

MEDIATION IN SOUTH AFRICA'S NEW CHILDREN'S ACT: A PYRRHIC VICTORY

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ABSTRACT

In 2002 the South African Law Commission proposed that all legislation governing children be codified in a single statute. It furthermore proposed a fundamental overhaul of the law relating to children as it was felt that South African law in this regard was out of sync with modern legal developments, that it was incongruent in many respects with our, then newly created, constitutional dispensation, and that it did not fully reflect South Africa's international law obligations.

After three years of research and debate the South African Parliament in 2005 passed the Children's Act 38 of 2005, which came into operation in June 2007. Consisting of 22 chapters and 315 sections, the Act is truly impressive; it deals with each and every aspect of childhood in South Africa.

Sweeping aside the conservatism of our Roman-Dutch legal heritage, the Act marks a dramatic change in legal policy affecting children. The recognition of surrogacy arrangements and the adoption of children by single parents and same-sex couples are but two examples of fundamental policy transformation. Following global concerns about the trafficking in children and their sexual, physical and emotional exploitation, the Act not only seeks to eradicate such practices, but also sets mechanisms in place to deal with the consequences of such actions. Cross-border adoptions, and the inter-country abduction of children by parents embroiled in custody battles, too, receive consideration – all in conformity with South Africa's self-imposed obligations under international law.

Significantly, for the purposes of alternative dispute resolution, the Act encourages and mandates mediation processes and procedures in a number of key areas (some of which are mentioned above). In my paper I wish to explore how the Act fosters mediation and to critically evaluate what success the endorsement of mediation is likely to have in the arena of children's law having regard to our deeply entrenched adversarial legal system.

The clichéd adage ‘children are our future’ holds special significance in South Africa where more than a third of the population¹ comprise of persons below the age of 18.² As a group, therefore, children make up a significant proportion of the population and with the AIDS pandemic constantly decreasing the adult population, children as a demographic group³ is sure to rise within the next few years - despite an unusually high infant mortality rate attributed to other forms of disease and poverty.⁴

In 2007 South Africa’s new Children’s Act 38 of 2005 came into operation. It seeks to treat each and every aspect of childhood in a holistic manner. In this article I would like to discuss one aspect of the new Children’s Act and that is the effect that it has had on promoting the use of mediation in legal disputes affecting children. The task is rather modest. However, having regard to the fact that traditionally disputes concerning children were decided in a state-sanctioned adversarial legal system, the legislative encouragement of the use of mediation proceedings marks a fundamental policy shift as regards how the interests of children might best be protected.

BACKGROUND TO THE NEW ACT

The Children’s Act is the legislative response to the work of the South African Law Reform Commission. In 1997 the Minister of Public Welfare and Population Development through the National Department of Justice and Constitutional Development mandated the South African Law Reform Commission to look into the situation of children because various provisions of the then prevailing legislation⁵ dealing with children were considered incongruent with the provisions of s28⁶ of the Constitution of the Republic of South Africa Act of 1996.⁷ Section 28 is to be found in the Bill of Rights of the Constitution and articulates the rights of children.⁸ It was

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¹ This is according to a recent report of the University of Cape Town Children’s Institute. See *The South African Child Gauge 2007/2008* p 64. A copy of this report may be downloaded from the following website: www.ci.org.za/site/includes/content/general/gauge2007.html.

² In terms of the Age of Majority Act 57 of 1972 majority commenced at age 21. However, the Children’s Act, s17 repeals Act 57 of 1972 and declares majority to commence at age 18 for all persons. Section 17 came into operation on 1 July 2007.

³ See *The South African Child Gauge 2007/2008*, above n 1, 64.

⁴ See http://www.unicef.org/infobycountry/southafrica_statistics.html#45. This website was last accessed on 6 May 2008.

⁵ Children’s law was, by and large, regulated by the Child Care Act 74 of 1983.

⁶ Act 108 of 1996.

⁷ Lois Law ‘The Children’s Act’ *Briefing Paper 153* (unpublished paper of the Southern African Catholic Bishops Conference Parliamentary Liaison Office, February 2006) 1.

⁸ Section 28 provides:

- ‘(1) Every child has the right-
 - (a) to a name and a nationality from birth;
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, abuse or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provide services that-
 - (i) are inappropriate for a person of that child’s age; or
 - (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;

felt that the then prevailing children's legislation could not meet the imperatives set out in s 28 and furthermore, that the legislation was in material respects unable to accommodate the values enshrined in s9, the equality clause, and s10, the dignity clause, of the Bill of Rights. That South Africa had ratified and was in the process of ratifying a number of international instruments relating to children served as a further impetus for a new legislative regime.⁹ Prevailing legislation simply could not meet the required standards if South Africa was to comply with its international law obligations.

No sooner had the work of the Law Reform Commission commenced when it dawned upon all concerned that the task was much greater than that originally envisaged. The position of the child in South Africa was not just a legal question. It required a multidisciplinary response. The mental, physical, psychological, social and economic well-being of the child was intimately linked to notion of the child as a legal subject. The devastating effect of AIDS on the family unit, resulting in more and more children heading households because of dying or already deceased parents and the gamut of problems associated with that, together with the high incidence of transmission of AIDS from mother to child during pregnancy, meant that the child as a legal subject could not be separated from the consequential effects of the health catastrophe that South Africa was facing. Poverty, other forms of disease, abuse and neglect, too, were identified as critical factors impacting on the lives of children.¹⁰ Consequently, the Law Reform Commission, after wide consultation,¹¹ produced a mammoth 337 page *Report* consisting of 24 chapters.¹² In it the Law Reform Commission articulated a new, comprehensive and multidimensional legal regime for children.

Out of the ashes of AIDS, poverty, disease, abuse and neglect comes the new Children's Act, a pyrrhic victory for children. Its gestation period was long. From conception (i.e. when the Law Reform Commission made its proposals) to birth (i.e.

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- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's best interests are of paramount importance in every matter concerning the child.
 (3) In this section 'child' means a person under the age of 18 years.'

⁹ South Africa ratified the following instruments: Convention on the Rights of the Child: ratified on 16 June 1995, without entering any reservations; African Charter on the Rights and Welfare of the Child: signed on 10 October 1997 and ratified on 7 January 2000; Hague Convention on the Civil Aspects of International Child Abduction: acceded to on 8 July 1997, came into force on 1 October 1997 and is now entrenched in chapter 17 of the Children's Act of 2005; The Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption: acceded to on 1 December 2003 and is entrenched in Chapter 16 of the Children's Act of 2005.

¹⁰ CJ Davel & AM Skelton Commentary on the Children's Act (2007 service) 1-8, 1-9.

¹¹ On this consultation process see CJ Davel & AM Skelton, note 10 above, 1-12, 1-13.

¹² South African Law Reform Commission *Project 110 Report on the Review of the Child Care Act* (2002). For the full report visit <http://www.doj.gov.za/salrc/reports.htm> (last accessed on 6 May 2008).

when Parliament passed the legislation and the President promulgated the legislation into law) a full decade passed. The majority of the provisions of the Act came into operation on 1 July 2007, whilst the operation of other provisions was delayed to end of 2007. And, recently the Children Act has been supplemented by the Children's Amendment Bill¹³ which completes the already vast Children's Act. The Children's Amendment Bill has already been passed by Parliament and signed by the President. It is just a matter of time before its effects also come into operation.

MEDIATION IN THE CHILDREN'S ACT: BACKGROUND AND OPPORTUNITIES FOR MEDIATION

The Law Reform Commission did not deal with the question of dispute resolution in any detail. To a large extent, the Law Reform Commission, it seems, assumed that the most appropriate forum to decide matters affecting children would be the children's court, a specialist court that had already been established under the then prevailing Child Care Act of 1983.¹⁴ The Law Reform Commission in its Report recommended for the children's court to also serve the needs of children under the new dispensation that *it* proposed. Mediation as a concept and as a method of dispute resolution was mentioned in passing but there was no discussion or evaluation of alternative dispute resolution mechanisms *per se*. The current mediation provisions in the Children's Act, it seems, is largely accredited to input made during the legislation drafting process. Although drafting documentation about the other substantive provisions of the Act is relatively easy to come by,¹⁵ the identities and the opinions of the movers and shakers behind the mediation provisions in the Act is not apparent and is at most anecdotal.

Mediation in the Children's Act may be discussed by drawing a distinction between *direct opportunities for mediation* and *indirect opportunities for mediation*. Direct opportunities for mediation refer to those instances where the Children's Act expressly makes mediation *mandatory* or *discretionary* (at the instance of the court). *Indirect opportunities for mediation* refer to those provisions in the Act where mediation is not contemplated, but in respect of which mediation might be recommended- if one has regard to the aims and objectives of those provisions. In this article, I will consider both the direct and the indirect opportunities for mediation in the Children's Act. Although each opportunity for mediation will be critically evaluated as and when it is discussed, at the end of this article there will, nevertheless, be a general comment articulating common concerns about the mediation provisions in the Act.

DIRECT OPPORTUNITIES FOR MEDIATION

(a) Mandatory Mediation

(i) Section 21: Parental responsibilities and the rights of unmarried fathers

¹³ Bill 19D of 2006.

¹⁴ Child Care Act 74 of 1983. Once all the provisions of the Children's Act comes into operation, the Child Care Act will be repealed in its entirety.

¹⁵ See <http://www.ci.org.za/site/frames.asp?section=lawreform> for copies of submissions. This website was last visited on 6 May 2008.

To understand the relevance of the mediation provisions in s21, some background explanation needs to be given about the section. In terms of our common law, as amplified by the case of *B v S*¹⁶, a father of an extra-marital child was historically in an invidious position. In *B v S* the Appellate Division held:

‘The fact is that in Roman-Dutch law an illegitimate child fell under the parental authority, and thus the guardianship and custody, of its mother; the father had no such authority: Van Leeuwen Het Roomsche Hollandsche Recht H 1.7.4; Van Bynkershoek Quaestiones Juris Privati 3.11; Van der Linden Koopmans Handboek 1.4.2. To acquire parental authority he had either to marry or be married to the child's mother or he had to adopt the child: Voet Commentarius ad Pandectas 1.6.4.’¹⁷

It followed from the above, held the court, that an unmarried father did not have any inherent rights of access and custody to his child.¹⁸ If a father of an extramarital child wanted access and custody he had to petition a court alleging and proving, on a balance of probabilities that it was in the best interests of the child concerned.¹⁹ The court went on to hold that ‘if there are sound sociological and policy reasons for affording such fathers an inherent access right, in addition to the right that they already have to be granted access where it is in the best interests of their children, then that is matter which can only be dealt with legislatively.’²⁰

Following the decision in *B v S (supra)* the legislature did indeed respond. It passed the Natural Fathers of Children Born out of Wedlock Act.²¹ Section 2 of this Act enabled biological fathers to acquire access to and custody and guardianship of their children born out of wedlock.²² In terms of this section a father seeking to acquire rights in terms of the Act had to make application to court and upon a preponderance of a number of factors the court had to determine whether it was in the best interests of the child to permit the father to exercise parental rights.²³ From the provisions of the Act it was clear, therefore, that to acquire rights a father of an extra-marital child had to resort to the adversarial litigation system. However, the Act did contain an important mechanism through which mediation might be activated. This was contained in s3 of the Act. It provided as follows:

‘Powers and duties of Family Advocate

3 (1) The Family Advocate shall after an application²⁴ has been lodged for—

¹⁶ 1995 (3) SA 571 (A).

¹⁷ *B v S (supra)* at 575G-H.

¹⁸ In *B v S (supra)* at 575 I-J the court held:

‘In the light of those authorities it cannot, in my view, be said that the common law is silent - in the sense of conveying nothing - as regards access by a father to his illegitimate child. The most that can be said in support of appellant's argument is that there is nothing express on the subject. However, the very clear implication in what is indeed said is that, having no parental authority, such a father was bereft of the very power from which any supposed inherent right of access could have originated ex lege.’

See also van Heerden et al *Boberg's Law of Persons and Marriage* (1999) 459-460.

¹⁹ In *B v S (supra)* at 579H.

²⁰ *B v S (supra)* at 583G.

²¹ Natural Fathers of Children Born out of Wedlock Act (*supra*).

²² The provisions of the section are attached as an addendum to this paper.

²³ Section 2(1) read with sections 2(2) and 2(5).

²⁴ Italics inserted for emphasis.

- (a) an order granting access rights to or custody or guardianship of a child born out of wedlock under section 2; or
- (b) the variation, rescission or suspension of such order.

if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him or her to furnish the court at the hearing of such application with a report and recommendations on any matter concerning the welfare of the child concerned or regarding any such matter as is referred to him or her by the court.

(2) The Family Advocate may after any application referred to in subsection (1) has been lodged, if he or she deems it in the interest of the child concerned apply to the court concerned for an order authorizing him or her to institute an enquiry referred to in that subsection.

(3) The Family Advocate may if he or she deems it in the interests of the child concerned, and shall, if so requested by a court, appear at the hearing of any application referred to in subsections (1) and (2) and may adduce any available evidence relevant to the application and cross-examine witnesses giving evidence thereat, suspension or variation of orders.’

If one reads s3 one would be forgiven for being skeptical of the presence of any form mediation as the word *mediation* does not feature anywhere in the provision. However, the reference to the involvement of the family advocate was significant. In terms of the section, after an application was lodged with a court, any party, or the court itself, could request the family advocate to conduct an ‘enquiry’ into the best interests of the child concerned. Family advocates are appointed in terms of the Mediation in Certain Divorce Matters Act²⁵ (the “MDM). The name of the MDM is misleading. When the Act was originally conceived its purpose was to provide mediation in divorce matters where minor children were involved. However, over the years the provisions of this Act came to be incrementally extended to reach beyond divorce matters. A dispute in terms of the Natural Fathers of Children Born out of Wedlock Act was an instance of the widening scope of the Act. Since inception the method of dispute resolution envisaged by the Act was that of mediation. This is apparent from the rather dated long title of the Act which defines the purpose of the Act:

‘To provide mediation in certain divorce proceedings, and in certain applications arising from such proceedings, in which minor children or dependent children of the marriage are involved.’

As I will be commenting on the mediatory function performed by the family advocate later in this article under the heading ‘general comment’, for the moment it is simply enough to point out that although the Natural Fathers of Children Born out of Wedlock Act mandated adversarial litigation as the means by which proceedings in terms of the Act was to be initiated, the reference to the involvement of the family advocate after the institution of proceedings created an opportunity for court-connected mediation. Whether in fact the family advocate exercised any mediatory function is a question to be addressed later.

²⁵ Act 24 of 1984.

In contrast to the common law and the Natural Fathers of Children Born out of Wedlock Act, s21 of the new Children's Act takes a more nuanced approach to the rights of unmarried fathers in respect of their biological children. The section provides as follows:

- '(1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-
- (a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or
 - (b) if he, regardless of whether he has lived or is living with the mother-
 - (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;
 - (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and
 - (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.
- (2) This section does not affect the duty of a father to contribute towards the maintenance of the child.
- (3) (a) If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfillment by that father of the conditions set out in subsection (1) (a) or (b), the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.
- (b) Any party to the mediation may have the outcome of the mediation reviewed by a court.
- (4) This section applies regardless of whether the child was born before or after the commencement of this Act. '

Unlike the common law and even the Natural Fathers of Children Born out of Wedlock Act which operated from the stance that the father in all circumstances had no inherent rights of guardianship, access and custody and that to obtain these rights a court order was needed, s21 takes a different approach.²⁶ If the father meets the factual criteria mentioned in subsection 1, he is ipso facto entitled to enjoy full parental rights. He is thus placed on the same footing as the mother and as that of any other father. The father can insist on gaining access to his child, and if the mother refuses him, he can take action.²⁷

²⁶ It was felt that the common law position as modified by the Natural Fathers of Children Born out of Wedlock Act (*supra*) was unconstitutional because it unfairly discriminated against biological fathers on the basis of sex and marital status, both of which are enumerated grounds of discrimination mentioned in s9 (the equality clause) of the Bill of Rights contained in the Constitution of the Republic of South Africa Act 108 of 1996. See in this regard CJ Davel & AM Skelton *Commentary on the Children's Act* (2007 service) 3-10 and see in particular fn5 and all the authorities there cited.

²⁷ It may be argued that the provision has little practical effect as it still requires the father to take positive steps to exercise his rights. However, the section does change the psyche with which society and for that matter the courts will view the rights of the father. If he meets the criteria, he goes to court with a prima facie entitlement and not because he has no inherent rights.

Section 21(3) deals with disputes between unmarried biological parents of a child. Presumably these disputes will turn on whether or not the father has met the criteria mentioned subsection 1. Section 21(3)(a) provides that a dispute ‘must’ be referred for mediation to a ‘family advocate, social worker, social service professional or other suitably qualified person.’ The word ‘must’, it is submitted, is peremptory. Parties are obliged to mediate their dispute first.²⁸ However, if a matter is urgent and there is great likelihood that the child’s best interests will be prejudiced by mediation, parties can under those circumstances, it is submitted, approach a court for immediate and urgent interim relief²⁹ pending the finalization of mediation. The section, therefore, does not diminish the power of the High Court, as upper guardian of all minors³⁰ to grant immediate relief and does not detract from the power of the children’s court³¹ to grant urgent relief in the form of interdicts.³² Despite the implied reservation of power in favour of the High Court and the children’s court to grant urgent relief, the provision is, nevertheless, a huge scoop for mediation. Mediation is no longer at the discretion of the parties or of the court as was formerly the case, but is a mandatory process. The fact that the Act does not require the lodgment of an application as a precursor to mediation, as was the case under the Natural Fathers of Children Born out of Wedlock Act, means that mediation need no longer be a court-sanctioned process; it can stand independently.

Whereas in the past the family advocate had sole official jurisdiction to conduct mediation type proceedings, the legislature in s21 has approved of other persons and bodies to conduct mediations. The reference to ‘other suitably qualified person’ makes provision for accredited mediators and mediating agencies to conduct such mediations. Whilst the Act is silent on what the qualifications for suitability would be, it is hoped that the Minister of Public Welfare will by means of Regulations³³ passed in terms of the Act determine the criteria for suitability. Removing the monopoly enjoyed by the family advocate to conduct mediations is a huge and necessary development. Why this is so will be explained later.

What is also interesting to note is that the parties, in terms of the section, are not obliged to place their mediation agreement before court for scrutiny and approval.

²⁸ For a similar view see CJ Davel and AM Skelton, note 10 above, 3-12.

²⁹ The children’s court does not have powers to entertain urgent proceedings. Such proceedings would have to be brought in the High Court in terms of Uniform Rule of Court 6(12). For a discussion of the application of Uniform Rule of Court 6(12) see LTC Harms *Civil Procedure in the Superior Courts-Student’s Edition* (2003) 114-115.

³⁰ See discussion in note 31 below.

³¹ The children’s court is not a completely new innovation. A court with the same name was established in terms of s8 of the Child Care Act 74 of 1983. However, the children’s court in terms of the Children’s Act (*supra*) has much wider scope and accordingly, it enjoys wider power and jurisdiction. It is essentially a civil court with civil jurisdiction and must be regarded as a creature of statute. This means that it must be accorded only those powers conferred upon it in the Children’s Act (*supra*). The High Court, which is a superior court (see Chapter 8 of the Constitution (*supra*)) has concurrent jurisdiction with the children’s court (see Children’s Act, s45(4)). Historically, the High Court was regarded as the upper guardian of all minors. See in this regard *Calitz v Calitz* 1939 AD 56.

³² Children’s Act, s48(1)(a).

³³ There are a number of places in the Act where the Minister of Public Welfare is empowered to make Regulations for the proper functioning of the Act. However, s306(1)(e) confers a general power on the Minister to make Regulations. In terms of this section, the ‘Minister may make regulations regarding ...generally any other ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.’ Regulations for the qualifications criteria for mediators could easily be accommodated within this provision.

Section 21(3)(b) provides that a mediation agreement ‘*may*’ be reviewed by a court. Section 21 must be read with section 22. In terms of the latter provision, if the parties undertake mediation which is not associated with the office of the family advocate (for example, they engage the services of a private mediation service provider), any agreement emanating from that process can be ‘registered’ with the family advocate without court intervention. It falls to the family advocate then to review the parenting plan against the best interests of the child standard.³⁴

By permitting the parties to mediate their dispute and then to refer an ensuing agreement to the family advocate for ‘registration’ without court intervention marks a fundamental policy shift. Whereas in the past there was always an assumption that the courts were best suited to decide questions of custodial rights and access to children, and to decide family disputes in general, in recent years this assumption has come to be questioned. Adversarial court proceedings in family disputes have been recognized for leading to acrimonious ‘battles’³⁵ culminating in family feuds worthy of shaming

³⁴ Section 22 provides:

‘(1) Subject to subsection (2), the mother of a child or other person who has parental responsibilities and rights in respect of a child may enter into an agreement providing for the acquisition of such parental responsibilities and rights in respect of the child as are set out in the agreement, with-

- (a) the biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of either section 20 or 21 or by court order; or
- (b) any other person having an interest in the care, well-being and development of the child.

(2) The mother or other person who has parental responsibilities and rights in respect of a child may only confer by agreement upon a person contemplated in subsection (1) those parental responsibilities and rights which she or that other person has in respect of the child at the time of the conclusion of such an agreement.

(3) A parental responsibilities and rights agreement must be in the prescribed format and contain the prescribed particulars.

(4) Subject to subsection (6), a parental responsibilities and rights agreement takes effect only if-

- (a) registered with the family advocate; or
- (b) made an order of the High Court, a divorce court in a divorce matter or the children's court on application by the parties to the agreement.

(5) Before registering a parental responsibilities and rights agreement or before making a parental responsibilities and rights agreement an order of court, the family advocate or the court concerned must be satisfied that the parental responsibilities and rights agreement is in the best interests of the child.

(6) (a) A parental responsibilities and rights agreement registered by the family advocate may be amended or terminated by the family advocate on application-

- (i) by a person having parental responsibilities and rights in respect of the child;
- (ii) by the child, acting with leave of the court; or
- (iii) in the child's interest by any other person, acting with leave of the court.

(b) A parental responsibilities and rights agreement that was made an order of court may only be amended or terminated on application-

- (i) by a person having parental responsibilities and rights in respect of the child;
- (ii) by the child, acting with leave of the court; or
- (iii) in the child's interest by any other person, acting with leave of the court.

(7) Only the High Court may confirm, amend or terminate a parental responsibilities and rights agreement that relates to the guardianship of a child.’

³⁵ See for example *Clemson v Clemson* [2000] 1 All SA 622 (W).

the Capulets and the Montagues.³⁶ Years can pass and hurt feelings never mended. This discord often translates into refusals to comply with a court's order necessitating further litigation, more costs and more heartache.³⁷ South African judges have noted that the coldness of a courtroom and an ensuing court order is neither the best venue nor the best vehicle to resolve matters affecting children who are often relegated to being innocent bystanders between two warring factions long after the court's gavel has fallen.³⁸ By treating mediation in the manner in which the legislature has, it has not only acknowledged the limitations associated with adversarial litigation, but it has also recognized the integrity of mediation as an effective dispute resolution mechanism. For following global dispute resolution trends³⁹, the legislature, on this occasion, must be lauded.

(ii) Section 33: Parenting plans

Neither s33 nor the Act defines what a parenting plan is. However, from s33 one can deduce that a parenting plan refers to an agreement in which co-holders of parental rights and responsibilities make arrangements about how they intend to exercise their respective parental rights and duties. Classically parenting plans are relevant to couples who divorce, or to unmarried couples who intend to bring up their children, whether biological or adopted⁴⁰, as single parents. In respect of parenting plans the section provides as follows:

³⁶ The Capulets and the Montagues were the two feuding families in the famous play *Romeo and Juliet* by William Shakespeare. The feud eventually led to the tragedy.

³⁷ The facts of *Soller NO v G and Another* 2003 (5) SA 430 (W) is indicative of a prevalent trend. In that case the court had the following to say about the relentless acrimony between the parties after the breakdown of their marriage: 'Mr and Mrs G were divorced from each other on 7 February 2001 (per Goldblatt J). Mrs G was awarded sole custody and sole guardianship over G (a son) and K. The Court order specifically reads that 'the non-custodian parent shall not be entitled to reasonable access to the said children, such including telephonic access' and that Mr G was advised of his right to apply to Court for a variation of that order should circumstances vary. Mr G was ordered to contribute towards the maintenance of both the son G and K each month by cash payments and payment of prescribed medical and private school expenses. There have been subsequent orders pertaining to both G and K. In essence, Mrs G has retained custody of both children while Mr G was granted access to G and K on 3 August 2001 (per Schabort J), subsequently amended on 28 November 2001 (per Van Oosten J, on two occasions). The ongoing acrimony between Mr G and the world (including Mrs G, G and this High Court) reached extraordinary levels of irrationality and resulted in extensive and damaging litigation. It should be noted that Mr G apparently procured his sequestration with the result that he has not contributed towards the maintenance of his children, G and K, and has thereby attempted to thwart implementing certain financial arrangements with regard to Mrs G and the children. Furthermore, the resort to litigation with allegations and counter-allegations eventually resulted in an interim order on 8 June 2001 (per Labuschagne J) and a final order on 24 October 2001 (per Van Oosten J) interdicting Mr G 'without leave of the High Court or any Judge thereof from instituting any further vexatious, frivolous and unlawful criminal and civil actions both in the High Court as well as the lower court... Mr G is unashamed in his contempt for the Court process and the judicial officers therein. He informed me from the Bar that he had not and would not comply with the maintenance order made Goldblatt J because the order was 'incorrect' and he did not consider himself bound thereby. Accordingly he has refused to pay maintenance for his children over some years' - Per Satchwell J, para 35, 36 and 41.

³⁸ See *Townsend-Turner and Another v Morrow* 2004 (2) SA 32 (C). In this case the court eventually ruled that the family dispute had to be referred to mediation.

³⁹ N Alexander (ed) *Global Trends in Mediation* (2006).

⁴⁰ Following several constitutional challenges to the adoption provisions contained in the Child Care Act 74 of 1983, the Children's Act, s231 permits the following categories of persons to adopt children:

- (1) A child may be adopted-
 - (a) jointly by-
 - (i) a husband and wife;

- ‘(1) The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.
- (2) If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.
- (3) A parenting plan may determine any matter in connection with parental responsibilities and rights, including-
- (a) where and with whom the child is to live;
 - (b) the maintenance of the child;
 - (c) contact between the child and-
 - (i) any of the parties; and
 - (ii) any other person; and
 - (d) the schooling and religious upbringing of the child.
- (4) A parenting plan must comply with the best interests of the child standard as set out in section 7.
- (5) In preparing a parenting plan as contemplated in subsection (2) the parties must seek-
- (a) the assistance of a family advocate, social worker or psychologist; or
 - (b) mediation through a social worker or other suitably qualified person.’

Section 33(2) discourages co-holders of parental rights and responsibilities, in the event of a dispute, from approaching the court as a first resort. Parties are obliged to seek agreement on a parenting plan before seeking the assistance of the court. Subsection 5 contemplates two ways in which such agreement ‘must’ be achieved, the first being through the ‘assistance of the family advocate, social worker or psychologist’ and the second, ‘mediation’ by⁴¹ ‘a social worker or other suitably qualified person.’

From the subsection there are two things that immediately catch the eye. First, it is axiomatic from the strong wording of the provision that mediation, for the purposes of s33, is also mandatory. Second, s33 reads differently to s21. The legislature does not typecast the services offered by the family advocate as mediation. It refers to the family advocate as rendering ‘assistance.’ Was this a legislative drafting error or a conscious decision by the legislature? What would be the difference between the

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- (ii) partners in a permanent domestic life-partnership; or
 - (iii) other persons sharing a common household and forming a permanent family unit;
 - (b) by a widower, widow, divorced or unmarried person;
 - (c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child;
 - (d) by the biological father of a child born out of wedlock; or
 - (e) by the foster parent of the child.’

⁴¹ The statute refers to mediation ‘through’ a social worker...’ The word ‘through’ seems to be a misfortunate phrasing error. Surely the legislature could not have intended mediation to be channeled ‘through’ the persons mentioned in the provision and must have intended for mediation to be conducted by a social worker or other suitably qualified person. See in this regard CJ Davel & A M Skelton, note 10 above 3-32.

‘assistance’ offered by the family advocate and ‘mediation offered by a social worker or other suitably qualified person’? It is hard to work out from the provisions of the Act why the legislature characterized the role of the family advocate differently in the two sections. It also appears that there is no literature which can explain the difference. It may be that the legislature separated the two forms of intervention because the ‘assistance’ by the family advocate is state-sponsored, whereas ‘mediation offered [by] a social worker or other suitably qualified person’ could be private, paid for by the parties themselves. Perhaps, the legislature separated the two forms of intervention so as not to discount the possibility of private mediation. But, if this was the intention of the legislature, then surely it would have done the same thing in s21 which, in any event, despite the non-separation between the services offered by the family advocate and other mediatory bodies contemplated by that section, does not exclude the possibility of private mediation either. Whatever the reason for the differentiation in s33, it is submitted, it is more correct, from a theoretical perspective, to distance the intervention of the family advocate from mediation for, as will be argued later when the role of the family advocate is examined in the general comment to this article, the family advocate is not in fact providing mediation in the classic sense but a form of state-sponsored, court-connected, and court-accountable social welfare intervention. The services offered by the family advocate, it will be argued, are fundamentally different to and irreconcilable with classic notions of mediation. To this extent, s33, it is submitted, is theoretically more correct than the provisions of s21 which do not distinguish the function of the family advocate from mediation.

The mechanics of s33 is interesting. Co-holders of parental rights and responsibilities need only refer a matter to the family advocate for assistance or to mediation if they are experiencing difficulties in exercising their parental rights and responsibilities. If no difficulties exist, there is no need to seek the assistance of the family advocate or to refer a parenting plan to mediation. The parents may simply *register* their agreed plan with the family advocate or ask the court to make the plan an order of court in which case the family advocate or the court⁴², as the case may be, must weigh the plan against the best interests of the child standard⁴³ before accepting the plan. Only a parenting plan which falls under s 33(2) (i.e where there is dispute) requires ‘assistance’ from the family advocate or the intervention of mediation.

A disputed parenting plan which is referred to the family advocate for assistance or to mediation and which is subsequently settled must, in terms of s34⁴⁴, be made either an

⁴² Section 34(1) read with s34(2) permits the parties to either register their plan with the family advocate or to make the parenting plan an order of court. Court involvement may thus be bypassed where the parties decide to register their plan with the family advocate.

⁴³ Act 38 of 2005, s 33(4) read with s 7.

⁴⁴ Section 34 provides:

- (1) A parenting plan-
 - (a) must be in writing and signed by the parties to the agreement; and
 - (b) subject to subsection (2), may be registered with a family advocate or made an order of court.
- (2) An application by co-holders contemplated in section 33 (1) for the registration of the parenting plan or for it to be made an order of court must-
 - (a) be in the prescribed format and contain the prescribed particulars; and
 - (b) be accompanied by a copy of the plan.
- (3) An application by co-holders contemplated in section 33 (2) for the registration of a parenting plan or for it to be made an order of court must-
 - (a) be in the prescribed format and contain the prescribed particulars; and

order of court or registered with the family advocate. Of course, having regard to general tenor of s33 read with s34 and the overarching requirement for a parenting plan to comply with the best interests of the child standard, the office of the family advocate cannot register a parenting plan in which *it* rendered assistance. Such a parenting plan must be made an order of court, so that the court can separately consider whether the plan is in the best interests of the child.⁴⁵ But, there is nothing precluding the family advocate, without the need for court intervention, to register a parenting plan that was agreed to by the parties upon completion of mediation.⁴⁶ Section 33 read with s34, permits the family advocate to scrutinize a parenting plan concluded as a result of mediation, and if the plan is determined to be in the best interests of the child standard, the family advocate can register it. When one weighs considerations of costs and time in bringing an application to court against the costs and time of mediation (which may be private, state-sponsored or community-based) then it may make better sense to refer a disputed parenting plan to mediation (as opposed to ‘assistance’ by the family advocate) for in that way the parties know that if they reach agreement, their parenting plan can simply be registered with the family advocate’s office, without the need to go down the more costly and time-consuming route of having the agreement confirmed by an order of court. Parties, it is submitted, should be informed of these procedural ramifications. At present it is uncertain whether family advocates or for that matter, legal professionals, provide people with this kind of information. Were such information to be given, it may assist to make private mediation, the more attractive option.

Where the assistance by the family advocate or mediator fail to yield positive results, then only can the parties, in terms of s33, approach a court for relief. In light of the mandatory requirement to refer disputes to either the family advocate or to mediation, it is submitted that the Minister should by means of Regulations⁴⁷ promulgated in terms of the Act, require a *certificate of mediation* to be furnished before a matter can

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- (b) be accompanied by-
 - (i) a copy of the plan; and
 - (ii) a statement by-
 - (aa) a family advocate, social worker or psychologist contemplated in section 33 (5) (a) to the effect that the plan was prepared after consultation with such family advocate, social worker or psychologist; or
 - (bb) a social worker or other appropriate person contemplated in section 33 (5) (b) to the effect that the plan was prepared after mediation by such social worker or such person.

(4) A parenting plan registered with a family advocate may be amended or terminated by the family advocate on application by the co-holders of parental responsibilities and rights who are parties to the plan.

(5) A parenting plan that was made an order of court may be amended or terminated only by an order of court on application-

- (a) by the co-holders of parental responsibilities and rights who are parties to the plan;
- (b) by the child, acting with leave of the court; or
- (c) in the child's interest, by any other person acting with leave of the court.

(6) Section 29 applies to an application in terms of subsection (2).

⁴⁵ Section 34(1) read with s34(3) and (4).

⁴⁶ Ibid, note 45 above.

⁴⁷ See note 33 above.

be brought to court.⁴⁸ While it is important for the certificate not to reveal the content of communications during the mediation process, such a certificate could be used to indicate to a court that a party refused to participate in mediation or that he or she abused the mediation process. Information such as this could in turn be utilized by a court to adjourn proceedings⁴⁹ so as to afford the parties an opportunity to make a bona fide attempt at mediation. Moreover, such information could also be used by a court to impose a punitive costs order on the uncooperative party where the court thinks this appropriate. Adjournments and punitive costs orders are considered in more detail later.

(b) Provisions which confer discretion on the court to refer a matter to mediation

(i) *Lay-forum mediation contained in sections 49*

As noted earlier, the Children's Act entrenches a specialist court, the children's court, to hear all matters arising from the provisions of the Act. Consequently, the jurisdiction of the court is as extensive as the Act is. It can, inter alia, consider issues pertaining to access, custody, guardianship, adoption, foster care, child abuse and neglect. It can also hear status matters, and the full gamut of issues affecting the mental, physical, psychological and emotional well-being of the child.⁵⁰

Because the children's court is not an entirely novel creation – it had been created under the old Child Care Act of 1983⁵¹ – the already existing processes and procedures⁵² of the children court is also applicable to the court after the coming into operation of the Children's Act. These inherited processes and procedures are, by and large, adversarial with the notable difference that, having regard to the age of those who fall within its protection, special measures⁵³ may, from time to time, be adopted to cushion the child from the intimidating nature of adversarial litigation.

For all the criticism that may be leveled against adversarial processes and procedure, the reality is that adversarial litigation cannot be jettisoned altogether. There are times when alternative dispute resolution fails or where matters are simply too complex or too sensitive to be dealt with by ADR. To strike a balance between adversarial litigation which is needed, and the need for a multidisciplinary approach to issues affecting children, the legislature has, in terms of s49, permitted a presiding officer of the children's court to exercise a discretion in favour of referring a matter to mediation. The court enjoys this discretion in all matters covered by the Act where mediation is not specifically mentioned, and even in those matters where mediation is envisaged, but where mediation has for some or other reason failed, thereby necessitating court intervention. In the latter case, the court, on account of an already failed mediation, is unlikely to refer the matter again to mediation unless the court

⁴⁸ In *Townsend-Turner and Another v Morrow* 2004 (2) SA 32 (C) at 55, the court informally recognized the use of a certificate of mediation before referring a matter to court.

⁴⁹ See discussion later.

⁵⁰ Children's Act, s45.

⁵¹ Child Care Act 74 (*supra*), Chapter 2.

⁵² See also the rules of the children's court published in Regulation Notice R2612 in GG 10546 of 12 December 1986 (with effect from 1 February 1987).

⁵³ Child Care Act (*supra*), s8.

thinks that mediation was not given a fair opportunity by the parties or where an issue crops up in court not previously mediated upon. As regards the power of the court to refer a matter to a matter to mediation, s49 provides:

- ‘(1) A children's court may, before it decides a matter or an issue in a matter, order a lay forum hearing in an attempt to settle the matter or issue out of court, which may include-
- (a) mediation by a family advocate, social worker, social service professional or other suitably qualified person;
 - (b) a family group conference contemplated in section 70; or
 - (c) mediation contemplated in section 71.
- (2) Before ordering a lay forum hearing, the court must take into account all relevant factors, including-
- (a) the vulnerability of the child;
 - (b) the ability of the child to participate in the proceedings;
 - (c) the power relationships within the family; and
 - (d) the nature of any allegations made by parties in the matter.’

Lay-fora conjuncture images of unstructured community-based dispute resolution venues. While the Act does not preclude matters from being referred to community-based resolution structures⁵⁴ or for that matter, ‘traditional authorities’⁵⁵, it is important to note, having regard to the qualifications contained in s49(2), that a judicial officer is unlikely to do so if he or she is not satisfied that the circumstances of the case warrant such a referral and that the interests of the child will best be realized by resolution of the dispute through those means than by a decision of the court. In all cases, where matters are referred to lay-fora, one must assume, having regard to the provisions of s49 and the cautious approach adopted by judicial officers in children’s matters historically, that the court concerned will refer a matter to those types of fora that will provide a structured form of intervention and an environment where the mental, physical, emotional and psychological well-being of the child will not be compromised.⁵⁶

It submitted, in light of the reputation of some community fora and traditional authorities for being insensitive to women and youth⁵⁷, a presiding officer is more likely to exercise a discretion in terms of s49 in favour of either the state-sponsored family advocate’s office or an accredited or court-recognized mediation agency, as opposed to a community based forum or traditional authority, which may be lacking in structure, or may provide an intimidating environment for the child, and whose mediation abilities might not be up to scratch.

In light of the above observations, it is imperative for mediation service providers to be properly accredited. It is also necessary for them to meet minimum standards as regards resources and infrastructure. Not to do so, will place a court in a difficult

⁵⁴ The phrase ‘which may include’ in s49(1) suggests that the court’s discretion to refer a matter to a lay-forum is wide and not limited to those institutions contemplated in subparagraphs (a) to (c) in subsection 1.

⁵⁵ See Children’s Act, s71(1)

⁵⁶ In fact, Children’s Act, s49(2) confirms this.

⁵⁷ South African Law Reform Commission *Project 94 Issue Paper 8 on Alternative Dispute Resolution* (1997) 33-38; see also South African Law Reform Commission *Project 94 Discussion Paper 87 on Community Dispute Resolution Structures* (1999).

situation of being unable to refer an appropriate matter for mediation simply because there are no competent bodies operating within the court's locality⁵⁸, or those that do exist, are unable to meet the concerns of the court as regards their ability to protect the interests of the child concerned. At present, there is no national governmental authority responsible for the accreditation of mediation service providers. There is also no quality assurance process through which mediation service providers can be monitored. This is indeed a deficiency, which may affect the extent to which judicial officers are willing to exercise their discretion in terms of s49.

Whilst it is safe to assume that a judicial officer will not exercise his or her discretion to refer a matter to a particular mediation agency in a capricious manner, what cannot be guaranteed is that the judicial officer will identify mediation as an appropriate means of dispute resolution *in the first place*. Because we have such a deeply entrenched adversarial litigation system, the possibility exists that judicial officers may be suspicious or even dismissive of alternative means of dispute resolution. There may be many who firmly hold the view that the adversarial system is the best way of protecting the interests of children. To overcome this possible result, it is important, if s49 is hold gravitas, for all judicial officers to receive basic training and information about mediation processes and outcomes, and also to learn about their limitations as judicial decision-makers in matters affecting children. At present, such a mandatory training program for judicial officers does not exist in South Africa.

(ii) Section 71: Mediation by a lay-forum or traditional authority

A similar provision to s 49 is to be found in s 71 which provides:

- '(1) The children's court may, where circumstances permit, refer a matter brought or referred to a children's court to any appropriate lay-forum, including a traditional authority, in an attempt to settle the matter by way of mediation out of court.
- (2) Lay-forums may not be held in the event of a matter involving the alleged abuse or sexual abuse of a child.
- (3) The children's court may-
 - (a) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and
 - (b) consider a report on the proceedings before the lay-forum to the court when the matter is heard.'

Because of the similarity between sections 49 and 71, one will be forgiven for wondering why the legislature had not simply amalgamated the provisions of both sections to make a single provision. However, s71 must be understood within the context of where it appears in the Act. Section 49 permits the children's court (and *a priori* the judicial officer), within the context of its general power, to refer any matter to mediation. Section 71, on the other hand, appears within the context of the case management powers of the children's court. As part of its case management options the children's court can refer a matter to mediation to resolve disputes which in the opinion of the Court can best be settled through alternative means of dispute resolution. What is important to note about s71 is that it expressly prohibits

⁵⁸ This may be a particular problem in the more rural areas of South Africa.

mediation from being used where there is allegation of ‘abuse or sexual abuse of a child.’ This exclusion makes sense. Most child advocates and mediation experts will agree that mediation has its limitations. The best interest of the child can never be served if an abuse or a sexual abuse case is referred to mediation.⁵⁹ Such matters call for the full weight of a court so that appropriate sanctions can be imposed on the offender.

INDIRECT OPPORTUNITIES FOR MEDIATION

There are several provisions in the Children’s Act where mediation, though not mentioned, may be relevant, having regard to the nature of the provision concerned.

(i) Section 70: Family group conferences

In terms of this section:

- (1) The children's court may cause a family group conference to be set up with the parties involved in a matter brought to or referred to a children's court, including any other family members of the child, in order to find solutions for any problem involving the child.
- (2) The children's court must-
 - (a) appoint a suitably qualified person or organization to facilitate at the family group conference;
 - (b) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and
 - (c) consider the report on the conference when the matter is heard.

Although this section does not contain the word *mediation*, it may be inferred from the general tenor of the provision and also from the reference ‘to suitably qualified person or organization to facilitate’ that mediation is not excluded as a possibility. Although the word *facilitate* connotes an active process of involvement, the word does not exclude⁶⁰ the use of a more moderate form of involvement such as that undertaken by a mediator.

(ii) Section 234: Post Adoption Agreements

Section 234 is to be found in chapter 15 of the Children’s Act. This chapter deals with adoption. According to s234:

- ‘(1) The parent or guardian of a child may, before an application for the adoption of a child is made in terms of section 239, enter into a post-adoption agreement with a prospective adoptive parent of that child to provide for-

⁵⁹ However, this is not to exclude the possibility of the use of mediation and other forms of ADR when it comes to the placement of children in foster care etc following abuse or neglect: see J M Lowry ‘Family Group Conferences as a Form of Court-Approved Alternative Dispute Resolution in Child Abuse and Neglect Cases’ *Univ Mich J L Reform* 31 (1997) 57, 69.

⁶⁰The *Oxford English Dictionary* (2005, revised second edition) 618 defines facilitate as ‘(v) make (an action or process) easy or easier. See also the discussion of the South African Law Reform Commission *Project 94 Issue Paper 8*, note 57 above, para 3.4.

- (a) communication, including visitation between the child and the parent or guardian concerned and such other person as may be stipulated in the agreement; and
 - (b) the provision of information, including medical information, about the child, after the application for adoption is granted.
- (2) An agreement contemplated in subsection (1) may not be entered into without the consent of the child if the child is of an age, maturity and stage of development to understand the implications of such an agreement.
- (3) The adoption social worker facilitating the adoption of the child must assist the parties in preparing a post-adoption agreement and counsel them on the implications of such an agreement.
- (4) A court may, when granting an application in terms of section 239 for the adoption of the child, confirm a post-adoption agreement if it is in the best interests of the child.
- (5) A post-adoption agreement must be in the prescribed format.
- (6) A post-adoption agreement-
- (a) takes effect only if made an order of court;
 - (b) may be amended or terminated only by an order of court on application-
 - (i) by a party to the agreement; or
 - (ii) by the adopted child.’

Post-adoption agreements may be negotiated between adoptive parents of the child concerned and its soon to be former parents. The purpose of such agreements is to regulate the relationship between former and adoptive parents vis-à-vis the child placed up for adoption. Even though the section does not mention mediation as a means by which negotiations may be finalized, the section does not preclude it either. It may be argued that where parties are in the process of formulating such an agreement, mediation might provide the best *modus operandi*. For parents in the process of adopting, and for parents placing a child up for adoption, it is often the case of living between hope and despair. For adopting parents, the desperation to have a child, and for parents placing a child up for adoption, the desire to do what is best for the child, can cause both sets of parents to negotiate to their and their child’s detriment. Since the purpose of s234 is to foster harmonious future relations between parents (former and adoptive) and the child, it is necessary, especially in the case of open adoptions, to reduce power imbalances. To this extent, mediation may serve as an excellent vehicle to create an enabling environment for the negotiation of a post-adoption agreement that is truly in keeping with the best interests of the child.

In terms of s234(2), a child who is mature enough to appreciate the implications of an adoption agreement must consent to the terms of the agreement. Whilst there are many arguments for and against children being involved in mediation proceedings,⁶¹ it is submitted that it would be better to facilitate the child’s involvement in terms of s234 through the process mediation than would otherwise be the case.

⁶¹ See D Saposnek ‘The Value of Children in Mediation: A Cross-Cultural Perspective’ (1991) 8 *Mediation Quarterly* 325; J McIntosh ‘Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study’ (2002) 18 *Mediation Quarterly* 55; M Rogers and T Gee ‘Mediation, Conciliation and High Conflict Families’ (2003) 14 *ADRJ* 266; Lansky, Swift, Manley, Elmore, Gerety ‘The Role of Children in Mediation’ (1996-1997) 14 *Mediation Quarterly* 147.

(iii) Section 292: Surrogate motherhood agreements

In terms of the common law, a surrogate motherhood agreement was unenforceable for being contrary to public policy on the basis that it constituted ‘a possible devaluation or distortion of the concept of the family and the marriage relationship.’⁶² The South African Law Reform Commission in 1992 recommended that the common law prohibition be removed and that legislation be passed so that the practice of surrogate motherhood could be formally recognized and regulated in South Africa.⁶³ It was felt that prevailing notions of public policy had changed⁶⁴ and that surrogate motherhood was not inimical to the values of African people as the practice of surrogate motherhood was even endorsed in African Customary Law.⁶⁵

Between 1992 and 1999 further studies and comparative analyses were conducted. These research studies were conducted under the auspices of a Parliamentary *Ad Hoc* Select Committee. In 1999 it tabled a Report to Parliament in which it recommended for the common law prohibition to go.⁶⁶ However, as the South African Law Commission had also, in the meantime, embarked on its review of the Child Care Act and had recommended that there be a single statute for comprehensively dealing with all aspects relating to childhood, Parliament decided to hold-off on legislation pertaining to surrogacy. The provisions⁶⁷ of the current Children’s Act are thus the product of a protracted process of investigation and evaluation. What the Act seeks to do is to regulate the legal requirements of a valid surrogate motherhood agreement, the effects a valid surrogate motherhood agreement, the circumstances under which an agreement may be rescinded and the consequences thereof, and general prohibitions relating to surrogacy. Of course, a discussion of all of these aspects fall outside the scope of this paper. Significantly and of immediate relevance is s292 which provides as follows:

- ‘(1) No surrogate motherhood agreement is valid unless-
- (a) the agreement is in writing and is signed by all the parties thereto;
 - (b) the agreement is entered into in the Republic;
 - (c) at least one of the commissioning parents, or where the commissioning parent is a single person, that person, is at the time of entering into the agreement domiciled in the Republic;
 - (d) the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in the Republic; and

⁶² South African Law Reform Commission *Project 65 Report on Surrogate Motherhood* (1992) para 4.7.3.

⁶³ South African Law Reform Commission *Project 65*, note 62 above, paras 7.2.2, 7.3, 7.4.1, 7.4.2.

⁶⁴ South African Law Reform Commission *Project 65*, note 62 above, para 2.2.3 – 2.2. 11. The Law Reform Commission was discovered that despite the common law prohibition there were many surrogacy agreements which had been concluded and fulfilled without publicity and without problems. However, because such arrangements were susceptible to being abused it recommended that the practice be formally regulated. It is interesting to read in the Law Commission’s Report that most religious groupings in South Africa were not in favour of surrogacy arrangements. The majority of churches found (and still finds) surrogacy unacceptable because it was seen as a blight on the monogamous nature of marriage. Islamic law equates surrogacy to adultery. Moralists argue that surrogacy amounts to womb-leasing, that it depersonalizes human reproduction and that it fails to take into the human dignity of the child: see CJ Davel & AM Skelton, note 10 above, 19-6.

⁶⁵ JC Bekker *Seymour’s Customary Law in Southern Africa* 5ed (1989) 279ff, and see South African Law Reform Commission *Project 65*, note 62 above, para 4.9.

⁶⁶ CJ Davel & AM Skelton, note 10 above, 19-5.

⁶⁷ Children’s Act, chapter 19.

- (e) the agreement is confirmed by the High Court within whose area of jurisdiction the commissioning parent or parents are domiciled or habitually resident.
- (2) A court may, on good cause shown, dispose with the requirement set out in subsection (1) (d).

Evidently the section makes provision for surrogacy agreements. While the section makes no provision for mediation at the time of negotiating and discussing the agreement, the section does not preclude it either. One of the fallacies associated with alternative dispute resolution is that it is only relevant when disputes arise. But ADR is not just a cure for existing disputes; it can also serve as a preventative measure. In the case of surrogate mother agreements, on account of the relative vulnerability of all parties concerned, it makes good sense for parties to consider *transactional mediation*⁶⁸ to iron out the terms of the agreement.

In terms of s301 of the Act, a surrogate mother is not permitted to receive compensation for fulfilling her duties. Her desire to act as a surrogate mother must therefore be altruistic. However, the Act does not preclude payments to the surrogate mother for expenses ‘that relate directly to the artificial insemination and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement.’⁶⁹ Furthermore, the Act also provides that the surrogate mother can be compensated for loss of earnings that she may suffer as her result of the pregnancy,⁷⁰ or for insurance to cover the surrogate mother for anything that may lead to her death or disability brought about by the pregnancy.⁷¹ So while the Act precludes general compensation, the Act does not preclude reimbursement for consequential expenses. Of course, it is easy to see how the provision of these consequential expenses could lead to differences: a surrogate may want private medical care vs the commissioning parents who, in relation to their means, may want to offer expenses for medical care in a state hospital. It may also be the case that the surrogate mother may peg her loss of earnings at a rate much higher than what the commissioning parents can afford. Even the amount of insurance can lead to dispute. As it is important for everyone to enter into this deeply emotional period of their lives with good feelings and for all concerned to exit this emotionally trying period on good terms, mediation may provide an excellent vehicle for the negotiation of the agreement and also to handle any ensuing disputes between the parties.

Furthermore, as the legal effects of a valid surrogate motherhood agreement can leave the surrogate feeling disempowered and perhaps, even emotionally scarred for many years to come, mediation, and more specifically, *therapeutic mediation*⁷² by a trained

⁶⁸ As regards *transactional mediation* L Boule, note 73 below, says: ‘[This form of] mediation is used not to settle or manage existing disputes, but to prevent disputes and problems from arising during the transactional process. It could be used in joint ventures, mergers and acquisitions, pre-nuptial negotiations, parenting plans, and the planning and construction of building projects.’ It is submitted that this statement can even be extended to surrogacy agreements.

⁶⁹ Children’s Act, s301(2)(a).

⁷⁰ Children’s Act, s301(2)(b).

⁷¹ Children’s Act, s301(2)(c).

⁷² For an exposition of what is meant by the concept *therapeutic mediation* (also called *transformative mediation*) see: JP Folger and R B Bush ‘Transformative Mediation and Third Party Intervention: Ten Hallmarks of Transformative Approach to Practice’ (1995) *Mediation Quarterly* 263; M Dewdney ‘Transformative Mediation: Implications for Practitioners’ (2001) 12 *ADRJ* 20.

psychologist and/or social worker at the time of entering into the agreement and even during and after pregnancy can work wonders in terms of emotional healing.

GENERAL COMMENT

Mediation as a concept is capable of being defined in more than one way.⁷³ This is not to suggest that mediation does not have core values. It is just that its core values are capable of being expressed in more than one manner. A particularly good definition, and one that has found approval among mediation experts⁷⁴, is the one adopted by the Australian government's advisory body on alternative dispute resolution, NADRAC (National Alternative Dispute Advisory Council). It provides:

‘Mediation is the process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach agreement. *The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution,*⁷⁵ but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.’⁷⁶

While some may wonder whether it is worth the energy to ponder a definition for mediation, it is submitted that such an endeavour is important for several reasons. Firstly, as ADR, and in particular mediation, becomes more and more institutionalized, it is important to distinguish between ADR concepts (such as mediation) and general litigation processes. Definitions assist to understand the core elements of ADR processes so that the line is not blurred between ADR and ordinary litigation. Secondly, if we are to instill public confidence in mediation, it is necessary to give users clarity about the nature of the intervention offered. Thirdly, for participants involved in mediation, sticking to a definition assists to carve out their respective roles so that expectations are appreciated and met. Fourthly, it is important for persons who refer parties to mediation to have an idea of what mediation entails so that it can be separated from other forms of ADR such as conciliation and arbitration. By separating concepts, a proper referral can be made having regard to the circumstances of a particular case. It is therefore important not only to define mediation but also other ADR terms such as conciliation and arbitration. Fifthly, for the purposes of drafting mediator codes of conduct and ethical standards, and in relation to statutory provisions and contractual terms providing mediators with immunity or protecting the confidentiality of proceedings, definitions matter.

It will be recalled that in many respects the Children's Act links mediation under the Act to the office of the family advocate. Throughout this article, reservation was

⁷³ L Boule *Mediation – Principles, Process, Practice* (2004) 3-16.

⁷⁴ L Boule, note 73 above, 9.

⁷⁵ Italics inserted. The italicized part of the definition is subject to qualification. It is said that it is not inimical for the mediator to play a ‘determinative role’ provided that he remains neutral throughout and does not breach confidentiality. A determinative role means that he or she can steer outcomes but not decide outcomes. A determinative role also excludes an inquisitorial role for the mediator. See in this regard L Boule, note 73 above, 9ff

⁷⁶ NADRAC *Alternative Dispute Resolution Definitions* (1997) 5; NADRAC *ADR Terminology – A Discussion Paper* (2002) 17-20.

expressed as regards the mediatory function of the family advocate. Having regard to the NADRAC definition of mediation and also having regard to the justifications for keeping to a core definition, which emphasizes neutrality and the need to keep proceedings confidential, let us consider the mediatory function of the family advocate.

(i) The office of the family advocate

In terms of the MDM⁷⁷, the Minister of Justice and Constitutional Development may appoint officers to each division of the High Court to take up the office of the family advocate.⁷⁸ The family advocate is drawn from the ranks of advocates and suitability is determined 'by reason of his⁷⁹ involvement in and experience of the adjudication or settlement of family disputes.'⁸⁰ The Minister is also empowered to appoint 'one or more suitably qualified or experienced persons' as family counselors to assist the family advocate.⁸¹ Together they work as an interdisciplinary team to promote the welfare of children. While the statute does not specify the qualifications of a family counselor, in practice only professionals with special expertise and experience in child and family matters are considered eligible.⁸² Social workers, retired teachers and ministers of religions often act as family counsellors.⁸³ The family advocate and the family counsellor is empowered by Regulations,⁸⁴ promulgated in terms of the MDM, to appoint person(s) to assist them in their duties.⁸⁵ Mental health professions such as psychiatrists and psychologists may be appointed to assist.

The problem with the so called mediatory function performed by the family advocate is that the mediation practised does not conform to classic definitions of mediation. Firstly, there seems to be an apparent contradiction between the long title⁸⁶ of the Act and the way in which the function of the family advocate is characterized. The MDM defines the role of the family advocate as being 'to institute an enquiry to enable him to furnish the court...with a report and recommendations on any matter concerning the welfare of each minor child or dependent child of the marriage or regarding such matter as is referred to him by court.'⁸⁷ It seems, therefore, that the mediation process is characterized as an 'enquiry'. It seems rather strange to employ this terminology within the context of mediation. The reference to enquiry, it is submitted, creates the reasonable impression that the family advocate may embark on fact-finding with a view to informed decision-making. Fact-finding is not in itself inimical to mediation as long as the mediator remains neutral. However, neutrality is difficult to guarantee under the Act. This is so because when the family advocate is unable to resolve a

⁷⁷ Mediation in Certain Divorce Matters Act (*supra*). This Act, it will be recalled, was discussed when the parental rights and duties of extra-marital father was considered earlier.

⁷⁸ Mediation in Certain Divorce Matters Act (*supra*), s 2(1).

⁷⁹ Or *her*. The Mediation in Certain Divorce Matters Act (*supra*), however, uses the masculine *he* when referring to the family advocate.

⁸⁰ Mediation in Certain Divorce Matters Act (*supra*), s 2(2).

⁸¹ Mediation in Certain Divorce Matters Act (*supra*), s 3.

⁸² F Kanganas & D Budlender *Family Advocate* (Law, Race and Gender Research Unit, University of Cape Town, 1996) at 1.

⁸³ Note 82 above at 2.

⁸⁴ Government Notice Regulation No 2513 GG 14263 of 3 October 1990.

⁸⁵ Note 84 above, Regulation 6.

⁸⁶ The provisions of the long title of the Act was mentioned above when s21 of the Children's Act was discussed.

⁸⁷ Mediation in Certain Divorce Matters Act (*supra*), s4(1).

dispute between the parties through an enquiry and the matter goes to court, the family advocate may appear to cross examine witnesses and adduce evidence.⁸⁸ The family advocate may even draft a report for consideration by the court.⁸⁹ To think of the function of the family advocate as a mediator in the classic sense, it is submitted, is a misnomer: neutrality and confidentiality, which are core values of mediation, are compromised. Instead of being a mediator, the family advocate must rather be appreciated and validated for offering state-sponsored, court-connected, and court-accountable social welfare intervention.

Since the ‘enquiry’ (mediation?) process undertaken by the family advocate is also not clearly spelt out in the legislation, research studies undertaken over the years have sought to shed some light on the process. According to studies,⁹⁰ where an enquiry is initiated, the parties must attend the enquiry at the office of the family advocate with their children. Should other persons be involved like aunts, uncles, grandparents and cohabitees, they, too, are required to attend. Where parties cannot attend, a social worker is requested to interview them at their residence.

At the enquiry, the family advocate acts as chairperson. The parties are informed of the role of the family advocate and the family counsellor (if one is present). They are informed that the matter revolves around the best interests of the children and are assured of the neutrality of the family advocate.⁹¹ All enquiries commence with interviews. Usually, the parties are interviewed individually, but in some instances, and this depends on the workload of a particular office, the parties are interviewed in each other’s presence. Parties are afforded an opportunity to state their case in terms of what they think is in the best interests of the children. Each party’s version is compared and discussed with the other party. Where the children are mature enough to understand the nature of the proceedings, they, too, are interviewed.

After the interview, the family advocate and family counsellor discuss the matter to arrive at a joint decision as to how they think the dispute can best be resolved between the parties without compromising the best interests of the children. The parties are recalled, and in a joint session the family advocate puts to the parties the prima facie impressions of the team so that the parties can take the discussion further and reach settlement. If parties are unable to reach agreement, further investigation becomes necessary and the family advocate may call for reports from experts such as psychologists and psychiatrists. Expert reports are necessary where there are allegations of neglect, mental, physical or sexual abuse. When differences arise, the family advocate, to his or her credit, takes a less active role. He or She guides the parties so that they can resolve the issues themselves.

If all attempts at resolving the dispute fail, the family advocate drafts a report and recommends what in her opinion is in the best interests of the children.⁹² This report

⁸⁸ Mediation in Certain Divorce Matters Act (*supra*), s4(3).

⁸⁹ Mediation in Certain Divorce Matters Act (*supra*), s6(1).

⁹⁰ I rely principally on the study undertaken by: G.J. van Zyl ‘The Family Advocate: 10 years later’ (2000) *Obiter* 372, and F. Kanganas & D. Budlender, note 82 above, 8–10.

⁹¹ It is important to note that family advocates are not deliberately misleading the public. From discussions with them, it is clear that they treat their jobs seriously, and that they engage their duties in good faith. Many family advocates view themselves as mediators. However, what they fail to realize is that the legislation under which they are operating is counter-intuitive to mediation.

⁹² *Soller NO v G and Another* 2003 (5) SA 430 (W) at 437.

is filed at court. The report forms part of the case record. After perusing the report, a judge can refer a matter back to the family advocate for further investigation. The judge can also call the family advocate to court to explain the report. If in the judge's opinion it is in the best interests of children, the judge can reject a report.⁹³

In one study,⁹⁴ 15 cases were evaluated in the Pretoria office of the family advocate. In it participants were requested to relate their personal experiences during enquiries. 60% were of the view that their ideas were respected; they were able to make a meaningful contribution to the ultimate recommendation; and that the enquiry was conducted in a sensitive manner. 67% felt that the mediation team was at all times neutral and impartial. 60% felt that the ultimate recommendation was in the children's best interest.

The difficulty with these studies is the sample of cases is extremely small. It is also difficult to work out whether people interviewed were familiar with the concepts of *neutrality* and *impartiality* within the mediation context. Consequently, these studies, it submitted, is flawed and cannot be treated as empirical proof of the integrity of the so-called mediation process undertaken by the family advocate.

On a review of the MDM, highlighted further by the research studies above, the so-called mediation undertaken by the family advocate is difficult to reconcile with widely accepted definitions of mediation. The family advocate, and the experts assisting her, actively participate in the decision making process. This is, perhaps, less evident at the preliminary enquiry stage but prevalent when settlement fails and the family advocate is expected to draft a report. The report is normally exhaustive and invariably contains facts revealed by the parties during the enquiry process. Confidentiality is thus compromised.⁹⁵ What studies also reveal is that the office of the family advocate is far too juridified and that it maintains strong links with the adversarial litigation process. Consequently, it is sometimes difficult to tell where the so-called mediation function of the family advocate ends and where the formal litigation process begins.

From discussions with members of the profession and with family advocates themselves, it would seem that the methodologies of the various offices of the family advocate for conducting enquiries differ. On one level this is understandable: each matter is different; the facts of cases differ. But one would have thought that the protocols for conducting an enquiry would be fairly similar. However, this is not so. A lot seems to depend on available resources. Offices that are under-resourced or overburdened with work require a quick turn around of cases to cope. They do not have the luxury of time when conducting an enquiry. Of course, such constraints are inimical to mediation – *if the process can be characterized as mediation at all*. Because mediation is less inquisitorially driven, the process usually takes longer. When time is of the essence, mediation under these circumstances cannot realize the same fruits as when the mediator and the parties are operating in a relaxed and non-

⁹³ C. Lind 'The Changing Face of Divorce – II Real Reform?' (1989) 18 *Businessman's Law* 163 at 164.

⁹⁴ The results of the study are summarized by G.J. van Zyl, note 90 above, 382.

⁹⁵ Note 82 above, 54.

time driven environment.⁹⁶ Mediation is predicated on consensual decision-making where parties voluntarily and without external pressure meet middle ground. In a time-driven, stressful environment there is always the risk that decisions may later be seen to have been foisted upon parties in a bid to resolve the matter as quickly as possible. When the person at the centre of the process, namely the mediator, is responsible for impatiently driving the process to a speedy resolution, parties are likely to challenge the neutrality of the mediator. He or she may be perceived as being biased, or far too interested in achieving a particular outcome. Such perceptions affect the integrity of mediation as a process.

In light of the aforementioned comments, it is better for the office of the family advocate not to be treated as one offering mediation services. In so far as the Children's Act visits a mediatory function on the family advocate, it is submitted, the legislation is flawed. It fails to take into account the core values of mediation. As submitted earlier, when considering the role of the family advocate, the latter must rather be appreciated and validated for being an officer of the court wearing the hat of a social welfare officer. As such, it still has an immensely valuable and supportive role to play in terms of 'assisting' a court to determine whether the outcome of a mediation is in the best interests of a child. Furthermore, the office family advocate can retain its role as an agency offering assistance to parties who do not want to undertake mediation and who would prefer for the family advocate to conduct an enquiry. However, it is important for the parties to be able to differentiate an enquiry from mediation and not to think that they are obtaining the benefits of mediation when in fact they are not, as is the position under the current dispensation where parties, in terms of our legislative framework, are misled into believing that they are obtaining the benefits of mediation when in fact what they are getting is *fact-finding with a view to informed decision-making*.

It is interesting to note that the South African Law Reform Commission recently published a questionnaire dealing with the office of the family advocate.⁹⁷ There are several questions requiring respondents to comment on mediation practices in the family advocate office. The results of this questionnaire will be interesting indeed. It may highlight in primary colours the concerns and criticisms raised in this article.

Unless there is a fundamental change to the office of the family advocate, mediation under the Children's Act, it is submitted, should be left to 'other suitable qualified persons' as contemplated in the Act. The state must make funds available for the creation of mediation agencies who can offer mediation in its intended form. Alternatively, existing mediation agencies such as the Family Mediators' Association of the Cape (FAMAC)⁹⁸, Family and Marriage Society of South Africa (FAMSA)⁹⁹, to name but two of the more established private family mediation service providers, should be bolstered with appropriate funding. It may be argued that it is not viable for the government, on account of limited resources, to fund such institutions. However,

⁹⁶ Studies show that on average successful family mediation proceedings require between six to eight one hour sessions. See D. Scott-Macnab 'Mediation in the Family Context' (1988) 105 *SALJ* at 709 at 718.

⁹⁷ These questionnaires may be viewed at the following website <http://www.doj.gov.za/salrc/qnr.htm> The website was last accessed on 9 May 2008.

⁹⁸ See their website for more information <http://www.famac.co.za/index.html>

⁹⁹ See their website for more information <http://www.famsa.org.za/about.asp>

there are two observations to be made in this regard. The government expressly made provision for mediation in the Children's Act. It thus the responsibility of the government, as a matter of principle, to make the process worth the paper it is written on. Furthermore, experience has shown that international donor funding is frequently available to support projects which aim to foster access to justice and dispute resolution in developing countries (such as South Africa). While it is often difficult for private individuals to tap into such funds, governments generally experience fewer obstacles in this regard. It is just a question of taking the initiative to look for alternative funding sources.

(ii) The mediator between a rock and a hard place: the best interests of the child standard

The Children's Act is peppered with references to the phrase the *best interests of the child*. Virtually every decision affecting the child in terms of the Act has to take into account the best interests of the child.¹⁰⁰ It would be hard for mediators to conduct mediations without this standard shadowing the mediation. This raises the interesting, yet important, question: Can mediators coax parties to conform to the best interests of the child standard, without falling foul of the core values of mediation? The answer to this is yes. There are different mediation models. According to the *evaluative mediation* model, a mediator is permitted to steer the parties towards an outcome that would meet a particular legal standard or norm.¹⁰¹ However, this is not to suggest that the mediator makes decisions for the parties as a court would. At the end of the day, it is still for the parties to reach a settlement and to take ownership of it.

The problem with the office of the family advocate is not that it steers parties to meet the best interests of the child standard. Rather, umbrage is taken with what happens when mediation fails. In classic mediation, when mediation fails, the mediator walks away. With the family advocate, it is different. She prepares a report for the court and exposes therein as it were all the dirty laundry. She is duty bound, as an officer of the court, to provide the court with a clinical solution. As stated earlier, she can even cross-examine the parties in court on the very information that she acquired during the so-called mediation process. This, it is submitted, represents an egregious misunderstanding of mediation.

(ii) Punitive measures

As stated earlier, the Children's Act in certain cases provides for mandatory mediation. However, under current legislation there is no mechanism for informing a court of the attitude of parties to mediation. Without such a reporting mechanism, how will a court know whether the parties have given mediation a chance? It remains open for one of the parties (or for both of them) to abuse the mediation provisions by submitting to mediation simply to comply with the black-letter statutory requirement, without indulging in mediation in good faith. If mediation is to make its mark, such

¹⁰⁰ The test to determine the best interests of the child is set out in considerable detail in the Children's Act, s7.

¹⁰¹ L Boule, note 73 above, 43-45.

situations must be foreseen and prevented. One way of solving the problem, as suggested earlier, is to require the mediator to complete a *certificate of mediation* for the benefit of a court. In it the mediator could, without breaching confidentiality about the actual content of the dispute, simply report any abuse of process. The court could use such information to admonish the parties by giving them a stern warning and to refer the matter back to mediation, or by imposing a costs order on the offending party.

Section 64 of the Children's Act provides:

- '(1) The proceedings of a children's court may be adjourned only-
- (a) on good cause shown, taking into account the best interests of the child;
 - (b) for a period of not more than 30 days at a time.
- (2) A presiding officer of a children's court may excuse any person from appearing at adjournment proceedings.'

The above provision was drafted with the intention to curtail delays.¹⁰² Prolonging matters are rarely in the best interests of children. However, it may be argued that delaying a matter so that it can be referred to mediation could be in the best interests of a child. It is submitted that in cases where parties have gone to mediation and it appears to the judicial officer concerned that the parties have not given mediation a fair opportunity, he or she should use the discretion to adjourn proceedings so that mediation can be undertaken. This should especially be the case where the mediation was mandatory in terms of the Act.

The idea of imposing a costs order is also not so far-fetched. In terms of the Child Care Act of 1983, the children's court could not make an order of costs in a litigation suit. However, under the Children's Act, this has changed. Today the court is empowered to make a costs order if the judicial officer believes that such an order is warranted.¹⁰³ It is submitted, failure or refusal to enter into mediation in good faith, where this was mandatory under the Act, could ground a punitive costs order where the court believes that there is a reasonable likelihood that the ensuing costs of litigation would have been less had one of the parties (or both of them) not abused the mediation process. To make such a finding the court would, again, have to know of an abuse of the mediation process. Currently there is simply no way of the court coming to know of this.

It is, therefore, recommended that the Minister should, by means of Regulations in terms of the Act, make provision for a *certificate of mediation* to be furnished by the mediator so that information relating to abuse of process can be brought to the attention of the judicial officer to enable him or her to either impose a costs order, or to adjourn proceedings.

(iii) Accreditation and quality assurance

Uniform mediation processes and procedures in terms of the Children's Act are important. How can the rights of the child and the rights of those who fall to be

¹⁰² CJ Davel & AM Skelton, note 10 above, 4-30.

¹⁰³ The Children's Act, s48(1)(d), empowers the children's court to 'make appropriate orders as to costs in matters before the court.'

protected in terms of the Children's Act be adequately protected when mediation is practised according to different standards of professionalism? While it is to the credit of most mediation agencies in South Africa for requiring persons seeking to be mediators to attend mediation training, mediation training is done in-house and according to varying norms and standard. The time has come, it is submitted, to regularize mediator training and for all mediators to go through the same process of accreditation.

It is also necessary for mediation agencies to be subject to quality assurance scrutiny at regular intervals to ensure that all mediation agencies are functioning according to same ethical and professional standards. Proper mediation training, accreditation and quality assurance, it is submitted, are not simply niceties but are prerequisites to ensure that we have uniform standards and procedures.¹⁰⁴

CONCLUSION

If the Children's Act is a pyrrhic victory for children, then so is the mediation provisions. Had it not been for the socio-economic and human rights plight of South African children, chances are we might not have seen the need to draft new legislation. Without new legislation it is more probably than not that we would have merrily continued to decide questions affecting children as we always did namely, by adversarial litigation. However, the fundamental overhaul of children's law in South Africa has even forced us to reconsider the way that we resolved disputes. That Parliament has seen fit to recognize mediation as a dispute resolution mechanism places the burden squarely on our shoulders to ensure that we take mediation seriously. Mediation must be seen to make a tangible difference. It must not be mere lip service. Mediation must not be a concept that we publicly brandish about to create an illusion that we are on par with international trends, but that we are too feign-hearted to actively pursue.

This article serves a dual purpose. On one hand, it is a source of information to those unfamiliar with the strides South Africa has made to incorporate mediation as a means of dispute resolution in matters affecting children. On the other hand, it is hoped that this article will be a cause for reflection to those who are thinking of going down a similar road not to make the same mistakes we have. Yes, we have incorporated mediation into the Children's Act, but when it comes mediation theory, it submitted, we have failed in *minor* respects. In the way we implement the mediation provisions, most notably through the office of the family advocate, we have failed to take account some core values of mediation. Respect for core values, I believe, is important at the end of the day if we are to truly embrace mediation as an alternative dispute resolution mechanism.

¹⁰⁴ Boule, note 73 above, 460-504.

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