

# Suggestions for a divorce process truly in the best interests of children (1)\*

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## OPSOMMING

### Voorstelle vir 'n egskeidingsproses waarlik in die beste belange van kinders

Egskeiding is by uitstek 'n aangeleentheid wat kinders negatief kan raak en as sodanig roep dit noodwendigerwys die beste belang van die kind-maatstaf en die beginsel van kinderdeelname by. Dit blyk desondanks dat hierdie maatstaf en beginsel nie effektief in ons regstelsel gehandhaaf en toegepas word nie. Die akkusatoriese stelsel van litigasie vererger trouens die risikofaktore waaraan kinders by egskeiding of gesinsverbrekking blootgestel word deurdat dit onder andere konflik tussen hulle ouers aanmoedig, bevoegde ouerskap teëwerk, tot afwesigheid van die niesorggewende ouer lei en 'n verlaging in die sorggewende ouer (en die kinders) se lewensstandaard veroorsaak. Daar is ook geen eenstemmigheid oor hoe en wanneer kinders se insette in die regsproses verkry moet word nie. Verder veroorsaak die akkusatoriese stelsel van litigasie dat veral bestrede egskeidingsverrigtinge onnodig uitgerek word en buitensporig duur is. Gevolglik word 'n radikale hervorming van die regstelsel voorgestel in die periode voor, by en na egskeiding. In die periode voor egskeiding moet daar eerstens voorsiening gemaak word vir 'n nuwe beginpunt of innameprosedure buite die regsmilieu waar ouers opgevoed kan word oor die effek van egskeiding op kinders, waar kinders ingelig kan word oor die proses wat gevolg gaan word en waar gesinsdispute geprioritiseer en gesinne na gepaste dienste of strukture verwys kan word. Tweedens moet 'n proses van verpligte kinderingelgte bemiddeling ingestel word waaraan kinders kan deelneem en waarin hulle beste belange deurgaans voorop gestel word. Alternatief word 'n beroep gedoen op 'n samewerkende egskeidingsproses waarin 'n neutrale kinderspesialis aangestel kan word om die insette van die kinders te verkry wat as fokuspunt dien vir onderhandelinge tussen die ouers en hulle regsverteenwoordigers. Verder, vir sover dit die hofproses betref, word voorstelle gemaak vir 'n minder akkusatoriese verhoor waarin die voorsittende beampte 'n meer aktiewe rol speel en kinders deurgaans insette kan lewer deur die tussenbeidetrede van 'n mediator op 'n nuwe en innoverende manier. Laastens, vir sover dit die periode na egskeiding betref, word voorstelle gemaak vir die beoefening van ouerskapskoördinerings op 'n wyse wat kinders se beste belange en hul deelname in die proses aanmoedig. Sodanige vooropstelling van kinders se beste belange in die periode voor, by en na egskeiding sal 'n goeie belegging in gesinstabiliteit en -produktiwiteit daarstel ongeag die voorval van egskeiding.

## 1 INTRODUCTION

As the point of departure, this article sets out the statutory requirements for proceedings concerning children, which include the best interests of the child

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\* The recommendations in this article represent the author's own views and recommendations.

standard, child-participation in decision-making affecting them and a problem-solving approach in which delays are avoided.<sup>1</sup> Next, it scrutinises the question whether the adversarial system of litigation complies with these requirements upon divorce, an event which is unavoidably highly hazardous for children.<sup>2</sup> As it will be seen that the adversarial legal process actually contributes to making matters worse for children, the remainder of this article will focus on alternative ways in which the situation of children could be improved before, upon and after divorce.

As far as pre-court processes are concerned,<sup>3</sup> suggestions are made, first, for a new intake point or procedure away from attorneys and the courts where parents could be educated about the effects of divorce on children, children could be informed about the process and families could be triaged and referred to an appropriate service or structure and, secondly, for a mandatory child-informed mediation process in which children could participate and in which their best interests would be the focal point for all negotiations. Alternatively, a call is made for a collaborative divorce law process in which a neutral child specialist might be appointed to bring the voice of the child into the negotiations between parents and their legal representatives.

With regard to the court process,<sup>4</sup> proposals are set out for a less adversarial trial in which the presiding officer would play a more active role and children would have an input throughout the process through the involvement of the mediator in a new and innovative manner.

With respect to the post-court process,<sup>5</sup> recommendations are made regarding the practice of parenting co-ordination (facilitation or case management) in a way that promotes children's best interests and their participation in the process.

## 2 STATUTORY REQUIREMENTS FOR PROCEEDINGS CONCERNING CHILDREN

The overriding principle, "namely that the interests of the children are paramount", "runs like a golden thread through the fabric of our whole law relating to children".<sup>6</sup> The principle is entrenched in section 28(2) of the Constitution of the Republic of South Africa, 1996, which provides that "[a] child's best interests are of paramount importance in every matter concerning the child". The best interests of the child standard is further contained in section 9 of the Children's Act 38 of 2005 which provides that "[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied". Section 7 of the Children's Act sets out a list of factors which are to be taken into consideration whenever a provision of the Act requires that the best interests of the child

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1 See 2 below.

2 See 3 below.

3 See 4 below.

4 See 5 below.

5 See 6 below.

6 *Segal v Segal* 1971 4 SA 317 (C) at 243B. See also *Kaiser v Chambers* 1969 4 SA 224 (C) 228F and Clark "A 'golden thread'? Some aspects of the application of the standard of the best interest of the child in South African family law" 2000 *Stell LR* 3–20.

standard is to be applied. Previously, in terms of case law,<sup>7</sup> “the child’s preference, if the court is satisfied that in the particular circumstances the child’s preference should be taken into consideration”, was one of the factors which had to be considered when determining the best interests of the child.<sup>8</sup> Although section 7 of the Children’s Act does not include the voice, preferences or views of the child in the list of factors which are to be considered in determining the best interests of the child, section 10 of the Children’s Act now states that “[e]very 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”. This section, commonly referred to as the child participation clause, therefore makes up for the omission of the child’s voice from the statutory list of factors set out in section 7 of the Act.<sup>9</sup> Other provisions of the Children’s Act echo the child participation clause and specifically give the child an opportunity to participate in any decision-making affecting him or her upon divorce<sup>10</sup> and the right to be informed of any action or decision taken in matters affecting the child.<sup>11</sup>

In addition, in terms of section 6(2)(a) of the Children’s Act, all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child’s rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 of the Act and the rights and principles set out in the Act. For the purposes of this article, the principle set out in section 6(4) of the Act is of particular importance. It provides as follows:

“In any matter concerning a child –

- (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and
- (b) a delay in any action or decision to be taken must be avoided as far as possible.”

Divorce is pre-eminently a matter concerning a child or a matter concerning the care, protection and well-being of a child which triggers the obligatory application of the best interests of the child standard, the child-participation clause and a problem-solving approach. It signals the beginning of a process of multiple changes, difficult challenges and complex adaptations for children which lasts

<sup>7</sup> *McCall v McCall* 1994 3 SA 201 (C).

<sup>8</sup> 205A–F.

<sup>9</sup> Boezaart “The position of minor and dependent children of divorcing and divorced spouses or civil union partners” in Heaton (ed) *The law of divorce and dissolution of life partnerships in South Africa* (2014) 180.

<sup>10</sup> See, eg, s 31 of the Act and regs 8(3)(a) and 11(1) under the Act which respectively give the child a voice in major decisions which are to be taken in respect of him or her and in the development of parental responsibilities and rights agreements and parenting plans. See also Moyo “Child participation under South African law: Beyond the Convention on the Rights of the Child?” 2015 *SAJHR* 180 who remarks that the Children’s Act “creates great space for children’s self-determination in many contexts”.

<sup>11</sup> S 6(5) of the Act provides that “[a] child, having regard to his or her age, maturity and stage of development . . . must be informed of any action or decision taken in a matter concerning the child which significantly affects the child”. See further regs 8(3)(b) and 11(2) in terms of which children must be informed of the contents of parental responsibilities and rights agreements and parenting plans.



for several years.<sup>12</sup> For the majority of children the separation of their parents precipitates a crisis of major proportions<sup>13</sup> and it unquestionably places children at risk for emotional, social and academic problems.<sup>14</sup> In this regard, there is agreement among research studies that children of divorced parents display higher levels of stress, depression, anxiety, insecurity, helplessness, rejection and delinquent behaviour and lower levels of self-esteem and academic achievement than their peers from intact families.<sup>15</sup>

The important question which ensues is whether our legal system acknowledges this deplorable situation and assists parents to put children's best interests first and to properly hear their voices at a critical time of change and upheaval.

### 3 DOES THE ADVERSARIAL SYSTEM OF LITIGATION COMPLY WITH THE STATUTORY REQUIREMENTS FOR PROCEEDINGS CONCERNING CHILDREN?

Our system for resolving the disputes between divorcing parents concerning their children (or their finances) that arise from reorganisation of the parental relationship remains a legal one based on legal rights and obligations. It seeks to resolve disputes with the assistance of attorneys (and advocates) through litigation in the high court or the civil regional court. Although most divorce cases are indeed settled out of court and only a small minority of cases are resolved after serious litigation in either the high court or the civil regional court,<sup>16</sup> the competitive attitude which prospective litigation creates permeates the entire process of negotiation through the parties' legal representatives.<sup>17</sup> Consequently, the adversarial process begins in all earnest the moment when one of the parents

12 McIntosh "The less adversarial approach and children's best interests" in Family Court of Australia *Less adversarial trial handbook* (2009) 1 available at <https://goo.gl/6sZYVV> (accessed on 20 March 2017).

13 Kelly and Kisthardt "Helping parents tell their children about separation and divorce: Social science frameworks and the lawyer's counselling responsibility" 2009 *J of the American Academy of Matrimonial Lawyers* 316.

14 Ballard *et al* "A randomized controlled trial of child-informed mediation" 2013 *Psychology, Public Policy, and Law* 271; Kourlis *et al* "ISAALS' Honoring Families Initiative: Courts and communities helping families in transition arising from separation or divorce" 2013 *Family Court R* 353; Sandford and Portnoy "The psychology of divorce: A lawyer's primer, Part 2: The effects of divorce on children" 2008 *American J of Family L* 127.

15 Jolivet "The psychological impact of divorce on children: What is a family lawyer to do?" 2011 *American J of Family L* 176–177; Moloney "Child-sensitive practices in high conflict parenting disputes: A 30-year road to serious reform" 2006 *J of Family Studies* 42; Kelly and Kisthardt 2009 *J of the American Academy of Matrimonial Lawyers* 317; Sandford and Portnoy 2008 *American J of Family L* 127–128.

16 SALRC *Family dispute resolution: Care of and contact with children* Issue Paper 31, Project 100D (2015) para 3.2.8 available at [http://www.justice.gov.za/salrc/ipapers/ip31\\_prj100d.pdf](http://www.justice.gov.za/salrc/ipapers/ip31_prj100d.pdf) (accessed on 1 April 2017) points out that most civil cases are in fact settled out of court. See also Moloney 2006 *J of Family Studies* 38 who indicates that only 5% to 10% of disputes commence serious litigation; Parliament of the Commonwealth of Australia para 1.23 which avers that only about 6% of family court cases go right through to judicial decision.

17 Marumoagae "Does collaborative divorce have a place in South African divorce law?" 2016 *De Jure* 54; Kourlis *et al* 2013 *Family Court R* 360.



consults an attorney regarding the divorce.<sup>18</sup> From the outset, legal advice is given on the basis of perceptions of likely court outcomes and legal services, including settlement negotiations, are provided in a context of preparation for litigation.<sup>19</sup> This is because legal practitioners are schooled in the adversarial system of litigation where it is all about tactics; all they are interested in is furthering their client's best interests and they subscribe to a "winner-takes-all" approach whenever they deal with a divorce.<sup>20</sup> It can therefore be said that legal practitioners assist their clients "in the shadow of the law"<sup>21</sup> or, perhaps more pertinently, "in the shadow of the legal process".<sup>22</sup> Various aspects of this process may, however, be detrimental to children.

### 3.1 Aggravation of the risks to which divorce exposes children

It appears that the adverse outcomes for children of divorce do not derive from the divorce *per se*, but rather from a number of risk factors prevalent at divorce,<sup>23</sup> which are unfortunately all exacerbated by the adversarial system of litigation.

The number one risk factor for children upon divorce is the level and intensity of parental conflict prior to, during and after the divorce.<sup>24</sup> It is generally accepted that ongoing parental conflict has serious developmental impacts on children and damages them<sup>25</sup> – the more pervasive and higher the levels of conflict to which children are exposed, the more negative the effects of divorce for them.<sup>26</sup> In this regard, research studies that compared the effect of divorce on boys and girls as separate groups have indicated that the effect of ongoing parental conflict is more immediate and dramatic for boys and less immediate for girls. Boys were found to be "... prone to aggression, disruption, acting-out behaviours, and [to be] developmentally vulnerable", while girls tend "... to show the effects more over time and culminating in a range of negative behaviours in adolescence", which include "... an increased rate of running away, skipping school, sexual promiscuity, and acting out".<sup>27</sup>

18 Moloney 2006 *J of Family Studies* 42 also says that adversarial processes normally begin the moment the first solicitor's letter of claim is received.

19 De Jong "Mediation and other appropriate forms of alternative dispute resolution upon divorce" in Heaton (ed) *The law of divorce and dissolution of life partnerships in South Africa* (2014) 578; Parliament of the Commonwealth of Australia para 4.45.

20 De Jong "A pragmatic look at mediation as an alternative to divorce litigation" 2010 *TSAR* 516; Schäfer "The role of the attorney in the divorce process" 1984 *De Rebus* 18.

21 Mnookin and Kornhauser "Bargaining in the shadow of the law: The case of divorce" 1979 *Yale LJ* 950.

22 Moloney 2006 *J of Family Studies* 38.

23 Sandford and Portnoy 2008 *American J of Family L* 127; Goldson "'Hello, I'm a voice, let me talk': Child-inclusive mediation in family separation" (2006) 6 available at <https://goo.gl/hv8EpS> (accessed on 23 March 2017).

24 SALRC Issue Paper 31, Project 100D (2015) para 3.1.1; Jolivet 2011 *American J of Family L* 176; Moloney 2006 *J of Family Studies* 42; Sandford and Portnoy 2008 *American J of Family L* 129.

25 Bryant "Forward" in Family Court of Australia *Less adversarial trial handbook* (2009) ii available at <https://goo.gl/6sZYVV> (accessed on 20 March 2017); Moloney 2006 *J of Family Studies* 42.

26 Kourlis *et al* 2013 *Family Court R* 360.

27 Jolivet 2011 *American J of Family L* 177.

As the win-lose orientation of the adversarial system places the focus on parental contest,<sup>28</sup> it creates animosity between parents<sup>29</sup> and increases inter-parental conflict.<sup>30</sup> It is estimated that the effect of contentious high-conflict divorce on children doubles the rate of behavioural and emotional adjustment problems in children<sup>31</sup> – those who have been subjected to outdrawn litigation between their parents may have difficulties extending into adulthood and ranging from feelings of sadness and vulnerability, to problems with relationships with other adults, and to more serious mental health issues.<sup>32</sup> Reference is made to the fact that such children may have

“a tendency toward lower rates of education, early marriage . . . and a group of behaviors which can be described as: lower commitment to marriage, infidelity, problems with anger management, feelings of insecurity, neediness, demandingness, denial and blame, contempt, and poor conflict resolution skills, higher levels of depression, and more problems with peers”.<sup>33</sup>

Another predictor of poor outcome for children is diminished or incompetent parenting.<sup>34</sup> Research has shown that parents’ ability to nurture and protect their children diminishes markedly in the period of the separation and the year or two following it.<sup>35</sup> As parents often have unresolved relationship issues and experience much stress, task overload and economic distress over this period, they tend to be less warm towards their children, more withdrawn and out of touch with their children’s emotional needs and unable to communicate properly with them and to hear their voices.<sup>36</sup> The issues troubling children at the time of divorce are frequently very different from those their parents are dealing with and parents are often oblivious of the details which are troubling their children.<sup>37</sup>

In the adversarial battle, highly conflicted parents may lose sight of their children<sup>38</sup> and view them as weapons in the matrimonial warfare<sup>39</sup> instead of as loved ones to be nurtured, protected and emotionally supported. Although it has been shown that children experiencing divorce tend to adapt best when both parents are involved in their post-reorganisation life and they receive safe and competent parenting, participation in adversarial negotiation or litigation seems to push parents apart.<sup>40</sup> It encourages polarised and positional thinking about each other’s deficiencies and discourages parental communication, co-operation

28 SALRC Paper 31, Project 100D (2015) para 3.2.4; McIntosh *et al* “Evidence of a different nature: The child-responsive and less adversarial initiatives of the Family Court of Australia” 2008 *Family Court R* 126.

29 Robinson “Die adversatiewe stelsel van bewyslewing en die beste belang van die kind in egskeidingsaangeleenthede: Enkele gedagtes oor *collaborative law* ter beslegting van ouerlike geskille” 2015 *PER* 1530.

30 Ballard *et al* 2013 *Psychology, Public Policy, and Law* 271; McIntosh in *Family Court of Australia* 1; Moloney 2006 *J of Family Studies* 42.

31 Jolivet 2011 *American J of Family L* 177.

32 Kourlis *et al* 2013 *Family Court R* 358.

33 Jolivet 2011 *American J of Family L* 177.

34 Sandford and Portnoy 2008 *American J of Family L* 129; Goldson 6.

35 Goldson 6.

36 Sandford and Portnoy 2008 *American J of Family L* 129; Goldson 6.

37 Goldson 17.

38 Byrnes “Voices of children in the legal process” 2011 *J of Family Studies* 44.

39 SALRC Issue Paper 31, Project 100D (2015) para 3.1.4.

40 Kourlis *et al* 2013 *Family Court R* 354, 369.

and more mature thinking about children's needs.<sup>41</sup> The antagonistic positions adopted by parents may lead to lengthy and expensive legal battles which could cause parents more stress and distress,<sup>42</sup> and may further inhibit the development of parenting capacity.<sup>43</sup>

A third definite risk factor for children is the abrupt departure in most families of one parent, usually the father, from the household.<sup>44</sup> Research has shown that paternal absence accompanying separation and divorce intensifies children's stress and distress and correlates with a greater risk of educational and cognitive deficits in children and with greater behavioural problems, including early pregnancy, drug use and involvement in the child justice system.<sup>45</sup>

Once again, this negative state of affairs is intensified by the adversarial system, which often causes parent-child relationships to suffer.<sup>46</sup> In high-conflict divorce cases, the care-giving parent may, for example, deliberately sabotage the contact visits of the non-resident parent, usually the father.<sup>47</sup> Kourlis, Taylor, Schepard *et al* indicate that the modal level of contact between many divorced, non-resident parents and their children ranges between every other weekend and several times a year, and that the frequency of this contact drops off sharply over time, particularly in conjunction with events such as remarriage, repartnering or relocation.<sup>48</sup> They point out that research involving non-resident fathers suggests that the win-lose orientation of the adversarial divorce process contributes significantly to this process of disengagement.<sup>49</sup>

A last risk factor for children is a decline in the standard of living of the care-giving parent, usually the mother, which often necessitates changes of location, new schools and loss of established peer support groups for children.<sup>50</sup> Such decline in the standard of living may be caused by non-compliance with child maintenance orders by the absent father.<sup>51</sup> The decline in the standard of living of the care-giving parent may also be triggered by clean-break principle,<sup>52</sup> which is commonly being applied by our courts in spousal maintenance awards upon divorce. This principle often results in continued hardship for women and the children in their care, as it ignores or underplays, firstly, the career sacrifices that many women make because of their domestic and child-care responsibilities, and

41 Schoffer "Bringing children to the mediation table: Defining a child's best interest in divorce mediation" 2005 *Family Court R* 325.

42 Kourlis *et al* 2013 *Family Court R* 354; McIntosh in *Family Court of Australia* 4.

43 Bryant in *Family Court of Australia* ii.

44 Kelly and Kisthardt 2009 *J of the American Academy of Matrimonial Lawyers* 317.

45 Kourlis *et al* 2013 *Family Court R* 359; Kelly and Kisthardt 2009 *J of the American Academy of Matrimonial Lawyers* 317.

46 Kourlis *et al* 2013 *Family Court R* 360; McIntosh in *Family Court of Australia* 3.

47 SALRC Issue Paper 31, Project 100D (2015) para 3.1.4.

48 Kourlis *et al* 2013 *Family Court R* 360.

49 *Ibid*.

50 Sandford and Portnoy 2008 *American J of Family L* 130.

51 Kourlis *et al* 2013 *Family Court R* 364 point out that lack of contact often goes hand-in-hand with non-compliance with child maintenance orders by the non-resident father. See also SALRC Issue Paper 31, Project 100D (2015) para 3.1.5.

52 In terms of this principle, no or no ongoing maintenance awards are made in favour of (mostly) women upon divorce.



secondly, the fact that women are generally clustered in lower-paid jobs.<sup>53</sup> In fact, it has been indicated that there is a direct correlation between divorce and poverty for women and children.<sup>54</sup> Another aspect of the adversarial system of litigation which may further aggravate the risk factor of a decline in the standard of living of the care-giving parent, or for that matter both parents, is the prohibitive costs involved.<sup>55</sup>

### 3.2 Problems associated with hearing the voice of the child in the process

Certain problems are further associated with hearing the voice of the child in the adversarial legal process. There are basically four possible ways in which the child's voice can be invited and canvassed in this process, namely through an expert report prepared by a private psychologist or social worker who has interviewed the child or done a forensic evaluation for the family;<sup>56</sup> through the report and recommendations of the office of the family advocate who may have canvassed the child's views in the course of an enquiry in terms of section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987;<sup>57</sup> through a separate legal representative appointed for the child in terms of section 29(6) of the Children's Act 38 of 2005, section 28(1)(h) of the Constitution of the Republic of South Africa, 1996, section 6(4) of the Divorce Act 70 of 1979 or section 33 of the Magistrates' Courts Act 32 of 1944;<sup>58</sup> and through a judge or presiding officer who may have interviewed the child in chambers or heard the evidence of

53 De Jong and Heaton "Post-divorce maintenance for a spouse or civil union partner" in Heaton (ed) *The law of divorce and dissolution of life partnerships in South Africa* (2014) 118–121.

54 Clark and Goldblatt "Gender and family law" in Bonthuys and Albertyn (eds) *Gender, law and justice* (2007) 219.

55 See, eg, *MB v NB* 2010 (3) SA 220 (SGJ) para 48 where it appeared at the trial of a fiercely contested divorce case that the cumulative legal costs of the parties amounted to something between R500 000 and R750 000. See also Botha *Ascertaining the voice of the child in South African divorce law* (LLM diss Unisa 2015) 61.

56 SALRC Issue Paper 31, Project 100D (2015) paras 2.2.30, 2.7.1; Boezaart in Heaton (2014) 195–196; Barratt "The child's right to be heard in custody and access determinations" 2002 *THRHR* 570. See also *Stock v Stock* 1981 3 SA 1280 (A); *I v S* 2000 2 SA 993 (C); *Van Rooyen v Van Rooyen* [2001] 2 All SA 37 (T); *Jackson v Jackson* 2002 2 SA 303 (SCA); *F v F* 2006 3 SA 42 (SCA); *P v P* 2007 5 SA 94 (SCA).

57 SALRC Issue Paper 31, Project 100D (2015) paras 2.2.30 2.2.32; Marumoagae "The role of children's views during divorce" May 2012 *De Rebus* 38; Pillay and Zaal "Child-interactive video recordings: A proposal for hearing the voices of children in divorce matters" 2005 *SALJ* 688; Barratt 2002 *THRHR* 571–573. See also *Soller v G* 2003 5 SA 430 (W); *WL v SH* [2017] 1 All SA 652 (KZD).

58 Moyo 2015 *SAJHR* 178; SALRC Issue Paper 31, Project 100D (2015) paras 2.2.45 2.2.51 2.2.62 2.2.68; Boezaart in Heaton (2014) 196–197; Carnelley "The right to legal representation at state expense for children in care and contact disputes – A discussion of the South African legal position with lessons from Australia" 2010 *Obiter* 638–661; Du Toit "Legal representation of children" in Boezaart (ed) *Child law in South Africa* (2009) 93–111; Sloth-Nielsen "Realising children's rights to legal representation and to be heard in judicial proceedings: An update" 2008 *SAJHR* 495–524; Kassan "Children's right to legal representation in divorce proceedings: Proposed guidelines concerning when a section 28(1)(h) legal practitioner might be deemed necessary or appropriate" in Sloth-Nielsen and Du Toit (eds) *Trials and tribulations* (2008) 199–200; Barratt 2002 *THRHR* 569–570. See also *Soller v G* 2003 5 SA 430 (W); *Legal Aid Board v R* 2009 2 SA 262 (D); *B v G* 2012 2 SA 329 (GJ).

the child in open court either as a witness or as a party in the matter.<sup>59</sup> According to standard operating procedure, the office of the family advocate will not endorse a parenting plan or settlement agreement if there is no statement in such plan or agreement to the effect that any children involved in the matter have been consulted in the process and informed of the agreed-upon parenting arrangements.<sup>60</sup> Nonetheless, in many cases children are not consulted – either because they are not asked to provide any ideas or feedback regarding future parenting arrangements or because they are not informed about the changes happening to their families and their relationships with their parents.<sup>61</sup>

There are also various problems with the available court-related participation processes. Besides specific problems associated with each of these processes,<sup>62</sup> there is no clear indication or certainty among legal practitioners as to when each of the processes would be best suited to determining the voice of the child.<sup>63</sup> In addition, in all the court-related participation processes, children's voices are filtered through the adult lens of what is in the children's best interests and they unfortunately remain on the periphery of these participation processes.<sup>64</sup> Children's voices are also heard "... primarily in the context of helping the court in its decision-making as opposed to having children contribute to the decision-making in concert with their parents".<sup>65</sup> Moreover, the court-related participation processes inevitably take place in the adversarial environment of the court and as such provide a very hostile environment in which children's voices are to be heard.<sup>66</sup> The stage at which children's voices are heard may also be too late as conflict between their parents may already have become entrenched when the court-related participation processes come into play.<sup>67</sup> In this regard, Botha remarks that "in most cases, by the time children are actually afforded the opportunity to express their views ... they have inadvertently been exposed to high levels of animosity and manipulative 'tactics' leaving them confused and torn between 'warring' parents".<sup>68</sup> It therefore appears that the court-related participation processes might not constitute "an appropriate way" as required by the child-participation clause in the Children's Act.<sup>69</sup>

### 3.3 Other negative aspects of the process

One of the biggest problems seems to be that in the adversarial system matters, especially contested matters, are unnecessarily protracted – matters take far too

59 SALRC Issue Paper 31, Project 100D (2015) paras 2.2.37–2.2.76; Barratt 2002 *THRHR* 569. See also *Märtens v Märtens* 1991 4 SA 287 (T); *Hlope v Mahlalela* 1998 1 SA 449 (T).

60 This statement in parenting plans or settlement agreements is required by the office of the family advocate in terms of ss 6(5) and 10 of Act 38 of 2005.

61 Schoffer 2005 *Family Court R* 325.

62 See, eg, SALRC Issue Paper 31, Project 100D (2015) paras 2.2.30–2.2.39 2.2.45–2.2.97; Botha (2015) 47–73; Barratt 2002 *THRHR* 568–573.

63 Botha (2015) 47; Dept of Justice, Canada, Research Report by Birnbaum "The voice of the child in separation/divorce mediation and other alternative dispute resolution processes: A literature review" (2009) 49 available at <http://bit.ly/2wL6cnS> (accessed on 18 March 2017).

64 Dept of Justice, Canada, Research Report by Birnbaum 24–49.

65 *Idem* 49.

66 *Idem* 24.

67 *Idem* 25.

68 Botha (2015) 7.

69 See 2 above.

long to finalise due to lengthy delays caused *inter alia* by the overburdened court rolls,<sup>70</sup> forensic assessments by mental health experts, enquiries by the office of the family advocate, investigations by legal representatives appointed for children and cumbersome procedural matters such as the rules relating to discovery<sup>71</sup> and pre-trial notices.<sup>72</sup> This state of affairs tends to exacerbate the parties' negative emotions<sup>73</sup> and extend the time in which children are victims of the stress, tension and anxiety.

In addition, it has been said that the adversarial system of litigation is not really a search for the truth, but only for the better of the two versions presented to the court.<sup>74</sup> Due to the technical nature of rules of evidence, matters that are relevant to a case, such as the best interests of children, are frequently obscured and the facts on which the court's decision is based are often skewed.<sup>75</sup> Affidavits and pleadings are drafted in a formal and artificial way and the real voices of the parties are frequently distorted.<sup>76</sup> This situation may be exacerbated by attorneys who may decide to discover only beneficial information in an effort to zealously champion their client's interests.<sup>77</sup> If an expert report or care evaluation is not favourable to a client,<sup>78</sup> it often happens that the report or evaluation is not disclosed.<sup>79</sup> On the other hand, discovery may be used as a tactical step in the contest by requesting and/or making available a plethora of information, including everything remotely relevant to the divorce case so as to overburden the other side and/or obscure something that might possibly be detrimental to a party's case.<sup>80</sup>

Another negative aspect of the adversarial system is that the court makes a final decision at the end of the hearing in terms of which all the aspects of the family relationship<sup>81</sup> are apportioned in a final order determining the parties' responsibilities and rights for the future.<sup>82</sup> Family disputes involving children are, however, not well suited to final resolution by a court in a one-time static determination of parental responsibilities and rights, as no order can be final in

70 Botha (2015) 95–96 118 122.

71 Rule 35 of the Uniform Rules of Court and rule 24 of the Magistrate's Court Rules. See also *B v B* (700/2013) [2014] ZASCA 137 (25 September 2014) para 39.

72 Rule 37(1) of the Uniform Rules of Court and rule 25(1) of the Magistrate's Court Rules.

73 Belinkie "Matrimonial arbitration" 1991 *Connecticut Bar J* 309; Carbonneau "A consideration of alternatives to divorce litigation" 1986 *U Ill L Rev* 1119–1122.

74 Family Court of Australia *Less adversarial trial handbook* (2009) 15 available at <https://goo.gl/6sZYVV> (accessed on 20 March 2017).

75 Robinson 2015 *PER* 1534; Family Court of Australia 21. See further *B v B* (700/2013) [2014] ZASCA 137 (25 September 2014) para 39.

76 Family Court of Australia 21.

77 Robinson 2015 *PER* 1530.

78 As it may contain information regarding problems in the relationship between the client and a child.

79 Robinson 2015 *PER* 1532. See also *B v B* (700/2013) [2014] ZASCA 137 (25 September 2014) para 40.

80 Webb and Ousky *The collaborative way to divorce: The revolutionary method that results in less stress, lower costs, and happier kids – without going to court* (2006) 16–17. See also De Jong in Heaton (2014) 579; *B v B* (700/2013) [2014] ZASCA 137 (25 September 2014) para 39.

81 That is parenting arrangements, maintenance and the division of assets.

82 Kourlis *et al* 2013 *Family Court R* 355.



regard to children.<sup>83</sup> There is a need for fluidity and flexibility<sup>84</sup> in accordance with children's developmental needs and changes in the circumstances of children and their parents. It is therefore clear that the adversarial system is neither dynamic nor aimed at promoting ongoing personal relationships between family members.<sup>85</sup> It is seen as "a process supporting a build-up to a single hearing, a single set of findings and a single outcome", which is usually a case of "too much too late".<sup>86</sup>

### 3.4 Conclusion

It is therefore abundantly clear that the adversarial system of litigation encourages confrontation, causes delays and is far more focused on parents' rights than on their children's needs and interests.<sup>87</sup> The process is a child-unfriendly one that, by its very nature, causes harm, rendering the best interests of the child principle meaningless and child-participation in the process inappropriate, ineffective and insignificant.<sup>88</sup> The inescapable conclusion is that the adversarial system does not comply with the statutory requirements for proceedings concerning children. This negative conclusion emphasises the need for interventions that buffer children from the risk factors of divorce and provide them with an appropriate and meaningful way in which to participate in the process. The following sections will therefore set out proposals to change the experience of family dispute resolution through a radical reshaping of the adversarial system so that co-operation and agreement replace confrontation, decision-making in a legal context is non-adversarial, children are given a voice in the decisions made about post-separation family arrangements, litigation is avoided as far as possible and, where unavoidable, follows a less adversarial approach.

## 4 NEWLY PROPOSED PRE-COURT PROCESSES

### 4.1 Introduction

To ease the rigours of the adversarial system and the transitions of divorce, families need early intervention services to provide them with the relationship skills that will enable them to focus on the needs of their children and resolve their parenting and other separation issues themselves.<sup>89</sup> Research clearly documents that when families address and solve their own issues and parents are able to reach agreement as to how to reorganise their family, share parental responsibilities and rights and divide their property, everyone benefits and the long-term impact is profound and positive.<sup>90</sup> However, to do so, families need

<sup>83</sup> *Idem* 360; Parliament of the Commonwealth of Australia para 4.28.

<sup>84</sup> Kourlis *et al* 2013 *Family Court R* 360.

<sup>85</sup> Robinson 2015 *PER* 1533.

<sup>86</sup> Moloney 2006 *J of Family Studies* 42.

<sup>87</sup> Robinson 2015 *PER* 1531. See also *WL v SH* [2017] 1 All SA 652 (KZD) para 56 where Sishi J remarks that "[i]n the present application what is before this Court is nothing but a fight between the parties, which does not take into consideration the interest of the minor child".

<sup>88</sup> See also Robinson 2015 *PER* 1533–1535.

<sup>89</sup> McIntosh *et al* 2008 *Family Court R* 133; Parliament of the Commonwealth of Australia para 3.67.

<sup>90</sup> Kourlis *et al* 2013 *Family Court R* 369.

assistance and education as well as access to mediation or, alternatively, collaborative law at an early stage in the separation process.

#### 4.2 Intake procedures that provide assistance and education to families

At present, South Africa does not have a comprehensive family law system; there are various avenues that parents could follow when initiating divorce proceedings.<sup>91</sup> They could, for example, approach an attorney's office, Legal Aid South Africa, university law clinics, the official courts, community-based advice centres, community courts or the tribal courts.<sup>92</sup> As it may well be a daunting task for a parent facing divorce to decide which of these structures or services to approach, it has been suggested that there is an urgent need for some kind of reception process or intake procedure for families in distress.<sup>93</sup> Ideally, there should be a single entry point for divorcing or separating families that is highly visible and accessible to everyone and where the shadow of the law and the legal process is more distant.<sup>94</sup> In this regard, Robinson contends that the first point of contact for divorcing families should not be attorneys or other professionals schooled in the adversarial system, but rather professionals from the helping professions.<sup>95</sup>

In Australia, community-based family relationship centres staffed by family advisers serve as reception points.<sup>96</sup> The centres were designed to bring about a cultural change or paradigm shift in the way people set about resolving family disputes, especially children's issues, and to replace the court system or a lawyer's office as the first port of call for divorcing families.<sup>97</sup> In another article, I proposed similar centres, which would provide the necessary intake procedure to a fully integrated family law system, for South Africa. In the light of the Australian example, which reframed parental conflicts arising from divorce and separation from a legal problem with relationship conflicts to a public health problem with legal elements, I suggest a transformation of the existing network of

91 De Jong "Australia's family relationship centres: A possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?" 2017 *TSAR* 307–308. See also SALRC Issue Paper 31, Project 100D (2015) para 4.9.77.

92 De Jong 2017 *TSAR* 307.

93 *Idem* 308.

94 Kourlis *et al* 2013 *Family Court R* 370; Kaspiew *et al* "Evaluation of the 2006 family law reforms" (2009) 4 available at <http://bit.ly/2xOC7AH> (accessed on 20 March 2017).

95 Robinson 2015 *PER* 1534, 1535. See also De Jong 2017 *TSAR* 316 who argues that the intake centres should not be attached to the courts since if they are situated in or near the court complex, the message conveyed will be that legal practitioners and the courts, and not the community, are still at the centre of the process of determining family separation and other parenting disputes.

96 De Jong 2017 *TSAR* 310–311.

97 Kelly "Getting it right for families in Australia: Commentary on the April 2013 special issue on family relationship centres" 2013 *Family Court R* 282; Parkinson "The idea of family relationship centres in Australia" 2013 *Family Court R* 197, 208; Moloney "From helping court to community-based services: The 30-year evolution of Australia's family relationship centres" 2013 *Family Court R* 214; Robinson "Family relationship centres – Australian lessons for South Africa (and beyond)" in Diedrich (ed) *The status quo of mediation in Europe and overseas: Options for countries in transition* (2014) 338–339.

primary health care clinics across the country into fully-fledged family health and relationship centres which also cater for families in distress.<sup>98</sup>

At the intake centres both parents and children should be required to attend divorce information and education programmes as a prerequisite to obtaining a divorce.<sup>99</sup> As parents are often unaware of the harmful effects their behaviour may be having on their children and underestimate or ignore the effects of conflict with the other parent,<sup>100</sup> they need to educate themselves and understand what to do and what not to do in order to make the divorce transition less traumatising for children (and themselves). The focus of these programmes should therefore be on alerting parents to the negative effect of children's exposure to parental conflict in both the short and long term; informing parents how children usually respond to divorce and what their developmental and psychological needs are; discussing the benefits of parenting plans and co-operation and the skills needed to build a co-operative or parallel parenting relationship; stressing the importance of children's participation in decision-making about parenting arrangements; teaching positive parenting behaviours and appropriate discipline; and alerting parents to children's need for an ongoing relationship with each parent and the important link between non-resident parent-child contact and compliance with child maintenance orders.<sup>101</sup> These programmes should also provide information on available sources to help with family violence and child abuse; describe available and helpful pre-court processes, such as mediation<sup>102</sup> and collaborative divorce,<sup>103</sup> and post-court processes, such as parenting co-ordination;<sup>104</sup> and point out the pitfalls of litigation as an option for dealing with disputes concerning children.<sup>105</sup> At this stage, children's participation should be focused on obtaining information<sup>106</sup> – they should be reassured that parenting is forever and both parents will continue to be involved in their lives; they should be informed on the process that lies ahead and the manner in which they will be able to give their input concerning parenting arrangements in pre-court, court and post-court processes. Very importantly, they need to be assured that they will not have to make any decisions or side with either of their parents.<sup>107</sup>

Divorcing families should further be triaged at the intake centres so as to match available pre-court services to families or identify high-needs families or problem cases that should proceed directly to the courts.<sup>108</sup> In other words,

98 De Jong 2017 TSAR 316–318.

99 Jolivet 2011 *American J of Family L* 179; Dept of Justice, Canada, Research Report by Birnbaum 41.

100 Goldson 7.

101 De Jong 2017 TSAR 312; Jolivet 2011 *American J of Family L* 180.

102 See 4.3 below.

103 See 4.4 below.

104 See 6.2 below.

105 De Jong 2017 TSAR 312; Kelly 2013 *Family Court R* 282 and 283; Parkinson 2013 *Family Court R* 201, 203–204; Jolivet 2011 *American J of Family L* 180.

106 Dept of Justice, Canada, Research Report by Birnbaum 41.

107 Heaton "Parental responsibilities and rights" in Davel and Skelton (eds) *Commentary on the Children's Act* revision service 6 (2013) 3–34.

108 Kourlis *et al* 2013 *Family Court R* 354 362 365 371. See also the grounds for exemption under which people may be exempted from mandatory divorce and family mediation in 3.3 below.



families need to be assessed for suitability for pre-court services and screened for family violence or other problems. Parents should thereupon be referred to the most appropriate service or structure.<sup>109</sup>

Until a single-entry point and/or family health and relationship centres become a reality in South Africa, all services or structures called upon by divorcing families for the first time should provide the necessary intake procedure and in terms thereof be obliged to provide the mandatory education programmes for parents and children and to perform the necessary triage and referral function.

### 4.3 Mandatory child-informed mediation

#### 4.3.1 Mandatory mediation in South Africa

At present, mediation is mandatory only in certain children's issues in terms of the Children's Act 38 of 2005.<sup>110</sup> The Act makes provision for statutory mandatory mediation, *inter alia* where parents find it difficult to agree on an appropriate parenting plan upon divorce or parental separation,<sup>111</sup> and for court-mandated mediation in various sections dealing with lay-forum hearings<sup>112</sup> and pre-hearing conferences.<sup>113</sup> Elements of mandatory mediation in issues concerning the care or guardianship of or contact with children are also found in the Mediation in Certain Divorce Matters Act 24 of 1987.<sup>114</sup> Various calls have, however, been made for the introduction of mandatory mediation in all divorce-related and other family disputes in South Africa.<sup>115</sup> It is argued that as divorce and family mediation offers overwhelming advantages to divorcing spouses, the children affected by divorce and the judicial system in general,<sup>116</sup> it is desirable that anyone who has to experience the pain of family breakdown should benefit from the advantages of mediation.<sup>117</sup>

Divorce or family mediation is described as a process in which the mediator, an impartial third party who has no decision-making powers, facilitates the negotiations between separating parties with the object of getting them back on speaking terms and helping them to make their own decisions on some or all divorce-related issues and, if possible, to reach a mutually satisfactory settlement

<sup>109</sup> De Jong 2017 *TSAR* 317.

<sup>110</sup> For a full discussion of the various circumstances in which mediation may be mandatory in terms of the Act, see De Jong "Opportunities for mediation in the new Children's Act 38 of 2005" 2008 *THRHR* 631–636.

<sup>111</sup> S 33(3) read with s 33(5) of Act 38 of 2005.

<sup>112</sup> Ss 49 70 71 of Act 38 of 2005.

<sup>113</sup> S 69 of Act 38 of 2005.

<sup>114</sup> De Jong "Child-focused mediation" in Boezaart (ed) *Child law in South Africa* (2009) 118–119.

<sup>115</sup> Slabbert *The differences and similarities between divorce mediation and collaborative practice* (LLM diss Unisa 2017) 106; Goldberg "Family courts in South Africa and the implication for divorce mediation" 1995 *THRHR* 284; De Jong *Egskeidingsbemiddeling in Suid-Afrika: 'n Vergelykende perspektief* (LLD thesis Unisa 2002) 286–345; De Jong "An acceptable, applicable and accessible family-law system for South Africa – Some suggestions concerning a family court and family mediation" 2005 *TSAR* 37–44; De Jong 2010 *TSAR* 523–531.

<sup>116</sup> For a discussion of the advantages of divorce and family mediation, see De Jong in Heaton (2014) 603–605; De Jong "Judicial stamp of approval for divorce and family mediation in South Africa" 2005 *THRHR* 96–99.

<sup>117</sup> De Jong 2005 *TSAR* 37–38; Goldberg 1995 *THRHR* 284.

agreement that recognises the needs and interests of all family members.<sup>118</sup> Instead of the divorcing spouses battling out differences in the adversarial system, mediation therefore provides an opportunity to engage the knowledge and skills of a neutral professional who can assist parents in negotiating the details of parenting arrangements with each other.<sup>119</sup> However, where mediation is available to families on a voluntary basis the process is completely under-utilised and far too many parents and children are still missing out on its benefits.<sup>120</sup> Consequently, it is argued that the process should simply be made mandatory as a required first step in the formal divorce process after the intake procedure.<sup>121</sup> It is also pointed out that where mediation is mandatory, parties are not forced to reach agreement<sup>122</sup> – they are merely compelled to participate in the mediation process and make a reasonable effort to reach agreement.<sup>123</sup>

Nevertheless, it is recognised that while mediation has many advantages, it may not be suitable in all cases and exceptions should be made in circumstances where there is a substantial power imbalance between the parties, which the mediator is unable to redress; where one or both of the parties are totally unassertive or unwilling to participate in the process; where there is a risk of child abuse; where there is the chance of serious family violence; where there are alcohol, drug or mental health problems; where large estates are at issue and the formal disclosure of documents is of cardinal importance; where the estate of one of the parties or the joint estate is insolvent; where very complicated legal issues are involved and/or a precedent is needed; and in cases where there is a very high level of conflict, for example, those involving allegations of parental unfitness.<sup>124</sup> Therefore, as in Australia,<sup>125</sup> there should be grounds for exemption under which people may be exempted from mandatory divorce and family mediation.

#### 4.3.2 *Child-informed mediation for children's issues*

The above proposals with regard to the introduction of mandatory mediation in all divorce-related and other family disputes are fully supported. However, the current proposal regarding mediation is wider in the sense that whenever children are involved in a matter a very specific form of mandatory mediation, namely child-informed mediation, is proposed. Child-informed mediation adds an explicit focus on the child to the mediation process and is designed to include children's perspectives and to motivate parents to focus on their children's

<sup>118</sup> De Jong in Heaton (2014) 582.

<sup>119</sup> Ballard *et al* 2013 *Psychology, Public Policy, and Law* 271; Schoffer 2005 *Family Court R* 325–326.

<sup>120</sup> De Jong 2005 *TSAR* 38.

<sup>121</sup> *Idem* 40; De Jong (2002) 296; European Commission for the Efficiency of Justice “Better implementation of mediation in the member states of the Council of Europe” principle VI(b) available at <http://bit.ly/2vu14oF> (accessed on 20 June 2017).

<sup>122</sup> De Jong in Heaton (2014) 583.

<sup>123</sup> *PD v MD* 2013 1 SA 366 (ECP) para 29; SALRC Issue Paper 31, Project 100D (2015) para 3.8.42.

<sup>124</sup> De Jong in Heaton (2014) 586–587; De Jong 2010 *TSAR* 522; De Jong (2002) 297–298.

<sup>125</sup> See s 60I(9) of the Australian Family Law Act 1975 for the exceptions to mandatory dispute resolution in parenting disputes/children's issues.



needs.<sup>126</sup> It includes two different sub-forms, namely child-focused mediation and child-inclusive mediation.

In the first sub-form, child-focused mediation, the children are not interviewed by the mediator, but the parents are assisted by the mediator to increase their focus on their children's developmental needs and to address those needs carefully within their negotiations about parenting arrangements.<sup>127</sup> A minimum requirement in child-focused mediation is that all conclusions and agreements that are reached must be in the best interests of each child involved in the case.<sup>128</sup> This form of child-informed mediation should be utilised in those cases where children are not of an age, maturity and stage of development that qualifies them to participate in the process or where children refuse to be interviewed or specifically request not to be interviewed.<sup>129</sup>

In the second sub-form, child-inclusive mediation, children are interviewed by a mediator, preferably the one who is involved with their parents<sup>130</sup> or by one who is specifically trained to deal with children. The information from the interview is then shared with the parents in the mediation process to assist them to better understand their children's views and needs.<sup>131</sup> Children should be interviewed in an age-appropriate way separately from their parents to give them the opportunity to have a voice in the context of their family situation.<sup>132</sup> Children should further be interviewed early in the process,<sup>133</sup> so that their input can inform, and be integrated into, all negotiations and decision-making by the parents. However, if parents are not yet ready to receive their children's input owing to high and/or entrenched conflict, children should be included only later on in the mediation process when the parents' readiness to truly hear the voices of their children has been increased through various strategies.<sup>134</sup> Children could

126 Ballard *et al* 2013 *Psychology, Public Policy, and Law* 272, 278.

127 Yassenik and Graham "The continuum of including children in ADR processes: A child-centered continuum model" 2016 *Family Court R* 189; McIntosh *et al* "Children beyond dispute: A four year follow up study of outcomes from child focused and child inclusive post-separation family dispute resolution" (2009) 90 available at <https://goo.gl/rXcvUd> (accessed on 25 November 2016).

128 Webb and Moloney "Child-focused development programs for family dispute professionals: Recent steps in the evolution of family dispute resolution strategies in Australia" 2003 *J of Family Studies* 24.

129 It should be noted that no child can ever be forced to participate in any process and it is very important to obtain children's consent regarding whether they want to be interviewed or not: Dept of Justice, Canada, Research Report by Birnbaum 62.

130 Goldson 7 argues that "[a] child is far more likely to feel motivated to talk to a person who is demonstrably involved with their parents in a positive and therapeutic manner" and consequently that "... feelings of disloyalty and disjunction for the child involved are minimised and the context is literally more familiar, encouraging and conducive to the expression of authentic views".

131 Ballard *et al* 2013 *Psychology, Public Policy, and Law* 272; Dept of Justice, Canada, Research Report by Birnbaum 11–12, 19; McIntosh, Long and Wells 90; Goldson 7–9.

132 Goldson 9. See also De Jong in Boezaart (2009) 126–128.

133 Yassenik and Graham 2016 *Family Court R* 188; Dept of Justice, Canada, Research Report by Birnbaum 19; De Jong in Boezaart (2009) 126–127.

134 According to Yassenik and Graham 2016 *Family Court R* 189–192, strategies designed to focus parents' minds increasingly on their children and their children's needs *inter alia* include an active engagement with each parent's conflict story; introducing the parents to the areas which are commonly of concern to children; and a directed discussion between the parents during joint mediation sessions regarding the specific needs of their children.



also be brought into mediation sessions as and when an issue comes up which the child can clarify.<sup>135</sup> Very importantly, children should be brought in at the final mediation session with their parents to be informed about the parenting arrangements on which their parents have reached agreement and the implementation of such arrangements.<sup>136</sup>

It is clear that of the two sub-forms of child-informed mediation, child-inclusive mediation is to be preferred as it provides children with more autonomy and direct input into the decision-making process.<sup>137</sup> Nevertheless, both sub-forms do have their place.

#### 4.3.3 Advantages of the process

Some overseas research studies have compared the two sub-forms of child-informed mediation on the one hand and mediation-as-usual on the other, while others specifically compared the two sub-forms of child-informed mediation, namely child-focused mediation on the one hand and child-inclusive mediation on the other.<sup>138</sup> It appears from the results of these various studies that child-informed mediation, but specifically child-inclusive mediation, has very positive results for both children and their parents. It literally addresses all the risk factors prevalent at divorce and provides for better integration of children's voices in the process.

In addition to the fact that mediation-as-usual teaches parties how to deal with conflict in a non-aggressive way,<sup>139</sup> child-informed mediation increases the likelihood of parents improving conflict management and reducing conflict even more, and keeping children out of parental disagreements.<sup>140</sup> It appears that where children are part of the process, parents' awareness of the impact of conflict and the impact of conciliation on their children's lives is greatly enhanced.<sup>141</sup> Agreements reached in child-informed mediation are, for example, more likely to prohibit fighting or conflict in the parental relationship than agreements reached in mediation-as-usual.<sup>142</sup> Furthermore, it appears that children involved in child-inclusive mediation experience less inter-parental conflict and feel less "caught in the middle" of their parents' disagreements.<sup>143</sup> It is therefore clear that child-informed mediation, and more specifically child-inclusive mediation,

<sup>135</sup> Dept of Justice, Canada, Research Report by Birnbaum 19.

<sup>136</sup> *Ibid*; Goldson 9. This will also be in confirmation of the relevant provisions of the Children's Act referred to in 2 above.

<sup>137</sup> Ballard *et al* 2013 *Psychology, Public Policy, and Law* 277; Dept of Justice, Canada, Research Report by Birnbaum 25.

<sup>138</sup> See, eg, Bell *et al* "Outcomes of child-inclusive mediation" 2013 *Int J of Law, Policy and the Family* 116–140; Ballard *et al* 2013 *Psychology, Public Policy, and Law* 271–280; McIntosh, Long and Wells 1–109; McIntosh *et al* "Child-focused and child-inclusive family law dispute resolution: One year findings from a prospective study of outcomes" 2007 *J of Family Studies* 8–25; Goldon 5–17; Schoffer 2005 *Family Court R* 323–338; McIntosh "Child-inclusive divorce mediation: Report on a qualitative research study" 2000 *Mediation Quarterly* 55–67.

<sup>139</sup> De Jong 2005 *THRHR* 97.

<sup>140</sup> Ballard *et al* 2013 *Psychology, Public Policy, and Law* 272; McIntosh in Family Court of Australia 6; Dept of Justice, Canada, Research Report by Birnbaum 12, 61; Goldson 16.

<sup>141</sup> Dept of Justice, Canada, Research Report by Birnbaum 12; Goldson 16.

<sup>142</sup> Ballard *et al* 2013 *Psychology, Public Policy, and Law* 278.

<sup>143</sup> *Idem* 272.

provides an opportunity to overcome the harm of parental conflict,<sup>144</sup> the primary risk factor for children upon divorce.

Another advantage of mediation-as-usual that is amplified in child-informed mediation is improved communication and a higher level of co-operation between divorcing or separating parties.<sup>145</sup> While mediation-as-usual is said to enable parents to develop a long-term ability to share their parental responsibilities and rights in the interests of their children and to manage co-operative parenting,<sup>146</sup> child-informed mediation is said to lead parents to make more developmentally appropriate arrangements for their children and to be more available emotionally.<sup>147</sup> In addition, agreements reached in child-informed mediation include more aspirational language about co-parental communication and more provision for improving the co-parental relationship compared to agreements made in mediation-as-usual.<sup>148</sup> Besides increasing the parents' awareness of the significance of working together on behalf of their children, child-inclusive mediation in particular appears to increase the likelihood of children's being aware of parental co-operation and parental unity.<sup>149</sup> Meaningful involvement of both parents creates a positive atmosphere for children and helps them to adjust to their new circumstances upon divorce.<sup>150</sup> Authoritative parenting is then established and diminished or incompetent parenting, the second risk factor, is counteracted.

Furthermore, mediation-as-usual is said to improve and preserve children's relationship with both their parents and to increase the chances of the non-resident parent, usually the father, remaining involved in his children's upbringing.<sup>151</sup> This seems to be especially the case in child-informed mediation.<sup>152</sup> From a comparative study between mediation-as-usual and child-informed mediation, it appears that agreements reached in child-informed mediation are more likely to include aspirational language about the importance of parent-child relationships and parents in child-informed mediation agree to even more parenting time for the non-resident parent.<sup>153</sup> Another finding was that mediation, particularly child-inclusive mediation, led to a higher number of children in the study reporting a close connection between themselves and their fathers.<sup>154</sup> In similar vein, some parents, mainly 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.<sup>155</sup> Interventions such as child-focused and child-inclusive mediation

144 Schoffer 2005 *Family Court R* 323.

145 McIntosh in *Family Court of Australia* 6; De Jong 2005 *THRHR* 97.

146 Parliament of the Commonwealth of Australia para 3.70.

147 Ballard *et al* 2013 *Psychology, Public Policy, and Law* 272.

148 *Idem* 278 279; Bell *et al* 2013 *Int J of Law, Policy and the Family* 136.

149 Dept of Justice, Canada, Research Report by Birnbaum 12; Goldson 7, 9.

150 De Jong 2005 *THRHR* 98.

151 *Ibid*; Schoffer 2005 *Family Court R* 329.

152 Dept of Justice, Canada, Research Report by Birnbaum 53, 61; McIntosh in *Family Court of Australia* 6.

153 Ballard *et al* 2013 *Psychology, Public Policy, and Law* 278 279.

154 *Idem* 272.

155 Saposnek "Working with children in mediation" in Folberg, Milne and Salem (eds) *Divorce and family mediation – Models, techniques, and applications* (2004) 158. See also De Jong in Boezaart (2009) 128.

may, therefore, improve child outcomes and alleviate child distress at losing a parent to divorce,<sup>156</sup> a third risk factor prevalent at divorce.

In addition, as mediation promotes respect for the law and the legal process, it increases compliance with agreements reached, including the non-resident parent's compliance with contact and child maintenance orders.<sup>157</sup> This, in turn, has a positive effect on the standard of living of the care-giving parent, usually the mother, and the children, thus alleviating another risk factor, namely a decline in the standard of living of the care-giving parent.

As regards the voice of the child, child-inclusive mediation par excellence produces positive results. It specifically targets the compromised capacity of parents to hear their children.<sup>158</sup> In this regard, parents involved in child-inclusive mediation reported that hearing and getting information about their own children was a helpful aspect of mediation<sup>159</sup> and assisted them in dealing with their children's reality.<sup>160</sup> Child-inclusive mediation further appears to be therapeutic for children.<sup>161</sup> Children involved in child-informed mediation felt that their strong need for a voice and for information from within the familial context was satisfied by this process.<sup>162</sup> Both children and their parents independently reported that the children were more relaxed and had adapted significantly better to the rearranged family situation after having been given the opportunity to have a voice and having been listened to by their parents.<sup>163</sup> Children were also more satisfied with the final parenting arrangements.<sup>164</sup> It is said that in the light of their involvement, "children fill in their concrete reality of what is happening at the mediation, which can help ameliorate fears and concerns".<sup>165</sup> All in all, the process leads to lower levels of behavioural disturbance in children and greater stability in parental arrangements.<sup>166</sup>

Moreover, it is claimed that unlike the adversarial system of litigation, which often draws out the divorce process,<sup>167</sup> mediation enables parents to work out and resolve all matters related to divorce, including emotional and underlying issues, as quickly as possible.<sup>168</sup> It may also save the parents a considerable amount of money<sup>169</sup> and it leads to a reduction in court applications in cases involving children.<sup>170</sup>

It is therefore abundantly clear that child-informed mediation minimises harm or risk to children as it specifically promotes protective factors for children by motivating parents to consider their children's perspectives during mediation. If mandatory child-informed mediation is introduced, children will be directly

<sup>156</sup> Ballard *et al* 2013 *Psychology, Public Policy, and Law* 279.

<sup>157</sup> Kourlis *et al* 2013 *Family Court R* 363–364.

<sup>158</sup> Goldson 6.

<sup>159</sup> Ballard *et al* 2013 *Psychology, Public Policy, and Law* 277–279.

<sup>160</sup> Schoffer 2005 *Family Court R* 330.

<sup>161</sup> Bell *et al* 2013 *Int J of Law, Policy and the Family* 136–137.

<sup>162</sup> Goldson 4.

<sup>163</sup> Dept of Justice, Canada, Research Report by Birnbaum 13; Goldson 4, 16.

<sup>164</sup> Dept of Justice, Canada, Research Report by Birnbaum 12.

<sup>165</sup> Schoffer 2005 *Family Court R* 329.

<sup>166</sup> Bell *et al* 2013 *Int J of Law, Policy and the Family* 136–137.

<sup>167</sup> See 3 3 above.

<sup>168</sup> De Jong 2005 *THRHR* 97.

<sup>169</sup> Schoffer 2005 *Family Court R* 324; De Jong 2005 *THRHR* 97.

<sup>170</sup> Moloney 2013 *Family Court R* 220.



involved in the process to give their input unless the child is unwilling or unable to do so due to his or her age, maturity or stage of development. There will be no uncertainty as to which process should be utilised in order to hear the voice of the child, as is the case in the adversarial legal process.<sup>171</sup> Furthermore, although it may be difficult to assess children's best interests over a short period of time in the mediation process, it nonetheless appears that mediation is far more in tune with children's best interests than the adversarial system of litigation.<sup>172</sup>

#### 4.4 Collaborative law

##### 4.4.1 A place for the collaborative route

In circumstances where parents are exempted from mandatory divorce and family mediation<sup>173</sup> or where mediation has proved to be unsuccessful in that it has not led to an agreement by the parents, it is preferable that parents should follow the collaborative law route rather than seek the advice and services of an ordinary (adversarial) family law attorney. Collaborative practice is basically a continuation of the trend that began with mediation, but instead of one neutral mediator, it involves two non-neutral mediators, the parties' respective attorneys, who jointly facilitate the settlement negotiations between the parents in so-called four-way or all-party meetings.<sup>174</sup> Like mediation, collaborative law seeks to resolve legal disputes in a non-adversarial way to avoid the polarisation of parents that emerges from the adversarial legal process.<sup>175</sup> In collaborative practice, both parents are required to obtain the services of a collaborative practitioner who agrees to work with the other side to reach a settlement regarding children's issues (and financial issues) arising out of divorce and to withdraw from the matter if no settlement on these issues can be effected between the parents.<sup>176</sup> Both parents and their attorneys therefore pledge in binding written agreements, known as participation agreements, not to litigate during the pendency of the process, but to work together constructively and respectfully and engage in creative problem-solving with the aim of settling the case by agreement.<sup>177</sup> This considered undertaking by the parents to be open-minded during the negotiation process allows them to be more conscious of the best interests of the other parent as well as their children.<sup>178</sup> It also allows attorneys to be "... true counsellors to their clients by developing and utilising unique problem solving skills designed

<sup>171</sup> See 3.2 above.

<sup>172</sup> Schoffer 2005 *Family Court R* 333.

<sup>173</sup> See 4.3.1 above.

<sup>174</sup> Marumoagae 2016 *De Jure* 52; De Jong in Heaton (2014) 625, 627.

<sup>175</sup> Slabbert (2017) 81–82; Marumoagae 2016 *De Jure* 52; Parliament of the Commonwealth of Australia para 4.52. There are nonetheless procedural differences between mediation and collaborative practice which make them distinct.

<sup>176</sup> De Jong in Heaton (2014) 625; Geldenhuys *et al* "Collaborative law: A new approach to family law" April 2009 *De Rebus* 27.

<sup>177</sup> SALRC Issue Paper 31, Project 100D (2015) para 3.12.4; De Jong in Heaton (2014) 625; Tesler *Collaborative law: Achieving effective resolution in divorce without litigation* (2008) 9.

<sup>178</sup> Marumoagae 2016 *De Jure* 44.

and aimed at reaching the best available outcome for both parties for the post-divorce restructured family, especially when children are involved".<sup>179</sup>

#### 4.4.2 *Involvement of a child specialist*

When a child involved in a matter has not already been interviewed in the mediation process, a neutral child specialist will be appointed to bring the voice of the child into the collaborative process and assist parents in developing workable parenting plans.<sup>180</sup> Typically, the child specialist is a mental health professional and is included in the agreement with the parents and their attorneys that any information obtained by the child specialist will be excluded from any future court process.<sup>181</sup> If the child has already been interviewed during the mediation process, the mediator or other professional who interviewed the child should bring the voice of the child into the collaborative process. It is important that children should never be subjected to a replication of a previous process.<sup>182</sup>

#### 4.4.3 *Advantages of the process*

A great advantage of collaborative practice is that it offers parents the support, protection and guidance of their own attorneys without their having to conduct negotiations in the shadow of the legal process and/or go to court.<sup>183</sup> Another advantage of collaborative law is that it "utilises the services of an interdisciplinary team approach that integrates legal, emotional, and financial aspects of the divorce".<sup>184</sup> Other advantages of the process include "speed, cost, better settlements, and less stress for clients, children and lawyers".<sup>185</sup> For the purposes of this article, the following quotation is particularly fitting:

"The collaborative divorce process provides support for the entire family and is respectful of each person's needs. The people choosing this process often state that they 'don't want to fight' and 'want to remain friends' after the divorce. Especially for parties with children, they want to divorce in a way that can preserve their relationship and enable them to co-parent after the divorce effectively."<sup>186</sup>

The development of collaborative practice by all family law attorneys should therefore be encouraged<sup>187</sup> and parents should approach only collaborative family law attorneys, as opposed to traditional adversarial attorneys, with their parenting disputes.

<sup>179</sup> *Idem* 45.

<sup>180</sup> *Idem* 44; Dept of Justice, Canada, Research Report by Birnbaum 24; De Jong in Heaton (2014) 626.

<sup>181</sup> Marumoagae 2016 *De Jure* 44; Dept of Justice, Canada, Research Report by Birnbaum 24.

<sup>182</sup> Yassenik and Graham 2016 *Family Court R* 189.

<sup>183</sup> SALRC Issue Paper 31, Project 100D (2015) para 3.12.3.

<sup>184</sup> O'Reilly "Lawyers as peacemakers conference" available at <http://bit.ly/2wKkq8Q> (accessed on 25 May 2017). See also Marumoagae 2016 *De Jure* 46, 56; SALRC Issue Paper 31, Project 100D (2015) para 3.12.15; De Jong in Heaton (2014) 625–626.

<sup>185</sup> Parliament of the Commonwealth of Australia para 4.52.

<sup>186</sup> Wright "Collaborative divorce practice: A revolution in family law" 2008 *Arizona Attorney* 39.

<sup>187</sup> See also Slabbert (2017) 107; Marumoagae 2016 *De Jure* 54–56.

#### **4.5 Conclusion**

It is clear that early intervention services, such as parent education, child-inclusive mediation and collaborative divorce, enable parents to hear their children's voices and to enter into agreements that will be beneficial for the restructured family outside of the legal process. These pre-court processes also result in better outcomes for children and minimise the risk factors inherent in the divorce process. It would therefore be sensible to make these non-adversarial, child-sensitive processes the norm when parents are engaged in disputes about their children and to fully integrate them into the family-law system of South Africa. However, whenever these pre-court processes are unsuccessful or inappropriate and cases need to proceed to the courts, the trial process should also be amended to become less adversarial and more child-sensitive.

**(to be continued)**