to fulfil.¹⁵⁷

4.6 Public education

But most important of all, the public needs to be educated about mediation. Although many divorcing couples indicate that they would like a dignified, fair and cooperative divorce, they do not connect the mediation process with these goals as yet.¹⁵⁸ Public awareness campaigns should therefore be a priority for the national regulatory body and also local membership organisations such as SAAM in the Gauteng area, so as to establish a cultural or paradigm shift in the way people set about obtaining a divorce. To a great extent, this is exactly the aim of this article. Hopefully, after reading this article readers will be persuaded of the value of mediation as an alternative to the traditional adversarial divorce.

SAMEVATTING

'N PRAGMATIESE BLIK OP BEMIDDELING AS ALTERNATIEF VIR EGSKEIDINGSLITIGASIE

Egskeiding of gesinsverbrotting, 'n realiteit vir bykans almal, is 'n multidimensionele proses wat die tussenkoms van sowel die sielkunde as die reg vereis. Desnieteenstaande hanteer regspraktisyns egskeiding dikwels uitsluitlik as 'n regsgebeurtenis. Boonop het die adversatiewe stelsel waar die funksies van die regter, die aanklaer en die regsverteenvoorder vir die beskuldigde duidelik geskei word, baie negatiewe gevolge vir beide die strydende partye en die betrokke kinders.

Egskeidingsbemiddeling, waar 'n onpartydige derde die onderhandelinge tussen die skeidende partye fasiliteer, is 'n multidissiplinêre proses wat gedragwetenskappe en die reg saamvleg tot voordeel van sowel die partye as die betrokke kinders. Dit is 'n buigsame, informele en private proses wat die partye groter inspraak gee in die gevolge van hulle egskeiding en wat verder op die beste belange van kinders fokus. Die bemiddelingsproses het egter nie ten doel om prokureurs uit te skakel nie en pas netjies in die regstelsel as 'n geheel.

Nie alle sake is geskik vir bemiddeling nie, maar ten spyte hiervan is daar 'n wêreldwye tendens om bemiddeling by gesinskweptes verpligtend te maak. Hierdie tendens is te bespeur in Anglo-Amerikaanse regstelsels, Europese of Kontinentale regstelsels, Oosterse regstelsels en regdeur Afrika, en meer spesifiek Suid-Afrika, waar die Wet op Bemiddeling in Sekere Egskeidingsaangeleenthede, die nuwe Kinderwet en die regspraak begin het om bemiddeling verpligtend te maak in sekere gesinsangeleenthede.

Alhoewel gesinsbemiddeling in Suid-Afrika tans in die publieke, privaat- en gemeenskapsektor beoefen word, is daar heelwat ruimte vir 'n meer omvattende aanwending van bemiddeling. In die toekoms behoort partye uit die staanspoor na privaatbemiddeling verwys te word, maar as kulturele, finansiële of ander logistieke oorwegings dit regverdig, kan die partye na staatsgesubsidieerde publieke of gemeenskapsbemiddeling verwys word. Alle bemiddelaars moet egter deur 'n nasionale beheerliggaam geakkrediteer word as hulle aan sekere vereistes voldoen. Opleidingsprogramme in gesinsbemiddeling behoort gestandaardiseer te word en eenvormige minimum praktykstandaarde behoort vir alle bemiddelaars gestel te word. Maar bowenal behoort die publiek doelgerig bewus gemaak te word van bemiddeling as 'n alternatiewe manier om 'n waardige, regverdige en welwillende egskeiding te verkry.

¹⁵⁶ Goldberg (n 29) 749; Rogers and Palmer (n 29) 947; Smith (n 30) 69; Shepard "The model standards of practice for family and divorce mediation" in Folberg, Milne and Salem (n 9) 516.

¹⁵⁷ Charlton (n 75) 15, 16.

¹⁵⁸ Folberg, Milne and Salem (n 9) 21.