

The role of court-based mediation in the resolution of divorce disputes

Y. C. STEYN
21650705

Dissertation submitted in fulfilment of the requirements for
the degree *Magister Legum* in
International Aspects of Law
at the Potchefstroom Campus of the North-West University

Supervisors: Prof SPlER de la Harpe
Co-supervisor: Michelle Schoeman

December 2015

TABLE OF CONTENTS

PERMISSION TO SUBMIT DISSERTATION FOR EXAMINATION PURPOSES.....	6
DECLARATION BY RESEARCHER.....	7
DECLARATION BY LANGUAGE EDITOR.....	8
ABSTRACT.....	9
OPSOMMING	10
LIST OF ABBREVIATIONS:	11
CHAPTER 1. INTRODUCTION AND PROBLEM STATEMENT.....	12
1.1 MEDIATION AND FAMILY LAW	12
1.2 THE ROLE OF THE FAMILY ADVOCATE	15
1.3 LEGISLATION AND MEDIATION	17
1.4 COURT-ANNEXED MEDIATION.....	18
1.5 STRUCTURE OF THIS DISSERTATION.....	20
CHAPTER 2: PRINCIPLES OF COURT-BASED FAMILY MEDIATION	22
2.1 DEFINING MEDIATION	22
2.2 GENERAL PRINCIPLES OF MEDIATION	25
2.2.1 <i>Key characteristics of mediation</i>	25
2.3 FORMS OF MEDIATION.....	31
2.3.1 <i>Facilitative Mediation</i>	32
2.3.2 <i>Evaluative Mediation</i>	33
2.3.3 <i>Transformative mediation</i>	34
2.3.4 <i>Activist mediation</i>	34
2.3.5 <i>Multi-generational mediation</i>	35
2.3.6 <i>Settlement model of mediation</i>	35
2.4 PROCESSES RELATED TO MEDIATION.....	35
2.4.1 <i>Settlement Conference</i>	35
2.4.2 <i>Facilitation</i>	38
2.4.3 <i>Conciliation</i>	38
2.4.4 <i>Family group conferencing</i>	39
2.5 THE FAMILY MEDIATION PROCESS	40
2.6 BENEFITS OF MEDIATION	42
2.6.1 <i>Improved communication and understanding</i>	42
2.6.2 <i>Litigation remains an option</i>	43
2.6.3 <i>Mediation is future-oriented</i>	43
2.6.4 <i>Confidentiality</i>	43
2.6.5 <i>Identifying settlement blockages</i>	43
2.6.6 <i>Informal and flexible</i>	44
2.6.7 <i>Cost effective</i>	44
2.6.8 <i>Promotes the best interest of children</i>	44
2.7 DISADVANTAGES OF MEDIATION.....	45

2.8 THE TRAINING AND APPOINTMENT OF MEDIATORS	46
2.9 COURT-BASED FAMILY MEDIATION.....	48
2.9.1 <i>Definition of court-based family mediation</i>	49
2.9.2 <i>South African case law on mediation</i>	50
2.9.3 <i>Court-based mediation in South Africa</i>	51
2.10 CONCLUSION.....	54
CHAPTER 3. THE FUNCTION OF THE FAMILY ADVOCATE IN COURT-BASED MEDIATION IN SOUTH AFRICA.....	55
3.1 HISTORY AND BACKGROUND	55
3.2 THE FAMILY ADVOCATE AND THE BEST INTEREST OF THE CHILD PRINCIPLE	57
3.2.1 <i>Powers and duties of Family Advocates</i>	58
3.2.2 <i>Procedure</i>	59
3.2.3 <i>Functions of the Family Advocate</i>	61
3.2.4 <i>Approach of the Family Advocate's office when instituting an enquiry:</i>	64
3.2.5 <i>Disadvantages of the Family Advocate</i>	64
3.2.6 <i>Function of the Family Advocate in court-based mediation</i>	66
CHAPTER 4. COURT-BASED FAMILY MEDIATION IN AUSTRALIA, CALIFORNIA AND CANADA	67
4.1 COURT-BASED FAMILY MEDIATION IN AUSTRALIA	67
4.1.1 <i>Introduction</i>	67
4.1.2 <i>History and background of divorce mediation in Australia</i>	67
4.1.3 <i>Courts with jurisdiction in family matters</i>	68
4.1.4 <i>Mediation in family matters</i>	69
4.1.5 <i>Regulatory framework</i>	71
4.1.2.2 <i>Family Dispute Resolution Practitioners</i>	74
4.2 COURT-BASED FAMILY MEDIATION IN CALIFORNIA	82
4.2.1. <i>Introduction</i>	82
4.2.2 <i>Historical background</i>	83
4.2.3 <i>Courts with jurisdiction in family matters</i>	83
4.2.4 <i>Mediation in family matters</i>	83
4.2.5 <i>Regulatory framework</i>	84
4.3 COURT-BASED FAMILY MEDIATION IN CANADA	91
4.3.1 <i>Introduction</i>	91
4.3.2 <i>Historical background</i>	91
4.3.3 <i>Courts with jurisdiction in family matters</i>	91
4.3.4 <i>Mediation in family matters</i>	92
4.3.5 <i>Regulatory framework</i>	92
CHAPTER 5. COMPARISON BETWEEN SOUTH AFRICA AND AUSTRALIA, AMERICA AND CANADA	99
5.1 INTRODUCTION.....	99
5.2 REGULATORY FRAMEWORK.....	99
5.2.1 <i>Mandatory mediation</i>	99
5.3 FAMILY ADVOCATE OR SIMILAR INSTITUTIONS.....	101
CHAPTER 6: CONCLUSION AND RECOMMENDATIONS	103

6.1 CONCLUSION.....	103
6.2 FINAL RECOMMENDATIONS	107
BIBLIOGRAPHY.....	109

ACKNOWLEDGEMENTS

Firstly, I would like to thank the Lord. Without His guidance and grace, I would not have been able to submit this dissertation.

I would like to give thanks to my supervisors, Prof. Stephen de la Harpe and Mrs Michelle Schoeman for guiding me through this journey. Thank you for your patience and support.

Lastly, I would like to thank my family and friends for constant love and support.

PERMISSION TO SUBMIT DISSERTATION FOR EXAMINATION PURPOSES

Study leader

Prof SPIER de la Hapre

Co-study leader

Mrs M Schoeman

DECLARATION BY RESEARCHER

I hereby declare that this research, **The role of court-based mediation in the resolution of divorce disputes** is entirely my own work, and that all sources have been fully referenced and acknowledged. Furthermore, I declare that this dissertation has been edited by a qualified language editor. Finally, I declare that this research was submitted to Turn-it-in and that a satisfactory report has been received stating that plagiarism had not been committed.

Yolandé Steyn

DECLARATION BY LANGUAGE EDITOR

I hereby declare that I have language-edited the manuscript
The role of court-based mediation in the resolution of divorce disputes.

by YC Steyn

submitted in partial fulfilment of the requirements
for the degree Magister Legum to the North West University (Potchefstroom
Campus)

Abstract

The *Access to Justice Conference July 2011* led to the introduction of the rules of the *Rules Board of Courts of Law*. These rules aim to regulate the procedure for voluntary referral to court-annexed mediation of civil disputes that are being implemented on a pilot basis in certain courts. As court-annexed mediation is presently being implemented on a pilot basis, and still a relatively new concept in South Africa, an examination of how other countries manage and implement court-annexed mediation processes was necessary. A literature comparison of the management and implementation processes of court-annexed mediation of South Africa, Australia, California and Canada was conducted as these legal systems provide for court-based mediation.

This literature study and literature comparison focussed on the role of court-based mediation in the resolution of divorce disputes and specifically how court-based mediation is implemented in these countries. It is recommended that should the pilot program launched in certain South African courts be successful, law reform be modelled after these countries with regard to the role of court-based mediation in the resolution of divorce disputes. It is further suggested that, like California, Australia and Canada, there be a central starting point in resolving divorce disputes. It is suggested that the office of the Family Advocate be expanded to provide the services similar to the triage model of service delivery in California and similar to the family relationship centres in Australia.

Key words: Court-annexed mediation; Divorce disputes; Family Advocate; Family law; Mediation

Opsomming

Die *Access to Justice Conference July 2011* het gelei tot die inwerkingtre van die reëls van *Rules Board of Courts of Law*. Die reëls fokus op die regulering van die prosedure vir vrywillige verwysing na hofgebaseerde mediasie van siviele dispute wat op proefbasis in sekere howe geïmplementeer word. Aangesien hofgebaseerde mediasie tans op proefbasis geïmplementeer word en steeds 'n betreklik nuwe konsep in Suid-Afrika is, was 'n ondersoek na hoe ander lande hofgebaseerde mediasieprosesse bestuur en implementeer, noodsaaklik. 'n Literatuurvergelyking van die bestuur en implementeringsprosesse van hofgebaseerde mediasie van Suid-Afrika, Australië, California en Kanada is uitgevoer, aangesien hierdie regstelsels voorsiening maak vir hofgebaseerde mediasie.

Hierdie literatuurstudie en literatuurvergelyking het op die rol van hofgebaseerde mediasie ter oplossing van egskedingsdispute en spesifiek hoe hofgebaseerde mediasie in hierdie lande geïmplementeer word. Daar word aanbeveel dat indien die proefprogram in sekere Suid-Afrikaanse howe geslaagd is, regshervorming op die lees van hierdie lande s'n geskoei moet word met betrekking tot die rol van hofgebaseerde mediasie ter oplossing van egskedingsdispute. Voorts word voorgestel dat, soos Amerika, Australië en Kanada, daar 'n sentrale beginpunt wees by die oplos van egskedingsdispute. Daar is voorgestel dat die kantoor van die Gesinsadvokaat uitgebrei moet word om die dienste te kan lewer, gelykstaande aan die sorteringsmodel se dienslewering in California asook soortgelyk aan dié van die familieverhoudingsentra in Australië.

Sleutelwoorde: Hofgebaseerde mediasie; Egskedingsdispute; Gesinsadvokaat; Familiereg; Mediasie

LIST OF ABBREVIATIONS:

CILSA	Comparative and International Law Journal of Southern Africa
SAJHR	South African Journal on Human Rights
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

Chapter 1. Introduction and problem statement

Divorce has become an accepted event in our society, often with damaging consequences for the children both in the short and long term. It is common knowledge that divorce or family breakdown is not only a legal problem, but also a social problem where many non-legal issues are encountered.¹ Moreover, it appears that the adversarial system of litigation, which works well in most other fields of our law, is not designed or developed to deal with these intimate, emotional and psychological aspects of divorce.²

Divorce proceedings are therefore normally traumatic events for those directly affected by them.³ The psychological, emotional and social consequences for the children are substantial, and the arrangements made for their future at the divorce will usually affect the rest of their lives.⁴ These decisions are determined by the availability of expert social work and psychological assessments and frequently, by the financial resources available for this expertise.⁵

1.1 Mediation and Family law

Due to the increase of divorce and family-related litigation, family law in South Africa has undergone considerable change in recent years with an increasing importance being placed on mediation.⁶ Court-based mediation will therefore potentially play a significant role in the resolution of divorce disputes in South Africa, especially where children are involved.

1 De Jong 2005 *TSAR* 33.

2 Wessels C and Steyn S 2015 "Assessment of parental responsibilities and rights: care, contact and guardianship" in Roos V, Scholtz JG and Wessels C (eds) *Introduction to Forensic Psychology* 155-181.

3 *Clemson v Clemson* [2001] 1 All Sa 622 (W).

4 Burman, Derman and Swanepoel 2000 *SAJHR* 535.

5 Burman, Derman and Swanepoel 2000 *SAJHR* 535; Wessels C and Steyn S 2015 "Assessment of parental responsibilities and rights: care, contact and guardianship" in Roos V, Scholtz JG and Wessels C (eds) *Introduction to Forensic Psychology* 155-181.

6 Schultz 2011 *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law system* 9.

Parties to a divorce dispute are being encouraged to mediate and to use litigation as a last resort.⁷ In this regard *MB v NB*⁸ Brassey AJ endorsed mediation where parties are considering divorce proceedings:

If mediation is appropriate in commercial cases, how much more appropriate is it in Family disputes. They engage the gamut of emotions, from greed through pain to vengefulness; they generally involve the rights of children, majors as well as minors, who can only experience fear and bewilderment at the breakdown of the structures of love and support on which they, as family members, have come to depend; and the division of the estates of the parties, intertwined as they invariably are, can be very complex and are frequently made the more so by the parties' bloody-mindedness and duplicity.

Brassey AJ continued to state that mediation was the better alternative and it should have been tried in this case.⁹ In order to understand the importance of mediation in the South African context, it is first necessary to describe and define mediation.

Schultz describes mediation as “a voluntary process where the disputing parties, with the assistance of a third, neutral party (the mediator); resolve the dispute between them in order to bring about an agreement or settlement.”¹⁰ Boezaart emphasizes the voluntary process of mediation and adds that court-based mediation is a process in which the mediator, a neutral third party who has no decision-making power, facilitates the negotiations between disputing parties with the object of getting them back on speaking terms and helping them to reach a mutually satisfying settlement agreement that recognises the needs and rights of all family members.¹¹ Although there are various definitions for mediation, for purposes of this study the definition of mediation as described in the Rules Regulating the Conduct of Proceedings of the Magistrates' Court of South Africa¹² (hereafter referred to as the Rules), as amended, will be used as this study focuses on the role of court-based mediation in the resolution of divorce disputes where children are involved.

7 Schultz 2011 *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law system* 9.

8 Paragraph 52 of *MB v NB 2010 (3) SA 220 (GSJ)*.

9 *MB v NB 2010 (3) SA 220 (GSJ)*.

10 Schultz 2011 *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law system* 11.

11 De Jong “Child-focused Mediation” in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009) 113.

12 The Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa published in GG No. 37448, 18 March 2014 (hereinafter the Rules).

The Rules define mediation as the process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute.¹³ In an attempt to achieve this, the mediator uses specific techniques and strategies for example empathic listening, clarifying and role reversal that could be similar to those used by the Family Advocate.¹⁴

Since the investigation of the Family Advocate can be initiated either by the parties involved, the court or the Family Advocate himself,¹⁵ it can be argued that services offered by the office of the Family Advocate include elements of voluntary as well as mandatory mediation.¹⁶ Because both Family Advocates and family counsellors (a suitably more qualified or experienced person) are often involved in the investigation, it can further be argued that the office of the Family Advocate may offer an interdisciplinary approach to the resolution of child-centred disputes. Section 3(1) *Mediation in Certain Divorce Matters Act*¹⁷ makes provision for the appointment of Family Counsellors to assist the Family Advocate with an enquiry as referred to above.

As it is part of the Family Advocate's function to evaluate the parties concerned and the relevant circumstances at an enquiry in order to make a recommendation to the court, and following the definition of evaluative mediation, the Family Advocate would appear to use the evaluative model of mediation.¹⁸ In evaluative mediation, the mediator plays a more active role in the decision making process¹⁹ by working to narrow the space between the disputing parties by specifically evaluating the merits

13 Rule 73 The Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa, published in GG No. 37448, 18 March 2014.

14 Charlton and Dewdney *The Mediator's Handbook Skills and Strategies for Practitioners* 1995 123-126; De Jong *TSAR* 2010 516.

15 Section 4 of the *Mediation in Certain Divorce Matters Act* 24 of 1987.

16 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009).

17 Section 3(1) of the *Mediation in Certain Divorce Matters Act* 24 of 1987.

18 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009).

19 Boniface 2012 *PELJ* 381.

of each party's position and by communicating these evaluations to the parties.²⁰ The Family Advocate therefore does not really mediate. The function of the Family Advocate is to ensure the best interest of the minor children²¹ by furnishing the court with a report or recommendations on any matter concerning the welfare of the minor children. Therefore, it would appear that in practice, the Family Advocate does not mediate since the mediator role would appear to be in conflict with the Family Advocate's evaluative role. In light of the fact that the Family Advocate has to safeguard the rights of minor children²² it stands to reason that the Family Advocate will have to play some role in the mediation process to ensure that the agreements reached are in the best interest of the minor children involved.

1.2 The role of the Family Advocate

The incidence of legal intervention in family life is at its highest at the time of divorce.²³ When legal intervention takes place and the Court, as upper guardian of all minor children, is faced with having to resolve problems regarding parental responsibilities and rights, it is trite law that the order of the Court must accord with the best interests of the child.²⁴

The Constitution of the Republic of South Africa, 1996, The Children's Act 38 of 2005 (hereafter referred to as the Children's Act) as well as several other legislation specifically provides for the best interest of the child.²⁵ Before a divorce can be granted, the court must be satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best in the circumstances.²⁶

In an effort to reduce the above-mentioned trauma and to ensure that the best interest of the child is served, South Africa introduced the office of the Family

20 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 307.

21 Section 4 of the *Mediation in Certain Divorce Matters Act* 24 of 1987.

22 *Mediation in Certain Divorce Matters Act* 24 of 1987.

23 Bosman 1994 *Welfare Focus* 37-38.

24 Bosman 1994 *Welfare Focus* 37-38.

25 Wessels C and Steyn S 2015 "Assessment of parental responsibilities and rights: care, contact and guardianship" in Roos V, Scholtz JG and Wessels C (eds) *Introduction to Forensic Psychology* 155-181.

26 Divorce Act 70 of 1979

Advocate²⁷ to provide an additional safeguard to ensure the best interest of children in divorce matters.²⁸

The Family Advocate is a state official appointed in terms of section 2(1) of the *Mediation in Certain Divorce Matters Act*²⁹ to exercise certain powers in accordance with this Act. Section 4 of the *Mediation in Certain Divorce Matters Act* makes provision for an enquiry by the office of the Family Advocate into matters concerning (a) access to and (b) the custody and guardianship of children after the institution of a divorce action or other post-divorce applications relating to children.³⁰ At this enquiry the office of the Family Advocate has to ensure that interests of each minor and dependent child of the marriage concerned are protected.³¹ Upon completion of the enquiry the court must be furnished with a report and recommendation on any matter concerning the welfare of such children.³²

It is important to note that the Family Advocate is not appointed as the representative of any party to a dispute, but a professional and neutral channel of communication between the conflicting parents, the child and the judicial officer.³³ In practice it is however the Family Advocate's roles to monitor settlement agreements, to mediate and settle disputes if possible, and evaluate the best interests of the child.³⁴ Although the *Mediation in Certain Divorce Matters Act*³⁵ does not explicitly provide for mediation in the resolution of divorce disputes there are other legislation that may be used to promote the use of court-based mediation in divorce disputes concerning minor children.

27 Van Wyk 1992 *Beleidsorsig* 29.

28 Burman, Derman and Swanepoel 2000 *SAJHR* 536.

29 24 of 1987.

30 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009)118.

31 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009)118-119; *Mediation in certain Divorce Matters Act* 24 of 1987.

32 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009) 118.

33 Kruger 2005 *Codicillus* 8.

34 Section 4(2) of the *Mediation in Certain Divorce Matters Act* 24 of 1987 and Carnelley 2010 *Obiter* 645.

35 24 of 1987.

1.3 Legislation and mediation

There is various legislation that provide for the use of mediation such as the *Short Process Courts*³⁶ that provides for voluntary mediation in certain civil matters and the *Children's Act*³⁷ which makes provision for the mandatory referral of certain child-centred disputes to mediation.

Section 21(3)(a) of the *Children's Act* specifically provides that if a dispute between the biological father and the biological mother of a child with regard to the fulfilment by that father of the conditions as set out in the Act, occurs the matter must be referred for mediation to a Family Advocate, social worker, social service professional or other suitably qualified person.³⁸

Furthermore, section 33(2) read together with section 33(5) of the *Children's Act* provides that co-holders of parental responsibilities and rights in respect of a child, who are experiencing difficulties in exercising their responsibilities and rights, must before seeking the intervention of a court, first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights concerning the child by obtaining the assistance of a Family Advocate, social worker or psychologist or by attending mediation through a social worker or other suitably qualified person.³⁹

Additionally, section 46(1)(h)(iii) of the *Children's Act*⁴⁰ states that a Children's Court may instruct a parent or care-giver of a child to undergo professional counselling, to participate in mediation, in a family group conference or another appropriate problem-solving forum. Section 49(1)(a)⁴¹ of the said Act further refers to mediation by a Family Advocate, social worker, social service professional or other suitably qualified person. Mediation is therefore seen as a suitable option to mitigate disputes between parents and care-givers which allows for the promotion of the best interest of the child.

36 *Short Process Courts and Mediation in Certain Civil Cases Act* 103 of 1991.

37 38 of 2005.

38 Section 21(3)(a) of the *Children's Act* 38 of 2005 (hereafter *The Children's Act*).

39 Section 33 of the *Children's Act* 38 of 2005.

40 Section 46(1)(h)(iii) of the *Children's Act* 38 of 2005.

41 Section 49(1)(a) of the *Children's Act* 38 of 2005.

Chapter 3 of the *Short Process Courts and Mediation in Certain Civil Cases Act*⁴² provides for mediation proceedings at any time prior to or after the issuing of a summons but prior to judgment for the institution of a civil action in a court or magistrates' court. This chapter can therefore be used in support of a non-adversarial system, such as court-based mediation, to resolve certain civil matters including divorce disputes.

1.4 Court-annexed mediation

The Access to Justice Conference, held in July 2011 towards achieving the delivery of accessible and quality justice for all, resolved that steps must be taken to introduce alternative dispute resolution into the court system.⁴³ Therefore the Rules Board of Courts of Law introduced rules to regulate the procedure for voluntary referral to court-annexed mediation of civil disputes to be implemented on a pilot basis in certain courts.⁴⁴ The rules were published in Government Gazette 37448 on 18 March 2014 and they provide the procedure for the voluntary submission of civil disputes to mediation in selected magistrates' courts. The rules apply to the voluntary submission by parties to mediation of disputes prior to as well as after the commencement of litigation. This is significant for divorce disputes as the *Jurisdiction of Regional Courts Amendment Act*,⁴⁵ which came into operation on 9 August 2010 extended the courts' jurisdiction to allow for the adjudication of various types of civil matters and divorce matters.

Court-annexed mediation is currently only being implemented on a pilot basis, and is still a relatively new concept in South Africa.⁴⁶ Hence it is necessary to examine how other countries implement and manage court-annexed mediation processes in divorce disputes where children are involved. Australia has increasingly been busy in

42 103 of 1991.

43 Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa.

44 Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa.

45 *Jurisdiction of Regional Courts Amendment Act* 31 of 2008.

46 Van der Berg 2015 *De Rebus* 25.

integrating alternative dispute resolution methods, especially divorce mediation, into the formal divorce process.⁴⁷

South Africa can benefit from examining how such mediation, as well as other alternative dispute-resolution methods are being applied in Australia and legal reform should be based on how mediation was integrated into the divorce process.⁴⁸ Over the past few years Australia has introduced new legislation that strongly encourages or even compels divorcing spouses to first make use of so-called 'family dispute resolution' methods, especially mediation, before resorting to divorce.⁴⁹

Similarly, since the introduction of 'no-fault' divorce in America, family courts, specifically in California have moved increasingly towards a philosophy that supports collaborative interdisciplinary dispute-resolution processes and limited the use of litigation by provision of mediation services.⁵⁰ In California, every long cause (civil cases in which the time estimated for trial is more than five hours)⁵¹, non-criminal, non-juvenile case must participate either in voluntary mediation, arbitration, neutral evaluation, early settlement conference or other alternative dispute resolution process prior to mandatory judicial settlement conference or trial.⁵²

Many jurisdictions in America have court-connected family court service agencies and offer a variety of services including parent education, mediation, judicially moderated settlement conference and high conflict interventions.⁵³ Despite the development of several new services, mediation remains at the centre of the family dispute resolution field and the tiered services model which offers a range of services in a linear manner where families begin with the least intrusive and time consuming service and then proceed to the more intrusive services.⁵⁴ As court-connected mediation services differ in certain states this study will focus on the

47 De Jong 2007 *XL CILSA* 280-281.

48 De Jong 2007 *XL CILSA* 280-281.

49 De Jong 2007 *XL CILSA* 280-281..

50 Johnston 2000 *University of Arkansas at Little Rock Law Review* 454; Salem 2009 *Family Court Review* 372.

51 Rule 3.735 California Rules of Court 2016.

52 Uniform Local Rules of Court Superior Court of California; www.sfgov.org/site/courtspace.asp?id=3802 (July 1998)

53 Salem 2009 *Family Court Review* 372.

54 Salem 2009 *Family Court Review* 372.

position of court-based mediation in California. The Mediation is widely available in both private and public sectors and court service agencies usually provide mediation services for a small fee or without charge, making it more affordable and accessible for those with limited resources.⁵⁵

Canada like Australia and California also encourage the use of mediation before the commencement of litigation proceedings in certain divorce disputes.⁵⁶ It is therefore necessary to examine the position in Australia, California and Canada in the determination of what role of court-based mediation will play in the resolution of divorce disputes in South Africa.

1.5 Structure of this dissertation

This text is based on a literature study and will include the principal text books, journal articles, legislation and case law in South Africa as well as that of Australia, America (California) and Canada in order to determine the role of court-annexed mediation in divorce disputes in South Africa. Chapter one of this text describes the introduction and problem statement question of the role court-based mediation can play in the resolution of divorce disputes in South Africa.

Chapter two will examine the principles of court-based family mediation in general. The function of the Family Advocate in court-based mediation and certain aspects of the procedure relating to disputes in divorce proceedings will be discussed in the third chapter. The role of the Family Advocate is discussed with specific reference to the *Mediation in Certain Divorce Matters Act 24 of 1987*. The regulations promulgated by the Minister providing for the practical implementation of the Act are also incorporated. The fourth chapter will contain a detailed discussion of court-based family mediation in Australia, California and Canada. Chapter five will contain a comparison between the respective positions in South Africa, Australia, California and Canada. The final chapter will comprise a conclusion and recommendations regarding the role of court-based mediation in the resolution of divorce disputes.

55 Salem 2009 *Family Court Review* 372.

56 Richler 2011 *Judges Journal* 14

Chapter 2: Principles of court-based family mediation

In order to determine the role of court-based mediation in the resolution of divorce disputes where children are involved it is necessary to determine what is meant by mediation and the principles applicable thereto. In this chapter the definition of mediation and more specifically court-based mediation in divorce disputes where children are involved will be examined. Secondly the general principles of mediation will be discussed and thereafter the processes related to mediation explored. The key characteristics of mediation as well as its benefits and disadvantages will subsequently be established. Thereafter chapter 2 of the Rules as published as well as comments thereon, along with the training and appointment of mediators will be discussed.

2.1 Defining mediation

There is a variety of definitions for mediation. The various definitions will be examined in order to formulate a definition for purposes of this study.

Van Zyl⁵⁷ defines mediation as a co-operative process whereby the disputing parties attempt to reach a mutually acceptable agreement or settlement on specific issues, or, when failing agreement or settlement, at least reduce conflict. A third party participates in the discussions, assists the parties, may act as a facilitator and even as a leader in negotiations, and may initiate, nourish and sustain the bilateral processes and narrow the field of discussion but does not make decisions for the parties.⁵⁸ Thus the outcome of the mediation is determined by the parties, not by the mediator.⁵⁹

57 Van Zyl *Alternative Dispute Resolution in the Best Interest of the Child* 171.

58 Davis 1983 *Journal of Social Welfare Law* 132; Van Zyl *Alternative Dispute Resolution in the Best Interest of the Child* 171.

59 Van Zyl *Alternative Dispute Resolution in the Best Interest of the Child* 171.

Similarly, Schultz⁶⁰ describes mediation as a voluntary process whereby the disputing parties, with the assistance of a third, neutral party (the mediator); resolve the dispute between them in order to bring about an agreement or settlement. According to this definition a mediator attempts to help the parties involved to negotiate more effectively than they could on their own. The mediator helps the parties to a dispute in finding solutions to their conflict and therefore Stitt⁶¹ describes mediation simply as facilitated negotiation.

De Jong⁶² defines family mediation as a process by means of which the mediator, an impartial party who has no decision making power, facilitates the negotiations between disputing parties with the objective of getting them back on speaking terms and helping them to reach a mutually satisfying agreement that recognise the needs and rights of all family members. Boule defines mediation as a decision making process in which the parties are assisted by a third party, the mediator; the mediator attempts to improve the process of decision making and to assist the parties to reach an outcome to which each of them can ascent.⁶³

Furthermore, mediation can also be defined as a process where a neutral third party, the mediator, acts as an intermediary and facilitates the conflict between the parties in order to assist them in reaching a mutually acceptable agreement.⁶⁴ The agreement may take the form of a settlement and the settlement may be made an order of court.⁶⁵

Although these definitions do differ, it is clear that mediation acknowledges the parties' emotions as well as the legal aspects of the divorce. Therefore, it is important to bear in mind that there often are psychological as well as legal obstacles which need to be understood and overcome before compromise and

60 Schultz 2011 *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law system* 11.

61 Stitt *Mediation: A practical guide* 1.

62 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009).

63 Holtring *Mandatory Mediation in Australian Family Law* 5.

64 Boniface 2012 *PELJ* 379.

65 Boniface 2012 *PELJ* 379 see also Peté *et al Civil Procedure A Practical Guide* 585.

agreement become possible.⁶⁶ Moreover, divorce mediation stresses honesty, informality, open and direct communication, expression, and attention to the underlying causes of the disputes, reinforcement of positive bonds and avoidance of blame.⁶⁷

Its purpose is therefore not only to help spouses in reaching an agreement which recognises the needs and rights of all family members, but also to lay the foundation for the healthy structuring of post-divorce family life.⁶⁸ Family mediation thus takes place where there is a dispute between family members including divorce and post-divorce matters.⁶⁹

As this study focuses on the role of court-based mediation in the resolution of divorce disputes and the jurisdiction of the Magistrates' courts was extended to include divorce disputes, it is important to examine the definition of mediation as defined in the Rules regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa.

The Rules define mediation as the process by which a mediator assists the parties to litigation to resolve the dispute between them by facilitating discussions between the parties, by assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute.⁷⁰

From the definitions above it can be concluded that mediation is a confidential process in which a neutral third party assists the disputing parties by facilitating the negotiation between them in order to resolve the dispute.

66 Wessels and Steyn 2015 Assessment of parental responsibilities and rights: care contact and guardianship in Roos V, Scholtz JG and Wessels C (eds) *Introduction to Forensic Psychology* 155-181.

67 Garner 1989 *Journal of Dispute Resolution* 141.

68 McNab and Mowatt 1986 *De Jure* 313-324.

69 Boniface 2012 *PELJ* 380.

70 Section 73 of the Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa.

Following the definitions of mediation and divorce mediation it is clear that there are general principles applicable in the mediation process. These principles will be discussed below.

2.2 General principles of mediation

When interpersonal conflict occurs, the most common approach to resolving it is negotiation, interplay and a dialogue between the disputants and their representatives aimed at resolving the conflict.⁷¹ If negotiation does not resolve the conflict and if the conflict involves legal issues, litigation is the only option many disputants see as recourse.⁷² Alternative dispute resolution (ADR) processes may be seen as suitable alternatives to litigation, one of which is mediation. Mediation is used as a type of assisted negotiation that uses a third party to help the disputants negotiate their settlement. The mediator is typically impartial with respect to the disputants and the settlement reached.⁷³ It is however, important to note that mediation is distinguished from other ADR processes in two principal ways. Firstly, in mediation the neutral third party does not issue a decision in the case and the disputants retain the power to settle.⁷⁴ Secondly, mediation can be conducted in various ways depending on the particular circumstances.⁷⁵ It is therefore necessary to define and discuss the various characteristics and styles of mediation.

2.2.1 Key characteristics of mediation

Following the definition of mediation, there are specific principles inherent in the mediation process. These principles are set out below.

2.2.1.1 Voluntary

71 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 305.

72 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 305.

73 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 306.

74 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 306.

75 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 306.

The first principle of mediation is its voluntary nature. Both parties decide to engage in the mediation process without restraint.⁷⁶ When the mediation is voluntary, the parties are usually highly motivated to participate and to reach a settlement.⁷⁷

However, mediation is not always entirely voluntary as parties to a dispute might be compelled to attend mediation by a contract clause or they might be strongly encouraged to engage in mediation by a judge or civil procedure rules.⁷⁸

It is, however, very important to note that, whether or not mediation is voluntary in its commencement, it is generally voluntary in its continuation⁷⁹ as the parties may at any time decide to terminate the mediation process and proceed to litigation. For that reason, the parties cannot be forced to reach an agreement and therefore the settlement can always be seen as voluntary.

2.2.1.2 Impartiality

A second characteristic of mediation is impartiality. It is fundamental to the integrity of the mediation process that the mediator should conduct it in an impartial⁸⁰ manner.⁸¹ This means that the mediator does not take sides or favour the position of any party above the other.⁸² Although impartiality is a key principle, a mediator can be linked in some way to a party and nevertheless still conduct the mediation.⁸³ The distinction between impartiality and neutrality is important in this regard. There is a view that mediator neutrality implies that the mediator will not bring his or her personal values into the process.⁸⁴ Impartiality in turn implies that the mediator does

76 Brand, Steadman and Todd *Commercial Mediation: A User's Guide* 24.

77 Brand, Steadman and Todd *Commercial Mediation: A User's Guide* 24.

78 Brand, Steadman and Todd *Commercial Mediation: A User's Guide* 24.

79 Brand, Steadman and Todd *Commercial Mediation: A User's Guide* 24.

80 Parkinson *Family Mediation* 13-14; Boniface 2012 *PELJ* 380; Roberts *Mediation in family disputes* 95.

81 Brown and Marriot *ADR Principles and Practice* 159; see also De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009) and Parkinson 1997 *Family Mediation* (Sweet & Maxwell London) 13-14.

82 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009).

83 Brown and Marriot *ADR Principles and Practice* 160.

84 Brown and Marriot *ADR Principles and Practice* 160.

not have any significant personal interest in the outcome of the mediation and that the mediator will conduct the process fairly.⁸⁵

During the mediation process the mediator must also ensure that one party is not disadvantaged by the other through intimidation and threats.⁸⁶ The mediator consequently has to conduct the process in such a manner as to redress any power imbalances between the parties.⁸⁷ As this might occasionally prove to be a very difficult task, the mediator should terminate the mediation process once it becomes apparent that it will be impossible to restore serious power imbalances.⁸⁸ De Jong continues in stating that in order to ensure impartiality, a mediator should only give the parties legal information as opposed to legal advice, and should never try to act as a therapist by analysing past behaviour.⁸⁹ As divorce is a emotional and traumatic time it is suggested that impartiality is of extreme importance in the divorce mediation process.

2.2.1.3 Confidentiality

The third principle of mediation is confidentiality,⁹⁰ and it is generally thought that confidentiality is necessary for successful mediation.⁹¹ As a result of the informal process, disputants can better communicate their interests and a lot of the stresses of the adversarial court processes is avoided.⁹² The trust, rapport and openness required for effective mediation are more easily achieved when the parties know that what they say in mediation will be held in strict confidence.⁹³ Mediation provides a confidential platform for disputants to properly express issues and is conducive to effective communication.⁹⁴ Parties to a dispute are encouraged by mediation to negotiate openly with one another in order to reach a settlement agreement. The parties will only be able to speak freely and negotiate honestly and openly if the

85 Boniface 2012 *PELJ* 381; Brown and Marriot *ADR Principles and Practice* 159.

86 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009).

87 De Jong 2010 *TSAR* 515-531.

88 De Jong 2010 *TSAR* 515-531.

89 De Jong 2010 *TSAR* 515-531.

90 Roberts *Mediation in Family Disputes* 95.

91 Folberg 1985 *Colum. J.L. & Soc. Probs.* 440.

92 Van der Berg 2015 *De Rebus* 25.

93 Folberg 1985 *Colum. J.L. & Soc. Probs.* 440.

94 Van den Berg 2015 *De Rebus* 25.

process is kept confidential. Therefore, mediation provides a suitable alternative for the parties who do not want to be embarrassed in open court. This is especially important in divorce disputes where the information is of a very personal nature. Parties can openly disclose any personal information, without being afraid that any statements made in the mediation process could later be used against them in litigation that might follow an unsuccessful mediation attempt.⁹⁵

Clause 2 of the Agreement to Mediate as provided for in the Rules specifically stipulates that the mediation will be strictly confidential and without prejudice.⁹⁶ The mediator may only break confidentiality if he or she suspects that another person may be in danger or harm.⁹⁷ In cases of child abuse, child neglect or other criminal behaviour, the mediator has a duty to immediately terminate the mediation and report the matter to the relevant authority.⁹⁸

2.2.1.4 Self-determination

The fourth principle is self-determination and is seen as one of the many advantages of mediation. The essence of mediation is that it is non-adjudicatory and assists parties in making their own decisions.⁹⁹ Mediation allows divorcing parties greater control over the consequences of their divorce as it is up to them to reach their own joint decisions.¹⁰⁰ It empowers the disputing parties to decide for themselves what agreement they will find acceptable. Once a matter becomes litigious the parties do not have control of the outcome. If parents are able to participate in mediation in order to settle a family dispute they will be better able to fully explore their options, truly hear one another and ultimately be empowered to make their own decisions that determine their own future.¹⁰¹

95 De Jong 2010 *TSAR* 515-531.

96 The Rules GG 37448 18 March 2014; Van den Berg 2015 25.

97 The Rules GG 37448 18 March 2014.

98 De Jong 2008 *TSAR* 4.

99 Brown and Marriot *ADR Principles and Practice* 162.

100 De Jong 2010 *TSAR* 515-531.

101 Salem 2009 *Family Court Review* 375.

Mediation implies that the parties themselves make the agreement and it is argued in support of mediation that the parties are more likely to adhere to its provisions.¹⁰² The divorcing parties formulate their own agreement and make an emotional investment in its success.¹⁰³ They are therefore more likely to support the agreement than they would be if the terms were negotiated by their legal representatives or orders by the court.¹⁰⁴

It needs to be noted that compulsion to enter into mediation, for example under court rules or judicial pressure does not impinge on the parties' self-determination within the mediation process.¹⁰⁵ Although the parties are compelled to enter into the mediation they still hold the ultimate decision-making power. Having fully participated in the process, the parties will experience a greater sense of ownership and satisfaction with the outcomes.¹⁰⁶

2.2.1.5 Mediation is a multi-disciplinary process

The multi-disciplinary nature of mediation¹⁰⁷ is the fifth principle. Inherent in mediation is a clear intention to construct behavioural sciences and law to improve the psychological functioning of separating couples in ways that promote their own and their children's best interests.¹⁰⁸ Because mediators are schooled in various disciplines such as social and behavioural sciences,¹⁰⁹ they know techniques and strategies to use in order to lessen conflict between parties and bridge communication gaps.¹¹⁰ As such, mediation reduces the emotional costs associated with divorce.¹¹¹ In addition, mediators should always advise parties to seek independent information and advice from a variety of professionals, such as

102 Clark 1993 *THRHR* 459.

103 De Jong 2010 *TSAR* 515-531.

104 De Jong 2010 *TSAR* 515-531.

105 Brown and Marriot *ADR Principles and Practice* 162.

106 Salem 2009 *Family Court Review* 375.

107 Parkinson 1997 *Family Mediation* (Sweet & Maxwell London) 13-14.

108 De Jong 2010 *TSAR* 515-531.

109 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009) 115.

110 Van Zyl *Alternative Dispute Resolution in the Best Interest of the Child* 246; De Jong 2010 *TSAR* 515-531.

111 De Jong 2010 *TSAR* 515-531.

attorneys, advocates, accountants, therapists or counsellors during the mediation process.¹¹²

2.2.1.6 Private and informal

Mediation is conducted in private so that private matters may be freely discussed without concern that the discussion is part of a public record.¹¹³

Mediation is thus not bound by the rules of procedure that dominate the adversarial system of litigation.¹¹⁴ This is a simple process that people can understand and in which they can fully participate.¹¹⁵ With the assistance of the mediator the parties may consider a much broader range of information in determining a settlement outcome than the information that is allowed to be introduced in court.¹¹⁶ The mediation process can further be tailored according to the circumstances of the dispute and the requirements of the parties concerned.¹¹⁷

Mediation can also accommodate different cultural value systems and/or religious convictions.¹¹⁸ Mediation can therefore achieve advantageous solutions that a court would not be able to grant.¹¹⁹ Furthermore, settlements can be reached in less time than when availing oneself of the traditional court process.¹²⁰

2.2.1.7 Flexible

Mediation is a flexible and creative process which takes place in an unthreatening atmosphere and takes into account religious and cultural differences.¹²¹ Therefore parties can easily relate to the mediation process. The mediation process may take place either early in the proceedings or just prior to trial, either in one day or over

112 De Jong 2010 *TSAR* 515-531.

113 Folberg 1985 *Colum. J. L & Soc. Probs.* 419.

114 Folberg, Milne and Salem 2004 *Divorce and Family Mediation – Models, Techniques and Applications* 5; De Jong 2010 *TSAR* 515-531.

115 De Jong 2010 *TSAR* 515-531.

116 Beyer 2008 *St Mary's Law Journal* 303-304; De Jong 2010 *TSAR* 515-531.

117 De Jong 2010 *TSAR* 515-531.

118 De Jong 2010 *TSAR* 515-531.

119 De Jong 2010 *TSAR* 515-531.

120 De Jong 2010 *TSAR* 515-531.

121 De Jong 2005 *THRHR* 97.

many weeks or shorter sessions. Because of its flexibility, various forms of mediation have evolved.¹²²

2.2.1.8 Operates in the shadow of the law

Although mediation is non-binding, it nevertheless, operates in the shadow of the law¹²³ which emphasizes that the rights of all parties will in the final analysis be protected by the courts.¹²⁴ One of the duties of the mediator is to give parties legal information. Preferably, the mediator should also refer the parties to attorneys for independent legal advice.¹²⁵ Negotiations between the parties take place against the background of this legal information.¹²⁶ It is therefore clear that it is by no means the intention to bypass attorneys in the mediation process.¹²⁷ In all different forms of mediation attorneys will still have an important role to play, albeit a less adversarial role. Besides giving legal advice to their clients it is very important for the attorneys representing the divorcing parties to review any agreement reached in the mediation process.¹²⁸ The attorneys should however, be mediation-friendly attorneys who are sensitive to mediated agreements and who follow an interest-based instead of positional approach.¹²⁹

Attorneys could also themselves engage in family mediation as they look for less adversarial ways to practise family law.¹³⁰ In light of the inherent principles of mediation there are also different forms of mediation that can be used to facilitate disputes between parties in divorce.

2.3 Forms of mediation

122 De Jong 2010 *TSAR* 515-531.

123 Van Zyl *Alternative Dispute Resolution in the Best Interest of the Child*

124 Cohen 1992 *De Rebus* 128.

125 De Jong 2010 *TSAR* 515-531.

126 De Jong 2010 *TSAR* 515-531.

127 De Jong 2010 *TSAR* 515-531.

128 De Jong 2010 *TSAR* 515-531.

129 De Jong 2010 *TSAR* 515-531.

130 De Jong 2010 *TSAR* 515-531.

2.3.1 Facilitative Mediation

In facilitative mediation, the mediator's primary function is to promote effective negotiation¹³¹ and to merely act as guardian of the mediation process.¹³² The mediator assists the disputants to explore the options in order to determine whether there is an option that appeals to both parties.¹³³ The mediator facilitates the discussion even when he believes that the option being discussed is unfair.¹³⁴ Facilitative mediators use techniques designed to promote effective negotiation as they view it. They lay ground rules for effective communication, help participants discover their counterparts, guide the disputants in the steps of cooperative negotiation and intervene at all stages of the conflict cycle to keep the conflict as non-competitive as possible.¹³⁵

2.3.1.1 Role of the mediator

The disputants and lawyers all play an active role in the mediation process, though they try to persuade each other, not the mediator.¹³⁶ Facilitative mediators are experts in the process of negotiation and not necessarily the substance of what is being discussed.¹³⁷ The strictly facilitative mediator diligently avoids any evaluation of the merits or strengths of either disputant's case.¹³⁸ Facilitative mediators try to enable the disputants to reach consensus on what they think is a fair outcome while evaluative mediators try to lead the disputants to his own assessment of what is fair.¹³⁹ Facilitative mediation can almost always be an appropriate way of proceeding since it affords the disputants the opportunity of talking, and possibly settling their disputes.¹⁴⁰ Facilitative mediation is especially appropriate when

131 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 307.

132 Botes 2015 De Rebus

133 Stitt *Mediation: A practical guide* 3; Boniface 2012 *PELJ* 381.

134 Stitt *Mediation: A practical guide* 3.

135 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 307.

136 Stitt *Mediation: A practical guide* 3.

137 Stitt *Mediation: A practical guide* 3.

138 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 307.

139 Stitt *Mediation: A practical guide* 4.

140 Stitt *Mediation: A practical guide* 4.

disputants have taken fixed positions or where the disputants may have confidential information that they do not wish to disclose to the other side.¹⁴¹

2.3.2 Evaluative Mediation

In evaluative mediation, the mediator plays a more active role in the decision-making process¹⁴² and works at narrowing the gap between the demands of each disputant by expressly evaluating the merits, strengths, and weaknesses of each disputant's position and by strategically communicating these evaluations to the disputants.¹⁴³ Evaluative mediation is an intervention, based on the belief that negotiation is a process of positional bargaining. The evaluative mediator attempts to minimize the distances between the disputants' positions and to create common ground, if possible.¹⁴⁴

Evaluative mediators consequently rely on their expertise and experience to assess situations and reach conclusions concerning the relative merits of the arguments being presented to them.¹⁴⁵ In evaluative mediation the role of the disputants, and their lawyers, is to present persuasive arguments that will convince the mediator that the disputant has a strong case and will win if the matter goes to trial.¹⁴⁶ Presentations to the mediator are in the form of legal arguments, usually made by a lawyer.¹⁴⁷ The process is similar to a court process, without the formality, and therefore some refer to it as non-binding arbitration.¹⁴⁸ Evaluative mediation is thus non-binding because the disputants do not need to accept the mediator's evaluation of the merits of the case.¹⁴⁹ Although evaluative mediation is non-binding it may be appropriate in cases where disputants have a technical dispute and need the opinion of a technical person in order to resolve the dispute.¹⁵⁰

141 Stitt *Mediation: A practical guide* 4.

142 Boniface 2012 *PELJ* 381.

143 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 307.

144 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 308.

145 Stitt *Mediation: A practical guide* 2; Botes 2015 *De Rebus*.

146 Stitt *Mediation: A practical guide* 2.

147 Stitt *Mediation: A practical guide* 2.

148 Stitt *Mediation: A practical guide* 2.

149 Stitt *Mediation: A practical guide* 2.

150 Stitt *Mediation: A practical guide* 2.

It is however, important to note that facilitative and evaluative mediation often overlap in practice. For example, most evaluative mediators use facilitative mediation tactics to promote cooperation and a speedy conclusion to the process.¹⁵¹ On the other hand some mediators may navigate between facilitative and evaluative approaches based on what they think will promote the goals of mediation.¹⁵²

2.3.3 Transformative mediation

Another approach to mediation is transformative mediation. Transformative mediation is closer to facilitative than an evaluative approach.¹⁵³ Transformative mediation takes place when the focus is on trying to change the dispute from a negative to a positive event.¹⁵⁴ The transformative mediator supports empowerment, encourages deliberation, decision making and perspective taking.¹⁵⁵ A transformative mediator is concerned with facilitating with a view to get the disputants to learn more about themselves and to learn a process that will help them resolve future conflict.¹⁵⁶ Caucuses (private meetings) are rare and the mediator focuses on facilitating communication between or among disputants. Transformative mediation therefore takes longer than facilitative or evaluative mediations.¹⁵⁷ Transformative mediation is most appropriate in situations where the disputants anticipate that they will have a number of disputes with each other in the future and will need to learn a process that will help them resolve the disputes as they arise.¹⁵⁸

2.3.4 Activist mediation

Activist mediation attempts to ensure that parties to a dispute are protected. Activist mediation is therefore appropriate in the case of unbalanced power relationships or in the presence of domestic violence.¹⁵⁹

151 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 308.

152 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 308.

153 Stitt *Mediation: A practical guide* 5.

154 Boniface 2012 *PELJ* 381.

155 Botes 2015 *De Rebus*.

156 Stitt *Mediation: A practical guide* 5.

157 Stitt *Mediation: A practical guide* 5.

158 Stitt *Mediation: A practical guide* 5.

159 Faris 2006 *CILSA* 442; Boniface 2012 *PELJ* 380; De Jong 2010 *TSAR* 515-531.

2.3.5 Multi-generational mediation

This form of mediation entails mediation with the different generations involved in the extended family,¹⁶⁰ including children affected by the proceedings.¹⁶¹

2.3.6 Settlement model of mediation

In this form of mediation, the parties are encouraged to reach an agreement within an anticipated range of likely court outcomes as determined by the mediator, who will usually be an expert in family law.¹⁶²

It is clear from the foregoing discussion that there are various mediation approaches that can be employed for mediation. It is however, also important to bear in mind that other processes exist that are related to mediation.

2.4 Processes related to Mediation

A number of dispute resolution processes are available that have characteristics in common with mediation. These processes are subsequently discussed.

2.4.1 Settlement Conference

A settlement conference is a judicially created process that is used for legal disputes filed in court and headed for trial.¹⁶³ A dispute in a civil matter may be settled at any time prior to the institution of legal proceedings, usually after demand is made, and thereafter at any time up to the time of judgement.¹⁶⁴ The function of a settlement conference is typically to reach agreement concerning the issues in dispute, to plan

160 De Jong 2010 *TSAR* 515-531.

161 Boniface 2012 *PELJ* 387.

162 De Jong 2010 *TSAR* 515-531.

163 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 308; Rule 37 of the Uniform Rules of Court.

164 Peté *et al Civil Procedure A Practical Guide* 365.

the trial so that it is orderly and efficient and to determine whether there are any existing disputes regarding witnesses and documentary evidence. The process of reaching a settlement requires many and varied skills such as negotiation and mediation techniques.¹⁶⁵ The aim and procedure of a settlement conference is therefore very similar to the mediation process.

At present the High Court Rules only require that mediation must be considered by the parties at a pre-trial conference.¹⁶⁶ The function of this pre-trial conference is to limit the time taken up by conducting of the trial itself.¹⁶⁷ In order to achieve this, the parties should try to define the points in issue between them, reach an agreement on as many issues as they can, and decide upon the most effective way of conducting the trial.¹⁶⁸ This process also affords the parties an opportunity of reducing costs and possibly settling the matter.¹⁶⁹

In the magistrates' courts the procedure laid down is not compulsory and takes place before the magistrate in chambers.¹⁷⁰ The conference can be convened by the court or by one of the parties.¹⁷¹ At the conference the simplification of the issues, the necessity to amend pleadings, the possibility of obtaining admissions, the limitation of the number of expert witnesses and any other matter may be discussed.¹⁷² The afore-mentioned procedure must now be read in the light of the possibility of the intervention of a mediator in terms of the *Short Process Courts and Mediation in Certain Civil Cases Act* 103 of 1991.¹⁷³

The magistrates' court is also provided with two adjuncts¹⁷⁴ to facilitate speedier resolution of disputes.¹⁷⁵ Firstly, mediators provide a pre-trial procedure which is

165 Peté *et al Civil Procedure A Practical Guide* 365.

166 Rule 37(6) of the High Court Rules; see also Brand, Steadman and Todd *Commercial Mediation: A User's Guide* 9.

167 Paterson *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 207.

168 Peté *et al Civil Procedure A Practical Guide* 250.

169 Peté *et al Civil Procedure A Practical Guide* 250.

170 Paterson *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 207- 208.

171 Paterson *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 207- 208.

172 Rule 25 of the Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa.

173 Paterson *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 207- 208.

174 Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991.

similar to the old pre-trial conference.¹⁷⁶ The clerk of the court shall upon receipt of notice that the parties have agreed to submit their dispute to mediation, give notice to the parties to appear in chambers for an interview and investigation. The purpose of this interview or investigation is for consideration of a settlement out of court between the parties and if a settlement cannot be reached for the simplification of the issues, the necessity of amending pleadings and the possibility of obtaining admissions of fact from the parties in order to avoid unnecessary adducing of evidence at trial.¹⁷⁷

As the parties are summonsed in order to discuss a possible settlement, the process cannot be described as mediation since the mechanisms are concerned with process rather than with finding a solution.¹⁷⁸ Paterson TMJ¹⁷⁹ is of opinion that the relationship between the role of the mediator and that of the traditional pre-trial conference still needs to be clarified as it seems to duplicate a similar process on the statute book. The role of the mediator also needs to be distinguished from the adjudicator of the process court. The mediators will exercise their functions subject to the administrative control of the magistrate.¹⁸⁰

The parties to the dispute have to agree to submit to the dispute mediation.¹⁸¹ The parties are then summoned by the clerk of the court to appear before a mediator in chambers with a view to consider a settlement out of court.¹⁸² After completion of the mediation interview, the mediator drafts a document which may embody the settlement or agreements on any issue.¹⁸³ If civil proceedings follow, this document becomes part of the record of the case and is binding on the parties, unless it is

175 Paterson *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 14.

176 Paterson *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 14.

177 Section 3 of the Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991.

178 Paterson *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 14.

179 Paterson *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 14.

180 Section 2 of the *Mediation in Certain Civil Cases Act* 103 of 1991; Paterson *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 15.

181 Section 3(1)(a) of the *Mediation of Certain Civil Cases Act* 103 of 1991.

182 Paterson *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 14.

183 Paterson *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 14.

amended at trial to prevent injustice.¹⁸⁴ A settlement recorded by a mediator becomes an order of the magistrates' court.¹⁸⁵

2.4.2 Facilitation

Facilitation is also very similar to mediation. Facilitation is a process in which a neutral third party helps prepare for a complex negotiation. Pretorius defines facilitation as the process whereby a facilitator assists two or more parties in their communications concerning a dispute or conflict.¹⁸⁶

The goal of facilitation is to bring the parties together in some or other form of meeting or process.¹⁸⁷ The facilitator may also chair or manage the meeting undertaken by the parties.¹⁸⁸ In doing so he may transform the facilitator's role to that of a mediator.¹⁸⁹ Facilitation is applied if an interpersonal conflict involves multiple, complex parties and issues. The facilitator takes on a number of important tasks including identifying interested participants and may even in appropriate cases help in selecting mediators or other ADR providers for participation in the negotiation.¹⁹⁰

Facilitation is an integral and primary aspect of mediation,¹⁹¹ as all mediation involves some element of facilitation, which is enhanced by the mediator's communication, negotiation and other skills.¹⁹² The mediator does not however, negotiate with the parties, but rather assists them in negotiating with each other.¹⁹³

2.4.3 Conciliation

184 Paterson *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 14.

185 Paterson *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 14.

186 Pretorius *Dispute Resolution* 4.

187 Pretorius *Dispute Resolution* 4.

188 Pretorius *Dispute Resolution* 4.

189 Pretorius *Dispute Resolution* 4.

190 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 309.

191 Brown and Marriot *ADR Principles and Practice* 160.

192 Brown and Marriot *ADR Principles and Practice* 160.

193 Brown and Marriot *ADR Principles and Practice* 160.

Mediation is not conciliation, though the terms are regularly used interchangeably.¹⁹⁴ Conciliation, like mediation, is a structured negotiation process involving the services of an impartial third party.¹⁹⁵ Conciliation is described as a process in which the participants, with the assistance of the conciliator, identify issues in dispute, develop options, consider alternatives and endeavour to reach an agreement.¹⁹⁶ The conciliator will, in addition to playing the role of the mediator, provide advice on matters in dispute and options for resolution¹⁹⁷ and make a formal recommendation to the parties for settlement of the dispute.¹⁹⁸ Conciliation differs from mediation in that the conciliator will advise the parties on the best possible option to take whereas the mediator does not advise the parties but allows them to choose what they consider to be the best solution.¹⁹⁹

2.4.4 Family group conferencing

Section 70 of the *Children's Act*²⁰⁰ makes provision for the use of family group conferences. 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. The family group conference may be attended by various affected parties including but not limited to the child, his or her parent, any person requested by the child, any support person of the victim's choice and any person authorised by the family group conference facilitator.²⁰¹ In terms of the *Children's Act*²⁰² the children's court must appoint a suitably qualified person or organisation to facilitate at the family group conference, prescribe the manner in which a record is kept of any agreement or settlement reached between the parties

194 Folberg 1985 *Colum. J. L. & Soc. Probs.* 417.

195 Pretorius *Dispute Resolution* 4.

196 Young & Monahan 2009 *Family Law in Australia* 51; Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 2.

197 Young & Monahan 2009 *Family Law in Australia* 51.

198 Pretorius *Dispute Resolution* 4.

199 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 2.

200 38 of 2005.

201 Boniface 2012 *PELJ* 389; Section 61(3)(b) *Child Justice Act* 75 of 2008.

202 38 of 2005.

and any fact emerging from such conference which ought to be brought to the notice of the court and consider the report on the conference when the matter is heard.²⁰³

The *Child Justice Act*²⁰⁴ also makes provision for family group conferencing in order to bring a child who is alleged to have committed an offence and victim together, supported by their families, at which a plan is developed on how the child will redress the effects of the offence.²⁰⁵

2.5 The family mediation process

Family mediation is a process in which time is needed to create an atmosphere of trust and openness in which spouses can reach a settlement that will accommodate their needs.²⁰⁶ There are several phases to be worked through in order to reach a settlement. These phases will consequently be discussed.

2.5.1 Phase 1: Orientation

During this phase the mediator makes introductions and each party gets the opportunity to put his or her case to the mediator.²⁰⁷ The mediator may also give a brief explanation of the process and an outline of the ground rules to be adhered to.²⁰⁸ Some of the ground rules for the mediator are to maintain confidentiality, maintain neutrality, not to do therapy, to focus on the present and the future and not the past, to assist decision making, to reserve the right to terminate the process prematurely and to refer the parties to other sources of help.²⁰⁹

203 Section 70 of the *Children's Act* 38 of 2005.

204 75 of 2008.

205 Section 61 of the *Child Justice Act* 75 of 2008.

206 Pretorius (ed) *Dispute Resolution* (Juta Claremont 2009) 79.

207 Hoffmann (ed) *Family Mediation in South Africa* (SAAM Auckland Park 1992) 80; see Also De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009)114.

208 Hoffmann (ed) *Family Mediation in South Africa* (SAAM Auckland Park 1992) 80.

209 Hoffmann (ed) *Family Mediation in South Africa* (SAAM Auckland Park 1992) 80.

2.5.2 Phase 2: Contracting

Contracting involves getting a commitment from the family that they want to mediate their dispute.²¹⁰ This commitment may be informal and verbal. In this phase all relevant information is put on the table and the parties systematically isolate the issues in dispute and an agenda is drawn up.²¹¹

2.5.3 Phase 3: Problem solving and negotiation

Once the family is committed to mediate the conflict, they are guided through structured problem solving by the mediator.²¹² The parties, with the assistance of the mediator, generate different options for the resolution of all of the issues on the agenda.²¹³

2.5.4 Phase 4: Settlement

Once the options have been exhausted, the mediator guides the family to the final selection and an agreement package.²¹⁴ All the proposals are summarised and clarified, all the options are evaluated and reviewed and both parties are expected to make compromises.²¹⁵ The results of the negotiation and settlement are put in writing and the parties sign the settlement agreement.²¹⁶

210 Hoffmann (ed) *Family Mediation in South Africa* (SAAM Auckland Park 1992) 80.

211 Hoffmann (ed) *Family Mediation in South Africa* (SAAM Auckland Park 1992) 80; see also De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009)114.

212 Hoffmann (ed) *Family Mediation in South Africa* (SAAM Auckland Park 1992) 81.

213 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009)114.

214 Hoffmann (ed) *Family Mediation in South Africa* (SAAM Auckland Park 1992) 81.

215 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009)114.

216 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009)114.

2.5.5 Phase 5: Follow up

In this phase the family's satisfaction with the settlement may be measured. The follow up is crucial and is useful to confirm the mediator's effectiveness.²¹⁷

2.6 Benefits of mediation

Mediation has several attributes that would be beneficial during the divorce procedure. The various benefits of family mediation will hence be discussed..

2.6.1 Improved communication and understanding

Mediation provides a confidential platform for the disputing parties to voice issues and is conducive to effective communication. As a result of the informal process and atmosphere of mediation, disputing parties can better communicate their interests and concerns.²¹⁸ Mediation improves communication between the divorcing parties. Some mediators are schooled in, amongst other things, the social and behavioural sciences, and know what techniques and strategies to use in order to lessen conflict between parties and to bridge communication gaps.²¹⁹ Meaningful communication between parties usually uncovers all kinds of problems, including underlying issues that often remain hidden in divorce litigation.²²⁰

Mediation also teaches parties to deal with conflict in a non-aggressive manner whilst affording them the opportunity of expressing their feelings of bitterness, disappointment and anger.²²¹ The mediation process therefore also allows parties to improve their interpersonal communication.

217 Hoffmann (ed) *Family Mediation in South Africa* (SAAM Auckland Park 1992) 81.

218 Van den Berg *De Rebus* 2015.

219 De Jong 2005 *THRHR* 97.

220 De Jong 2005 *THRHR* 97.

221 De Jong 2005 *THRHR* 97.

2.6.2 Litigation remains an option

Should the mediation fail, the parties are free to resort to or continue with litigation. In civil and commercial mediation, the parties' legal representatives usually are present.²²² This allows them the opportunity to assess the strength of their client's case and to assist in the exploration of options for settlement that would be to the client's benefit.²²³ If the mediation fails to produce a settlement, the parties are still able to arrive at an agreement on the issues that remain in dispute.²²⁴

2.6.3 Mediation is future-oriented

As it focuses on the future rather than on the past and as it establishes principles of future behaviour rather than focusing on apportionment of blame or on past conduct. The mediation process further aids disputing parties in resuming workable relationships with each other and enable them with a framework for resolving future disputes on their own and cut litigation and court costs both for the parties and the judicial system.²²⁵

2.6.4 Confidentiality

Parties to the mediation process can openly discuss any facts or information without fear of any of the statements made in the mediation process later being used against them in litigation that might follow. Mediators may however, terminate the mediation process and report matters to the authorities where they suspect another person may be in danger or harm, for example cases where child abuse, child neglect or criminal behaviour is involved.²²⁶

2.6.5 Identifying settlement blockages

222 Jordaan 2012 *De Rebus* 19.

223 Jordaan 2012 *De Rebus* 19.

224 Jordaan 2012 *De Rebus* 19.

225 De Jong 2010 *TSAR* 515-531.

226 De Jong 2010 *TSAR* 515-531.

The mediator is also in a unique position to objectively determine the context and what the real obstacles are which impede progress towards a settlement.²²⁷ The mediator is thus able to move beyond the narrow confines of the dispute, allowing for a more holistic view of the dispute.²²⁸

2.6.6 Informal and flexible

Another advantage of mediation is that it is an informal and non-legal process with governing norms set out by the parties themselves. This means that the mediation is an interactive process for disputing parties.²²⁹ Mediation does not contain strict formalities such as in the litigation process.

2.6.7 Cost effective

As mediation is an informal process it does not require discovery, pleading, motions or rules of evidence. As a result, even when the lawyers are involved at every step of the mediation process, it is much more cost effective than litigation.²³⁰ On the other hand, whilst mediation is undoubtedly cost effective to clients the question can be posed as to whether it can generate the type of fees that would make it worthwhile for attorneys wishing to do so to practise as mediators.²³¹ By offering clients a faster and arguably better method of dispute resolution than the costly and lengthy path, traditional litigation attorneys will capture or recapture a great deal of fee-generating work that is presently eluding them.²³²

2.6.8 Promotes the best interest of children

227 Jordaan 2012 *De Rebus* 19.

228 Jordaan 2012 *De Rebus* 19.

229 Schultz 2011 *A Legal Discussion of the Development of Family Law* 15.

230 Coltri *Conflict Diagnosis and Alternative Dispute Resolution* 336.

231 Cohen 1992 *De Rebus* 128.

232 Cohen 1992 *De Rebus* 128.

A key advantage of mediation is that, if properly conducted, it may focus on the needs of children in particular.²³³ Some mediators promote the inclusion of children in the mediation process.²³⁴ The success of the inclusion of children depends on the mediator's skill in interviewing the children.²³⁵ Legal literature often refers to the fact that mediation focuses on the best interest of children.²³⁶ Mediation enables those who know the children best, namely their parents, and not some third party or institution, to make decisions concerning their welfare.²³⁷

Furthermore, section 28(2) of the *Constitution*²³⁸ and section 9 of the *Children's Act*²³⁹ place an obligation on the mediator, amongst others, to see to it that separating parties put the interests of their children first in all negotiations between them. The chances of the children being protected in the mediation process are therefore excellent.²⁴⁰ Research has shown that upon divorce, the provisions regarding the interests of children are far more advantageous under mediated settlement agreements than under agreements or orders made in terms of the adversarial system.²⁴¹ As mediation teaches divorced spouses to better get along with each other, it also improves the likelihood of children maintaining a meaningful relationship with both parents after the divorce and consequently minimises potential psychological injury to children.²⁴²

2.7 Disadvantages of mediation²⁴³

Although mediation has been shown to be successful in the majority of situations in which it is attempted, one should be careful not to exaggerate the advantages of mediation and to oversell the process on the basis of a win/win situation.²⁴⁴

233 Clark 1993 *THRHR* 458.

234 Clark 1993 *THRHR* 459.

235 Clark 1993 *THRHR* 459.

236 De Jong 2010 *TSAR* 515-531.

237 *The Constitution of the Republic of South Africa*, 1996.

238 De Jong 2010 *TSAR* 515-531.

239 38 of 2005.

240 De Jong 2010 *TSAR* 515-531.

241 De Jong 2010 *TSAR* 515-531.

242 De Jong 2010 *TSAR* 515-531.

243 Voluntary Court-Annexed Mediation Rules of the Magistrates' Courts

244 De Jong 2010 *TSAR* 515-531

The very elements that make mediation so appealing compared to the adversarial model also create dangers and raise substantial issues.²⁴⁵ It must be acknowledged that the majority of cases in which a settlement is reached involve compromises with which neither side are completely happy.²⁴⁶ Because mediation represents an alternative to the adversarial system, it lacks the precise and perfected checks and balances, which are the principal benefits of the adversary process.²⁴⁷ Should the parties be unhappy there is no structure in place for them to appeal the outcome.

A further disadvantage of divorce mediation is that it is inappropriate where the parties do not have equal bargaining power. Where there is a power imbalance mediators must exercise a greater measure of control to ensure that one party is not prejudiced.²⁴⁸ The training and appointment of mediators is therefore of extreme importance.

Another disadvantage of divorce mediation is that there is no standardised procedure. As a formal procedure to be followed in mediation does not necessarily exist, every mediation will not be concluded in a uniform manner, rendering the procedure to thus be unregulated.²⁴⁹ Furthermore, as there is no review or appeal²⁵⁰ procedure as is the case in the litigation process, weaker parties may be coerced into settlements that are more beneficial to the stronger party.

2.8 The training and appointment of mediators

The Rules make provision for the accreditation of mediators. Section 86 of the Rules states that the qualification, standards and levels of mediators who will conduct mediation under the rules will be determined by the Minister from time to time.

245 Folberg 1985 *Colum. J.L. & Soc. Probs.*431.

246 De Jong 2010 *TSAR* 515-531

247 Folberg 1985 *Colum. J.L. & Soc. Probs.*432.

248 De Jong 2005 *THRHR* 99.

249 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 20-21.

250 Pretorius (ed) *Dispute Resolution* (Juta Cape Town 2009).

The *Children's Act*²⁵¹ makes provision for mediation by a Family Advocate, social worker, social service professional or other suitably qualified person. At present no national standard qualification or accreditation standard exists for mediators. The South African Dispute Settlement Accreditation Council (DiSAC)²⁵² has worked to establish cooperation within the industry and to set accreditation standards for mediators, trainers, coaches, assessors and dispute resolution administrators.²⁵³

DiSAC was launched in March 2010. It is a voluntary body that aims to provide a uniform system to dispute resolution practitioner accreditation and to represent the collective view of the dispute settlement industry in South Africa.²⁵⁴

Additionally, the National Accreditation Board for Family Mediators (NABFAM) was officially launched on 23 March 2010²⁵⁵. The Board runs parallel to and is affiliated to DiSAC and is housed by the Africa Centre for Dispute Settlement at the University of Stellenbosch Business School. In defining and adopting standards, the Board took note of South African standards with international best practice.²⁵⁶ NABFAM aims at aligning accreditation with the standards of the International Mediation Institute in order to ensure that locally accredited mediators also qualify for international accreditation.

The Board sets a minimum national standard for qualification, namely providing proof of training in an accredited mediator training course, completion of any prescribed additional training requirements as well as attainment of 8 CPD (Continuous Professional Development) training points per year. A further requirement is proof of having met the practice requirements being participation in a minimum of three supervised mediation sessions, discussion of two written case summaries with the supervisor, an accredited and paid up member organisations of NABFAM, written

251 38 of 2005.

252 The Dispute Settlement Accreditation Council (DiSAC)

253 DiSAC Final Submission to the Rules Board on the Draft Mediation Rules 2.

254 DiSAC comments on Accreditation for Court-annexed Mediators, 27 August 2014.

255 National Standards for Family Mediation, 11 November 2011.

256 National Standards for Family Mediation, 11 November 2011.

confirmation that the applicant has no criminal record and that the applicant will subject himself to the set code of conduct.²⁵⁷

It is recommended that the work done by this body be drawn upon to guide the establishment of accreditation standards.²⁵⁸ These standards have been based on international best practice.²⁵⁹ One of the primary requirements for effective mediation is the provision of properly trained mediators. Mediation is premised on a specialised skill requiring formal training and experience.²⁶⁰

The training and accreditation of mediators in court-aligned mediation as well as the selection and accreditation criteria for mediator trainers, coaches and assessors are critical to the proper functioning of the system.²⁶¹ This should include standards for accredited training systems, standards for mediator accreditation including competence, independence, impartiality and compliance with a code of professional conduct.²⁶²

When referring a matter to mediation, delineation needs to be made between the complexity and type of dispute and the level of skill and type of expertise of the mediator. This will require scales of mediation expertise which will need to be professionally allocated by a dispute resolution administrator. There also needs to be due regard for current legislation that provides for mediation.

2.9 Court-based family mediation

As this study focuses on the role of court-based mediation in divorce disputes court-based mediation will be discussed with specific reference to divorce disputes. The

257 National Standards for Family Mediation, 11 November 2011.

258 DiSAC Final Submission to the Rules Board on the Draft Mediation Rules 2.

259 DiSAC Final Submission to the Rules Board on the Draft Mediation Rules 2.

260 DiSAC Final Submission to the Rules Board on the Draft Mediation Rules 2.

261 DiSAC Final Submission to the Rules Board on the Draft Mediation Rules 2.

262 DiSAC Final Submission to the Rules Board on the Draft Mediation Rules 2.

Magistrates' Courts Act,²⁶³ has been amended so as to confer on courts for regional divisions jurisdiction in respect of certain civil disputes including divorce matters.²⁶⁴

Divorce or family breakdown is not only a legal problem, but also a social problem where many non-legal issues are encountered.²⁶⁵ It also appears that the adversarial system of litigation, which works well in most other fields of our law, is not designed to deal with the intimate, emotional and psychological aspects of divorce.²⁶⁶

Mediation has become important in the early stages of the divorce process and offers an effective alternative to the current adversarial court procedure.²⁶⁷ Mediation may be regarded as a logical extension to the concept of divorce on the grounds of irretrievable breakdown, or so called no-fault divorce, in terms of which the law has passed to the adult parties a greater control over their own affairs.²⁶⁸

2.9.1 Definition of court-based family mediation

The definition of court based family mediation was discussed in paragraphs 1 and 2.1 above. In essence, family mediation is a process in which the mediator, an impartial third party who has no decision-making power, facilitates the negotiations between disputing parties with the objective of getting them back on speaking terms and helping them to reach a mutually satisfying settlement agreement that recognises the needs and rights of all family members.²⁶⁹

Divorce mediation is described as the process whereby divorcing couples, with the assistance of a neutral person or neutral persons, systematically identify disputed issues so that the various options open to them can be considered and decisions taken that are to the overall benefit of the couple and their dependants.²⁷⁰ Divorce

263 *Magistrates' Courts Act*, 1944.

264 *Jurisdiction of Regional Courts Amendment Act* 31 of 2008.

265 De Jong 2005 *TSAR* 33.

266 De Jong 2005 *TSAR* 33.

267 McNab and Mowatt 1986 *De Jure* 313-324.

268 McNab and Mowatt 1986 *De Jure* 313-324.

269 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009).

270 Folb and de Bruyn 1994 *S. African L.J.* 316.

mediation has been conceptualized as a multi-stage process that looks at resolution and results rather than the internalized causes of conflict behaviour.²⁷¹ The *Jurisdiction of Regional Courts Amendment Act*²⁷² has enhanced access to justice by conferring jurisdiction on regional courts to deal with certain civil matters including divorce. The Rules²⁷³ further provides for voluntary referral to court-annexed mediation of civil disputes. Therefore divorcing parties now have the option to refer their disputes to mediation in order to facilitate a settlement between them.

2.9.2 South African case law on mediation

In *Van den Berg v Le Roux*²⁷⁴ the parties were ordered to privately mediate all future disputes with regard to their minor child. Kgomo JP held that only subsequent to the conclusion of the mediation process could either party approach a competent court which has the jurisdiction to decide the dispute.²⁷⁵ In *Townsend-Turner v Morrow*²⁷⁶ the court similarly ordered the parties to attend mediation offered by a private mediator of their own choice or those proposed by the office of the Family Advocate. The court held that the mediation continues for a period of three months or for the duration of at least four mediation sessions and that the parties were to share the costs of the mediation equally.²⁷⁷

In the case *MB v NB*²⁷⁸ Brassey AJ strongly supported the use of alternative dispute resolution and more specifically mediation where parties are contemplating divorce proceedings:²⁷⁹

Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the

271 Folberg 1985 Colum. *J.L & Soc. Probs.*416.

272 31 of 2008.

273 The Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa.

274 Paragraph 40 of *Van den Berg v Le Roux* 2003 All SA 599 (NC).

275 Paragraph 40 of *Van den Berg v Le Roux* 2003 All SA 599 (NC).

276 Paragraph 13 of *Townsend-Turner v Morrow* (524/2003, 6055/2003) [2003] ZAWCHC 53

277 *Townsend-Turner v Morrow* (524/2003, 6055/2003) [2003] ZAWCHC 53.

278 *MB v NB* 2010 (3) SA 220 (GSJ) hereafter *Brownlee v Brownlee*.

279 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 1.

strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.

Lewis JA endorsed the views expressed by Brassey that mediation in family matters is a useful way of avoiding protracted and expensive legal battles, and that litigation should not necessarily be a first resort in *S v J*.²⁸⁰ He continued by stating that legal practitioners should heed section 6(4) of the *Children's Act*²⁸¹ which provides that in matters concerning children an approach 'conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided.

Goosen J stated in *PD v MD*²⁸² that it is generally in the best interest of children that conflict and confrontation between parents regarding the care and parenting of children is to be avoided, and that, where disputes regarding the exercise of parental responsibilities arise, such disputes are to be resolved by mediation as far as possible.²⁸³

From the above-mentioned cases it is clear that the courts are lending more support to alternative dispute resolution methods, especially mediation in cases where children are involved.

2.9.3 Court-based mediation in South Africa

2.9.3.1 Procedure for court-based mediation

The procedure for court-based mediation is set out in the Magistrates' Court Rules. The rules were published in Government Gazette 37448 on 18 March 2014 and they provide the procedure for the voluntary submission of civil disputes to mediation in selected courts.²⁸⁴ As

280 (695/10) 2010 ZASCA 139.

281 38 of 2005.

282 2013 (1) SA 366 (ECP) C.

283 Paragraph 24 of *PD v MD* 2013 (1) SA 366 (ECP) C.

284 Johannesburg Cental Magisterial District: Johannesburg; Johannesburg Central Sub-District: Soweto; Johannesburg North Magisterial District: Randburg; Mogale City Magisterial District: Krugersdorp; Mogale City Sub-District: Kagiso; Tshwane North Magisterial District: Pretoria

previously stated this is significant because the magistrates' court's jurisdiction has been extended to include divorce disputes. The Rules apply to the voluntary submission by parties to mediation of disputes prior to commencement of litigation. At present the High Court rules only require that mediation be considered by the parties at the pre-trial conference.²⁸⁵

In terms of section 75 of the Rules²⁸⁶ parties may refer a dispute to mediation prior to the commencement of litigation or after commencement of litigation but prior to judgment provided that where trial has commenced the parties must obtain authorisation from the court. A party that wishes to submit a dispute to mediation before commencement of litigation must make a request in writing to the clerk or registrar of the court.²⁸⁷

The clerk or registrar of the court must inform all other parties to the dispute that mediation of the dispute is being sought and must call upon the party seeking mediation and all other parties to the dispute to attend a conference within 10 days, in the interest of determining whether all or some of the parties agree to submit the dispute to mediation.²⁸⁸ Thereafter once the parties between whom mediation is possible have agreed to submit the dispute to mediation the clerk or registrar of the court must, in collaboration with the parties, appoint a mediator, confer with the mediator and set the date, time and venue for mediation and assist the parties in concluding a written mediation agreement between the parties which needs to be signed by them.²⁸⁹

North; Tshwane North Sub-District: Soshanguve; Ekurhuleni Central Magisterial District: Palm Ridge; Sebokeng Sub-District: Sebokeng.

285 Rule 37(6) of the High Court Rules.

286 Rule 75 of The Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa, published in GG No. 37448, 18 March 2014.

287 Rule 76 of The Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa, published in GG No. 37448, 18 March 2014.

288 Rule 76(3) of The Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa, published in GG No. 37448, 18 March 2014.

289 Rule 76(5) of The Rules.

The party claiming relief must lodge a statement of claim with the clerk or registrar of the court within ten days of signature of the agreement to mediate and the party against whom relief is claimed must lodge a statement of defence within ten days of receipt of the statement of claim. If litigation has commenced and pleadings have closed, the summons or declaration and plea will serve as statement of claim and statement of defence.²⁹⁰

The mediator will assist the parties in drafting a settlement agreement and within five days of the conclusion of the mediation, submit a report to the court informing them of the outcome of the mediation, namely whether or not the dispute has been resolved. In the event that the dispute has not been resolved, the mediator will refer the dispute back to the clerk or registrar of the court informing them that the dispute could not be resolved.

2.9.3.2 Role and functions of mediator

At the commencement of mediation, the mediator must inform the parties of the purposes of mediation and its objective to facilitate settlement between the parties. The mediator must further inform the parties of his/her facilitative role as facilitative mediator. The mediator may not make any decisions of fact or law and may not determine the credibility of any person participating in the mediation.²⁹¹ All discussions and disclosures made during mediation are confidential and inadmissible as evidence unless recorded in a settlement agreement.²⁹²

2.9.3.3 Representation of parties at mediation proceedings

Subject to sub rules (2) and (3), the parties to mediation must attend the mediation sessions in person. Where a juristic person or a firm or a

290 Rule 76 of The Rules.
291 Rule 80 of The Rules.
292 Rule 80 of The Rules.

partnership is a party to mediation proceedings such entity must be represented by an official from that juristic person, firm or partnership who must be duly authorised to represent the entity, to conclude a settlement and sign a settlement agreement on behalf of such entity. The Rules further provide that any party to the mediation proceedings may be assisted by a practitioner.²⁹³

2.10 Conclusion

Following the discussion above it is clear that there are various definitions of mediation. For the purposes of this study mediation is a confidential process in which a neutral third party assists the disputing parties by facilitating the negotiation between them in order to resolve the dispute. As accreditation as mediators is not yet standardised it is suggested that standards be formulated and based on international best practice.²⁹⁴ There are various benefits to mediation such as improved communication, confidentiality and flexibility. From the discussion of the benefits above it is clear that divorcing couples will certainly benefit from the mediation process. Divorce mediation is future-oriented and improves communication and understanding. This is important as the parties with minor children will still have to communicate with each other after the divorce has been finalised. There are however, also a few disadvantages to mediation in divorce disputes. Mediation is not always appropriate where there is no equal bargaining power. A further disadvantage to mediation in divorce disputes is that there is no formal procedure. From the discussion of South African case law above, it is clear that the courts are lending more support to alternative dispute resolution methods, especially mediation in cases where children are involved.

293 Rule 85 of The Rules.

294 DiSAC Final Submission to the Rules Board on the Draft Mediation Rules 2.

Chapter 3. The function of the Family Advocate in court-based mediation in South Africa

The Constitution²⁹⁵ as well as other legislation provide for the best interest of the child. One of the mechanisms responsible for ensuring that these national and international obligations are fulfilled is the office of the Family Advocate. In order to determine what role, if any, the Family Advocate will play in court-based mediation it is first essential to determine the function of the Family Advocate in South Africa. Subsequently the history and background of the Family Advocate, the best interest of the child as well as the procedure followed by the Family Advocate will be examined.

3.1 History and Background

The *Mediation in Certain Divorce Matters Act*,²⁹⁶ which came into operation in October 1990, makes provision for the institution of the Office of the Family Advocate. In terms of this Act, the Minister may appoint one or more suitably qualified or experienced persons as family counsellors to assist the Family Advocate in carrying out the tasks mandated in terms of the Act.²⁹⁷ From its inception until 2000, the office of the Family Advocate was limited to only reviewing divorce cases heard in the High Court and applications made under the *Divorce Act* 70 of 1979 (hereafter the Divorce Act), where minor children are involved.²⁹⁸

The office is empowered to institute an enquiry into these matters and report to the court on all issues concerning the welfare of any minor or dependent children of the marriage concerned.²⁹⁹ Apart from contributing by way of a report, the *Mediation in*

295 Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

296 *Mediation in Certain Divorce Matters Act* 24 of 1987.

297 Section 2 *Mediation in Certain Divorce Matters Act* 24 of 1987; Kassan *How can the voice of the child be adequately heard in Family Law proceedings* 51; Kaganas F & Budlender D *Issues in Law, Race and Gender* Unit 1996.

298 Glasser 2002 *De Jure* 225.

299 Glasser 2002 *De Jure* 225.

*Certain Divorce Matters Act*³⁰⁰ further authorises the Family Advocate to protect the child's interests by appearing in court as an independent authority and cross-examine witnesses.³⁰¹ The act initially excluded involvement in divorce actions adjudicated in the lower courts.³⁰² Although the jurisdiction has now been extended to these courts, issues relating to questions of adoption, guardianship outside of divorce, maintenance, care of children born out of wedlock, or of religious unions and until recently customary marriages, still fall outside the ambit of the Family Advocate's workings.³⁰³

As a result of their specialised skill and training, it was felt that family counsellors could provide the court with expert guidance which would better equip the judge or other presiding officer to reach well informed conclusions.³⁰⁴ Family counsellors are usually trained psychologists, social workers or religious workers.³⁰⁵ A variety of dynamics impact on the functioning of children, and it was thought that a specialised knowledge of the social sciences enables the family counsellor to understand more fully the broader context within which children function.³⁰⁶

It also allows the family counsellor to understand properly the different levels of cognitive, linguistic and social functioning of a child.³⁰⁷ The notion of collaborative assessment by persons with specialised skills, training and education is thus at the core of the role of this office.³⁰⁸ The reason for a multidisciplinary approach is because family relationships fall within the scope of social sciences and the Family Advocate is trained in the legal field.³⁰⁹ As a result of these specialised skills, it was argued that the office of the Family Advocate could assist the court in the exercise of

300 Section 4 of the *Mediation in Certain Divorce Matters Act* 24 of 1987.

301 Glasser 2002 *De Jure* 225; Brandaw 2003 *Advocate* 5.

302 Glasser 2002 *De Jure* 225-226.

303 Glasser 2002 *De Jure* 225-226.

304 Glasser 2002 *De Jure* 225-226.

305 Schultz 2011 *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 50.

306 Glasser 2002 *De Jure* 225-226.

307 Glasser 2002 *De Jure* 225-226.

308 Glasser 2002 *De Jure* 225-226.

309 Schultz 2011 *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 50.

its role as upper guardian of all minor children by acting as a fact finder, thereby ensuring that the best interest of the child was served.³¹⁰

Prior to the existence of the office of the Family Advocate, court decisions relating to minor and dependent children were regularly based on the statement of one parent with the result that frequently a welfare agency would have had to become involved in order to resolve continuing problems.³¹¹

3.2 The Family Advocate and the best interest of the child principle

The standard of the child's best interest has been described as a golden thread which runs throughout the whole fabric of our law relating to children.³¹² The best interest of the child is established as the determining factor in decisions relating to parental responsibilities and rights in our private law and this rule is entrenched in the Constitution.³¹³

Before a divorce can be granted the court must be satisfied that the arrangements for the children are satisfactory or are the best in the circumstances.³¹⁴ The court is obliged to give effect to these provisions and will usually refuse to do so where they are vague or undesirable on any ground.³¹⁵ Invariably the best interest requires that the child's welfare be determined as speedily as possible.³¹⁶

The Family Advocate is a creature of statute empowered to intervene in the best interest of the child but only in certain circumstances, namely after a divorce has been instituted or after an action or application for the variation of an existing divorce order relating to a minor or dependent child has been launched.³¹⁷

310 Glasser 2002 *De Jure* 225-226.

311 Burman and Mclennan 1996 *Acta Juridica* 70.

312 Clark 2000 *Stell LR* 3.

313 Section 28 of the Constitution of the Republic of South Africa, 1996; Clark 2000 *Stell LR* 3.

314 S 6(1)(a) of the Divorce Act 70 of 1979; see also Clark 2000 *Stell LR* 5-6.

315 Clark 2000 *Stell LR* 5-6.

316 Bosman 1994 *Welfare Focus* 37-38.

317 Bosman 1994 *Welfare Focus* 37-38.

In the case of *Van Vuuren v Van Vuuren*³¹⁸ the Court suggested that the Family Advocate should ask the court for authority to investigate any case in which it appears that there is an intention not to place young children in the custody of their mother, there is an intention to separate children from each other, custody of the child is granted to a person other than the parents of the child, and there is an intention to make an arrangement in respect of custody which *prima facie* is not in the best interest of the child.³¹⁹

These guidelines reflect the concern of the Supreme Court, as the upper guardian of all minor children, to ensure that children are spared, as far as possible, the pain caused by the divorce of their parents.³²⁰

3.2.1 Powers and duties of Family Advocates

Section 4 of the *Mediation in Certain Divorce Matters Act*,³²¹ set out the powers and duties of Family Advocates. In terms of this section the Family Advocate's primary function is to institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned. The enquiry can be requested by any party to such proceedings or by the court concerned.³²²

Where the Family Advocate institutes the enquiry on its own initiative or at the request of the court, any mediation which takes place is mandatory.³²³ From the discussion on mediation above, it is clear this is not mediation but rather an investigation or enquiry.

Such an enquiry is ordinarily carried out after the commencement of a divorce action or after an application has been launched for the variation, recession or suspension

318 *Van Vuuren v Van Vuuren* 1993 (1) SA 163 (T).

319 Bosman 1994 *Welfare Focus* 37-38.

320 Bosman 1994 *Welfare Focus* 37-38.

321 24 of 1987.

322 Section 4 of the *Mediation in Certain Divorce Matters Act* 24 of 1987; De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009).

323 Van Zyl *Alternative Dispute Resolution in the Best Interest of the Child* 195.

of an order with regard to parental responsibilities and rights made in terms of the *Divorce Act*.³²⁴ The Family Advocate may also apply to court himself for an order authorising him to initiate an enquiry if he deems it to be in the interest of the child. In addition, a Family Advocate may decide or be requested by court to appear at the trial or hearing and may adduce any relevant evidence.³²⁵

In terms of the *Mediation in Certain Divorce Matters Act*³²⁶, Family Advocates offices may be established in each provincial division of the High Court.³²⁷ In addition the office utilises the services of state social workers for investigating cases in rural areas.³²⁸ The manner in which the office is to become involved is prescribed.³²⁹

3.2.2 Procedure

*The Mediation in Certain Divorce Matters Regulations*³³⁰ stipulate the procedure to be followed by Family Advocates, in certain cases. Regulation 3³³¹ states that when the court has in terms of section 4 of the Act³³² requested the Family Advocate to institute an enquiry, the clerk of the Court shall endorse on the court file accordingly, and shall inform the Family Advocate in writing of such request.

Regulation 3(2)³³³ further states that any party to a divorce action or application who desires an enquiry to be instituted by the Family Advocate shall request the Family Advocate accordingly in a form corresponding substantially to Annexure B and shall also deliver a copy of such form on every other party to such action or application and file a further copy with the registrar of the Court.

324 Kassan *How can the voice of the child be adequately heard in Family Law proceedings* 51; *Divorce Act 70 of 1979*.

325 Section 4 of the *Mediation of Certain Divorce Matters Act 24 of 1987*; Kassan *How can the voice of the child be adequately heard in family law proceedings* 51.

326 24 of 1987.

327 Glasser 2002 *De Jure* 225-226.

328 Glasser 2002 *De Jure* 225-228.

329 Glasser 2002 *De Jure* 225-228.

330 GN R2385 in GG 12781 of 3 October 1990.

331 GN R2385 in GG 12781 of 3 October 1990.

332 24 of 1987.

333 GN R2385 in GG 12781 of 3 October 1990.

Regulation 4 describes the procedure to be followed on application by the Family Advocate to the court for an order authorising an enquiry for purposes of a report and recommendation to the court on the welfare of minor or dependent children. The regulation states that an application by the Family Advocate contemplated in section 4(2) of the Act³³⁴ shall be made either orally or in writing in a form corresponding to Annexure C.

In order to ensure their involvement in the specified matters, the registrar of the High Court and the registrar of the family court, is obliged to forward to the office copies of all founding documents in divorces and related applications, together with a prescribed form.³³⁵ These documents are perused by a Family Advocate who, on the strength thereof, determines whether or not an investigation is indeed necessary.³³⁶ If at this initial assessment the Family Advocate detects a problem or irregularity in any proposed custody arrangements, he may apply to court for leave to institute an inquiry.³³⁷

Alternatively, the court itself, or any party to the proceedings, may request that the office institute an inquiry and furnish the court with a report and recommendations regarding the welfare of any minor or dependent child.³³⁸ Although the Family Advocate's office is charged with instituting an inquiry, the manner in which this inquiry is to be conducted is not prescribed and is left to the discretion of the Family Advocate.³³⁹

The plaintiff is required to submit a completed questionnaire to which the defendant may reply.³⁴⁰ Most arrangements are found to be *prima facie* satisfactory, although the Family Advocate may query them.³⁴¹ The aim of the Family Advocate is to settle the matter between the parties on the terms that will reduce conflict and be most

334 24 of 1987.

335 Glasser 2002 *De Jure* 225-228.

336 Glasser 2002 *De Jure* 225-228.

337 Glasser 2002 *De Jure* 225-228.

338 Glasser 2002 *De Jure* 225-228.

339 Glasser 2002 *De Jure* 225-228.

340 Clark 2000 *Stell LR* 7.

341 Clark 2000 *Stell LR* 7.

favourable to the welfare of the children.³⁴² If an inquiry is held the Family Advocate usually interviews the parents together; teenagers may be interviewed by either the Family Advocate or a family counsellor and young children are often seen only by a family counsellor.³⁴³

If necessary, other social workers who have been involved with the family and anyone else who can contribute information are contacted.³⁴⁴ The Family Advocate will observe the relationship between the children and parents and will discuss with all parties involved the care and contact arrangements.³⁴⁵ Lastly, the Family Advocate will make a recommendation to the court, by means of a written report, as to the best care and contact arrangements to be made for the children.³⁴⁶

3.2.3 Functions of the Family Advocate

In order to determine whether the Family Advocate is practising mediation as defined in this text, the functions being performed must be examined. In practice the Family Advocate has three functions, namely to monitor, to mediate and to evaluate.³⁴⁷

3.2.3.1 To monitor

The monitoring function is derived from section 4(2) of the *Mediation in Certain Divorce Matters Act*³⁴⁸ where the Family Advocate is tasked with deciding whether, in a particular case, an enquiry is desirable.³⁴⁹

The Supreme Court is the upper guardian of all minor children and as such may intervene in any action or decision by parents in regard to their minor children.³⁵⁰ The Family Advocate, with the assistance of the Family Counsellor, acts as a mere

342 Burman and Mclennan 1996 *Acta Juridica* 72.

343 Burman and Mclennan 1996 *Acta Juridica* 72.

344 Burman and Mclennan 1996 *Acta Juridica* 72.

345 Burman and Mclennan 1996 *Acta Juridica* 72.

346 Burman and Mclennan 1996 *Acta Juridica* 72.

347 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009).

348 24 of 1987.

349 Kassan *How can the voice of the child be adequately heard in Family Law proceedings* 51-52.

350 Hoffmann (ed) *Family Mediation in South Africa* (SAAM Auckland Park 1992) 54.

fact finder by examining all court papers in divorce proceedings and post-divorce applications.³⁵¹ Regulations 9 to 11 of the *General Regulations Regarding the Children's Act*³⁵² provides that when applying for the registration of parenting plans, the applicants must file copies of such plan with the Family Advocate, children's court or High Court.

3.2.3.2 To mediate

The *Mediation in Certain Divorce Matters Act*³⁵³ provides for the Family Advocate to be assisted by Family Counsellors.³⁵⁴ In practice Family Counsellors are mostly qualified and registered social workers. Both Family Advocates and Family Counsellors facilitate the resolution of issues regarding the children concerned. Mediation is not defined in the Act but the concept of mediation has however been developed and given content administratively and has been implemented as part of the procedure adopted when an enquiry is conducted by a Family Advocate.³⁵⁵ The Family Advocate does not mediate but investigates in order to furnish the court with a recommendation on the welfare of the children.

Regulation 8 of the General Regulations Regarding Children in terms of the *Children's Act* specifically provides for mediation by a Family Advocate, social worker, social service professional or other suitably qualified person in the case of a dispute between the biological father and mother of a child under the conditions set out in section 21(1) of the *Children's Act*.³⁵⁶ The regulations further provide that where a child in respect of whom a parental responsibilities and rights agreement is concluded is not in agreement with the contents thereof, the matter should be referred for mediation by *inter alia* the Family Advocate.³⁵⁷ Whereas Family Advocates and Family Counsellors are involved in the investigation, it can further be

351 Hoffmann (ed) Family Mediation in South Africa (SAAM Auckland Park 1992) 54.

352 GN R261 in GG 33076 1 April 2010.

353 24 of 1987.

354 Section 3(1) *Mediation in Certain Divorce Matters Act* 24 of 1987.

355 Hoffmann (ed) Family Mediation in South Africa (SAAM Auckland Park 1992) 57.
25 of 2008.

357 GN R261 in GG 33076 of 1 April 2010.

argued that the office of the Family Advocate offers an interdisciplinary approach to the resolution of child-centred disputes.³⁵⁸

Because the investigation of the Family Advocate can be initiated either by the parties involved, the court or the Family Advocate himself, it can be argued that the services offered by the office of the Family Advocate include elements of both voluntary and mandatory mediation.³⁵⁹ As discussed above the title of the Act is misleading as the Family Advocate does not mediate but rather investigates in order to furnish the court with recommendations on the welfare of the minor children.

3.2.3.3. To evaluate

Section 4 of the *Mediation in Certain Divorce Matters Act*³⁶⁰ provides that the Family Advocate must determine what is in the best interest of the minor and dependent children and advise the court accordingly.³⁶¹

The position of the Family Advocate is that of an impartial and independent expert who is supposed to possess the skill and experience needed to evaluate the overall family circumstances in order to make recommendations to promote and protect the overall welfare of the child.³⁶² The Family Advocate does not represent any particular party but rather assesses the situation to assist the court with recommendations as to the best care and contact arrangements for the child.³⁶³ As it is part of the Family Advocate's function to evaluate the parties concerned and the relevant circumstances at an inquiry in order to make a recommendation to the court, it would appear that the Family Advocate makes use of the evaluative model of mediation.³⁶⁴

358 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009).

359 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009).

360 *Mediation in Certain Divorce Matters Act* 24 of 1987.

361 Section 4(2) of the *Mediation in Certain Divorce Matters Act* 24 of 1987; Kaganas F & Budlender D *Issues in Law, Race and Gender* Unit 1996 4.

362 Kassan *How can the voice of the child be adequately heard in Family Law proceedings* 57.

363 Kassan *How can the voice of the child be adequately heard in Family Law proceedings* 57.

364 De Jong "Child-focused Mediation" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009).

Should the Family Advocate not succeed in mediating or settling the disputes relating to the children, an evaluation must take place and a recommendation be made to the Court.³⁶⁵ The recommendation is made with due regard to all circumstances of the case and all professional opinions at the disposal of the Family Advocate. No arbitrary recommendation can be made and whatever is recommended must be in line with legal precedents which have crystallised into binding legal rules or guidelines over the years.³⁶⁶

3.2.4 Approach of the Family Advocate's office when instituting an enquiry:

The mission of the Family Advocate is the protection of the welfare and interests of all minor and dependent children in divorce action, as well as the variation of divorce orders in so far as the welfare and interest of the children are concerned.³⁶⁷

In the case *Soller v G*³⁶⁸ Satchwell J pointed out the differences between the functions of the Family Advocate and the legal practitioner assigned in terms of section 28(1) (h) of the *Constitution*.³⁶⁹ The Family Advocate is not appointed as the representative of any party to a dispute, but as a professional and neutral channel of communication between the disputing parents, the child and judicial officer. The legal practitioner on the other hand represents stands in the corner of the child and has the task of presenting and arguing the wishes of the child.

The value of recommendations made by the Family Advocate and evidence by expert witnesses in determining the best interest of the child was examined in *P v P*.³⁷⁰

3.2.5 Disadvantages of the Family Advocate

Complaints have been launched that facts of certain cases were not properly investigated and as a result thereof the recommendations were made without

365 Bosman 1994 *Welfare Focus* 37-38.

366 Bosman 1994 *Welfare Focus* 37-38.

367 Bosman 1994 *Welfare Focus* 37-38.

368 *Soller v G* 2003 (5) SA 430 (W).

369 *The Constitution of the Republic of South Africa*, 1996.

370 *P v P* 2007 (5) SA 94 (SCA).

sufficient evidence.³⁷¹ The outcome of a dispute concerning the future care of a child might end up depending on the economic position of the parent since a parent unable to obtain the services of a private psychologist or social worker is usually advised by lawyers that the recommendations of the Family Advocate's report must be accepted, however defective.³⁷² Unless new expert evidence can be produced, the report is most unlikely to be reconsidered by the Family Advocate or rejected by the judge.³⁷³ For all parents to have a more equal opportunity of disputing the report, the services currently provided largely by the private practitioners will have to be made available to all income groups.³⁷⁴

The criticism levelled at the system of the Family Advocate is that it is impossible to come to some kind of considered opinion based on the information contained in the forms completed and submitted by the parties.³⁷⁵ No requirement exists that compels the defendant to be present in court to question statements made by the plaintiff and the plaintiff's replies are aimed towards achieving the purpose of the divorce.³⁷⁶ The role of the Family Advocate and other relevant advisors is only to make a recommendation and the court's ultimate decision as to what is in the best interest of the child is based on insufficient evidence.³⁷⁷

Although Family Advocates may assist in lessening the financial and emotional costs of litigation, the main problems are the delays in furnishing reports from the Family Advocates and the poor quality of some of their investigations.³⁷⁸

Secondly, although provision is made for multi-disciplinary assessment and report, there is no obligation on the office of the Family Advocate to supplement its work with any additional inter-disciplinary input.³⁷⁹

371 Burman, Derman and Swanepoel 2000 *SAJHR* 545.

372 Clark 2000 *Stell LR* 7-8.

373 Clark 2000 *Stell LR* 8.

374 Clark 2000 *Stell LR* 8.

375 Clark 2000 *Stell LR* 7.

376 Clark 2000 *Stell LR* 7.

377 Clark 2000 *Stell LR* 7.

378 Clark 2000 *Stell LR* 8.

379 Glasser 2002 *De Jure* 225-226.

3.2.6. Function of the Family Advocate in court-based mediation

As discussed above, the functions of the Family Advocate are clearly set out in the *Mediation in Certain Divorce Matters Act*. Currently the Family Advocate does not play an active role in private mediations.

In the premise of the above it is submitted that the title of the Act is misleading as the Family Advocate does not mediate the disputes between divorcing parties but rather investigates in order to safeguard the welfare of the children. The Family Advocate would not be able to be the mediator in court-based mediation as its role as mediator would be in conflict with its evaluative one.

It is, however, submitted that the office of the Family Advocate should organise and regulate the court-based family mediation in South Africa. As previously discussed, the Family Advocate must ensure that the best interest of the minor children is ensured. Therefore, the Family Advocate should at least have insight into the settlements reached with regards to the minor children in divorce disputes to safeguard the rights of the minor children and ensure that the best interest of the children is served.

The office of the Family Advocate could act as a first step in the divorce proceedings and provide the parties with the necessary assistance in resolving their disputes where minor children are involved. The parties can be referred to trained mediators to conduct the mediation process where after the settlements reached in the court-based mediation can be in terms of the *Mediation in Certain Divorce Matters Act* be sent to the office of the Family Advocate for endorsement. This would form part of its monitoring and evaluative function. The Family Advocate may still request an investigation into the best interest of the children involved.

Chapter 4. Court-based family mediation in Australia, California and Canada

As previously mentioned in chapter one of this study court-annexed mediation is still a relatively new process in South Africa. It is therefore essential to examine how other countries implement and manage mediation processes. In this chapter court-based family mediation in Australia, California and Canada will be examined and discussed.

4.1 Court-based family mediation in Australia

4.1.1 Introduction

Australia has been engaged in integrating alternative dispute resolution methods, especially divorce mediation, into the formal divorce process.³⁸⁰ Over the past few years Australia has introduced new legislation that strongly encourages or even compels divorcing spouses to first make use of so-called 'family dispute resolution' methods, especially mediation, before resorting to divorce.³⁸¹ Mediation is widely available in both private and public sectors and court service agencies usually provide mediation services for a small fee or without charge, making it more affordable for, and accessible to, those with limited resources.³⁸²

4.1.2 History and background of divorce mediation in Australia

In 1975 the *Family Law Act 53 of 1975*³⁸³ was introduced. It replaced the previous fault-based grounds for divorce with a single no-fault ground namely the irretrievable

380 De Jong 2007 *XL CILSA* 280-281.

381 De Jong 2007 *XL CILSA* 280-281.

382 Salem 2009 *Family Court Review* 372.

383 *Family Law Act 53 of 1975* (hereafter *Family Law Act*).

breakdown of the marriage.³⁸⁴ Despite important changes brought about by the *Family Law Act*³⁸⁵ divorce proceedings were still too costly, lengthy and adversarial.³⁸⁶ Widespread interest in mediation led to the institution of several mediation services in Australia at first in the private sector and community level and later in family courts.³⁸⁷ Because the state courts, dealing with criminal cases, were unsuitable for divorce cases, the *Family Law Act*³⁸⁸ led to the establishment of the Australian Family Court.

4.1.3 Courts with jurisdiction in family matters

The Family Court of Australia is a superior court of record established by Parliament in 1975 that assists parties in resolving most complex family law disputes through its specialist judges and staff.³⁸⁹ The Family Court deals with more complex matters.

It commenced operations on 5 January 1976 and consists of a Chief Justice, a Deputy Chief Justice and other judges and includes all Australian states and territories except Western Australia.³⁹⁰ The aim of the Court is to deliver excellence in service for children, families through effective judicial and non-judicial processes and high-quality and timely judgments while respecting the needs of separating families.³⁹¹

The Family Court has emphasised the importance of counselling and conciliation in divorce matters. In response to the demand for mediation a pilot project was launched in the Melbourne registry of the family court and today it provides a family court mediation service at all registries.³⁹² The court concluded contracts with several approved community-based organisations to render mediation services on its behalf in cases where distance or pressure of work has made it impossible to render such services itself.

384 De Jong 2007 *XL CILSA* 281.

385 53 of 1975.

386 De Jong 2007 *XL CILSA* 283.

387 De Jong 2007 *XL CILSA* 283.

388 53 of 1975.

389 <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/>

390 <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/>

391 <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/>

392 De Jong 2007 *XL CILSA* 285.

In principle the family court mediation service is only available to parties after they have brought applications involving the interests of the children or financial issues to the family court. In some registries of the family court mediation services for matters affecting children are available even before an application impacting on the interests of the children has been brought.³⁹³

If mediation services are offered by the family court itself, disputes regarding solely children are mediated by court counsellors only.³⁹⁴

The Federal Magistrates Court of Australia was established in 2000 as an independent federal court.³⁹⁵ It was renamed the Federal Circuit Court of Australia³⁹⁶ and deals with both family law and general federal law matters.

4.1.4 Mediation in family matters

De Jong is of the view that "the Family Court which since its inception has emphasised the significance of counselling and conciliation in divorce matters, began responding to a demand for mediation."³⁹⁷ The court procedures were reduced and unnecessary formalities were done away with.³⁹⁸ The court concluded contracts with several approved community based organisations to render mediation services on its behalf in cases where distance or pressure of work make it impossible to render such services itself.³⁹⁹ Section 13B of the *Family Law Act*⁴⁰⁰ provides for organisations that comply with certain requirements to apply to the minister for recognition as mediation organisations.⁴⁰¹ Section 13B(2)(b) was repealed and substituted the following:

393 De Jong 2007 XL CILSA 285.

394 De Jong 2007 XL CILSA 285.

395 <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/publications/corporate-publications/fcc-namechange>

396 <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/publications/corporate-publications/fcc-namechange>

397 De Jong 2007 XL CILSA 283-285.

398 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 102.

399 De Jong 2007 XL CILSA 285.

400 53 of 1975.

401 De Jong 2007 XL CILSA 285.

(b) *the organisation's activities include, or will include, family and child mediation.*⁴⁰²

In principle the Family Court mediation service is only available to parties after they have brought applications involving the interests of the children or financial issues to the family court.⁴⁰³

Since 2006 direct references to mediation have been removed from the *Family Law Act*⁴⁰⁴ and merely renamed family dispute resolution or FDR.⁴⁰⁵

Mediation or FDR is used in family matters especially where there are parenting disputes. The *Family Law Act*⁴⁰⁶ defines FDR as follows:⁴⁰⁷

'Family dispute resolution is a process (other than a judicial process):

- (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
- (b) in which the practitioner is independent of all of the parties involved in the process.'

The Act further requires that when parties attend the family dispute resolution sessions, they must make a genuine effort to resolve that dispute by family dispute resolution.⁴⁰⁸

Since the opening of the Family Court of Australia in 1975, applications for principal relief (divorce) have been solely on the grounds of separation of one year or more.⁴⁰⁹

The hope attached to this single and seemingly simple criterion was that separation and divorce would become a more civilized process than the procedures that had existed under the essentially fault orientated legislation that preceded it.⁴¹⁰ The new

402 *Family Law Amendment (Shared Parental Responsibility) Act, 2006*

403 De Jong 2007 XL CILSA 285; see also <http://www.familylawcourts.gov.au> (26 July 2013).

404 53 of 1975.

405 Schultz 2011 *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 106.

406 53 of 1975.

407 Section 10F of the *Family Law Act* 53 of 1975; Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 106.

408 Section 60I(l) of the *Family Law Act* 53 of 1975; Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 106.

409 Holtring *Mandatory Mediation in Australian Family Law* 5.

410 Holtring *Mandatory Mediation in Australian Family Law* 5.

legislation was however widely criticized. The “best interest of the child” standard supporting decision making in parenting disputes was thought by many to be too vague.⁴¹¹ In addition, a significant number of scholars were unhappy with the principles that informed property distribution, spousal support and child support after separation.⁴¹² The *Family Law Act* also placed the interests of children above all considerations in divorce and other family law disputes.⁴¹³ The *Family Law Reform Act 167 of 1995*⁴¹⁴ amended the *Family Law Act*⁴¹⁵ BY introducing the family dispute resolution provisions into the *Family Law Act* and⁴¹⁶ focusing on the treatment of children in family court proceedings.⁴¹⁷ Important provisions of the *Family Law Act* were amended to provide for the shifting of the emphasis from parental rights to the best interest of the child.⁴¹⁸

4.1.5 Regulatory framework

The regulatory framework of court-based mediation in divorce disputes in Australia will be discussed.

4.1.5.1 Purpose and nature of family mediation in divorce disputes

The aforementioned irretrievable breakdown of the marriage had to be proved by the fact that the spouses have lived separately and apart for a period of at least twelve months.⁴¹⁹ The Act further provides that fault no longer plays a part in the financial consequences of divorce or in any decisions regarding the welfare of the children.⁴²⁰

In the private sector, private professional mediators are accredited by organisations such as LEADR (Lawyers Engaged in Alternative Dispute Resolution) and Mediate

411 Holtring *Mandatory Mediation in Australian Family Law* 5.

412 Holtring *Mandatory Mediation in Australian Family Law* 5.

413 Section 60B of the *Family Law Act* 53 of 1975, see also De Jong 2007 *XL CILSA* 283.

414 *Family Law Reform Act* 167 of 1995.

415 53 of 1975.

416 53 of 1975, see also De Jong 2007 *XL CILSA* 287.

417 De Jong 2007 *XL CILSA* 287.

418 De Jong 2007 *XL CILSA* 287.

419 De Jong 2007 *XL CILSA* 281-282.

420 De Jong 2007 *XL CILSA* 282.

Today.⁴²¹ These organisations have taken the lead in rendering mediation services to the public, both professionally and voluntarily.⁴²² These independent organisations make significant contributions to the training of private mediation and the promotion and advertising of their services.⁴²³ De Jong⁴²⁴ states that

“From databases of accredited mediators available on the internet, it is apparent that private mediators span a wide variety of professions and occupations and are available for private mediation throughout Australia, even in remote rural areas, although not yet fully utilised by the public”.

Several organisations such as Relationships Australia, Lifeworks, Centacare Australia and Family Services Australia, began providing mediation services to the public free of charge.⁴²⁵

Since 1989 community based services have been mainly government funded.⁴²⁶ To date the government has spent several millions on expanding and improving the access and availability of these services throughout Australia.⁴²⁷ Australians in general have confidence in community-based organisations and the mediation services they offer have become popular.⁴²⁸ The latest government initiative in this regard involves so called family relationship centres, which will be established in cities and towns across Australia over the next two years.⁴²⁹ These centres will provide assistance for separating families by offering, inter alia, mediation services for the resolution of all separation issues.⁴³⁰ The Family Relationship Centres do not merely offer mediation to the public but also acts as a gateway to guide the disputing parties to other organisations from where they are able to find assistance.⁴³¹

421 De Jong 2007 *XL CILSA* 284.

422 De Jong 2007 *XL CILSA* 284.

423 De Jong 2007 *XL CILSA* 287.

424 De Jong 2007 *XL CILSA* 287.

425 De Jong 2007 *XL CILSA* 284-285.

426 De Jong 2007 *XL CILSA* 285.

427 De Jong 2007 *XL CILSA* 285.

428 De Jong 2007 *XL CILSA* 285.

429 De Jong 2007 *XL CILSA* 285.

430 De Jong 2007 *XL CILSA* 285; Family Relationships at: www.familyrelationships.gov.au/Family_Relationship_Centres.html (accessed on 30 November 2015).

431 Schultz 2011 *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 175.

4.1.5.2 Structures

4.1.5.2.1 Independent Attorney

Where the needs of the child need to be protected and looked after in any matter that arises, an independent children's lawyer is appointed on the child's behalf by the court.⁴³² Section 68LA (2) to (4) describes the general role of an independent attorney:⁴³³

'General nature of role of independent children's lawyer

- (2) The independent children's lawyer must:
 - (a) form an independent view, based on the evidence available to the independent children's lawyer, of what is in the best interests of the child; and
 - (b) act in relation to the proceedings in what the independent children's lawyer believes to be the best interests of the child.
- (3) The independent children's lawyer must, if satisfied that the adoption of a particular course of action is in the best interests of the child, make a submission to the court suggesting the adoption of that course of action.
- (4) The independent children's lawyer:
 - (a) is not the child's legal representative; and
 - (b) is not obliged to act on the child's instructions in relation to the proceedings.

From the above mentioned it is clear that the independent lawyer has similar functions to those of the Family Advocate in South Africa.⁴³⁴ The independent lawyer will set up reports and specifically look into the child's best interests where it is necessary.⁴³⁵ The court may appoint the independent children's lawyer on its own

432 Sections 68L – 68M of the *Family Law Act* 53 of 1975.

433 Section 68LA of the *Family Law Act* 53 of 1975.

434 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 112.

435 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 112.

initiative or on application by the child, an organisation concerned with the welfare of the child or any other person.⁴³⁶

4.1.2.2 Family Dispute Resolution Practitioners

The *Family Law Act*⁴³⁷ sets out the persons who may qualify as family dispute practitioners. Section 10G (1) of the *Family Law Act*⁴³⁸ defines a family dispute resolution practitioner as a person who is accredited as such under the Accreditation Rules; or a person who is authorised to act on behalf of an organisation designated by the Minister for the purposes of this paragraph; or a person authorised to act under section 93D of the *Federal Magistrates Act 1999*; or a person who is authorised to act as a family dispute resolution practitioner by a Family Court of a State.

The Family Law Regulations 2008⁴³⁹ provide criteria for family dispute resolution practitioners to be accredited and further provide obligations in relation to conducting family dispute resolution work. The general obligations of family dispute resolution practitioners' states that in providing family dispute resolution services under the Act, a family dispute resolution practitioner:

- (a) must ensure that, as far as possible, the family dispute resolution process is suited to the needs of the parties involved (for example, by ensuring the suitability of the family dispute resolution venue, the layout of the family dispute resolution room and the times at which family dispute resolution is held); and
- (b) must ensure that:
 - (i) family dispute resolution is provided only in accordance with this Part; and
 - (ii) any record of the family dispute resolution is stored securely to prevent unauthorised access to it; and
- (c) must terminate the family dispute resolution:
 - (i) if requested to do so by a party; or

436 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 112.

437 53 of 1975.

438 Section 10G (1)(a) to (e) of the *Family Law Act*, 53 of 1975.

439 Family Law (Family Dispute Resolution Practitioners) Regulations 2008 www.comlaw.gov.au.

- (ii) if the family dispute resolution practitioner is no longer satisfied that family dispute resolution is appropriate; and
- (d) must not provide legal advice to any of the parties unless:
 - (i) the family dispute resolution practitioner is also a legal practitioner; or
 - (ii) the advice is about procedural matters; and
- (e) must not use any information acquired from a family dispute resolution:
 - (i) for personal gain; or
 - (ii) to the detriment of any person.

Additionally, the *Family Law Act*⁴⁴⁰ states that communications in family dispute resolution are confidential and may not be disclosed except in certain circumstances. A family dispute resolution practitioner may disclose a communication if consent to the disclosure is given or if the practitioner reasonably believes that the disclosure is necessary for the purpose of protecting a child or other party to the mediation from the risk of harm.⁴⁴¹

Section 10J further states that evidence of anything said, or any admission made, by or in the company of a family dispute resolution practitioner conducting family dispute resolution; or a person (the professional) to whom a family dispute resolution practitioner refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person, is not admissible in any court or in any proceedings before a person authorised to hear evidence. However this does not apply to admissions made by an adult or child that indicates the threat of abuse or actual abuse of a child⁴⁴²

4.1.5.3 Procedure

In Part IIIA of the *Family Law Act*⁴⁴³ there is a subdivision that places an obligation on legal representatives to advise clients of alternative methods of dispute resolution or family dispute resolution.⁴⁴⁴

The Family Law Rules came into operation in March 2004 and repealed the 'old rules' of 1984. The main purpose of these Rules is to ensure that each case is

440 Section 10H of the *Family Law Act*, 53 of 1975.

441 Section 10H (4)(a) to (e) of the *Family Law Act*, 53 of 1975.

442 Section 10J (2) of the *Family Law Act*, 53 of 1975.

443 53 of 1975.

444 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 104.

resolved in a just and timely manner at a cost to the parties that is reasonable in the circumstances of the case.⁴⁴⁵ The Rules go further and gives directives on achieving the main purpose:⁴⁴⁶

‘Achieving the main purpose

To achieve the main purpose, the court applies these Rules in a way that:

- (a) deals with each case fairly, justly and in a timely manner;
- (b) encourages parties to negotiate a settlement, if appropriate;
- (c) is proportionate to the issues in a case and their complexity, and the likely costs of the case;
- (d) promotes the saving of costs;
- (e) gives an appropriate share of the court’s resources to a case, taking into account the needs of other cases; and
- (f) promotes family relationships after resolution of the dispute, where possible.’

Thus the Rules provide for certainty on how the *Family Law Act*⁴⁴⁷ should be put into practice and the procedure that should be used when dealing with matters before the Family Law Court.⁴⁴⁸

Rule 6 sets out how lawyers and legal practitioners are to conduct themselves during the pre-action procedures. The Rule encourages lawyers or legal practitioners to advise clients regarding FDR or pre-action procedures, also stating that where lawyers or legal practitioners feel that it is advisable that the client should settle, he or she must be told to do so.⁴⁴⁹ In terms of section 60I (8) of the *Family Law Act*⁴⁵⁰ a family dispute resolution practitioner may give one of the following kinds of certificates to a person:

- (a) a certificate to the effect that the person did not attend family

445 Rule 1.04 of the Family Law Rules 2004.

446 Rule 1.07 of the Family Law Rules 2004.

447 53 of 1975.

448 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 108.

449 Rule 6(1) of the Family Law Rules 2004; Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 109.

dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but the person's failure to do so was due to the refusal, or the failure, of the other party or parties to the proceedings to attend;

- (aa) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, because the practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to conduct the proposed family dispute resolution;
- (b) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, and that all attendees made a genuine effort to resolve the issue or issues;
- (c) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the person, the other party or another of the parties did not make a genuine effort to resolve the issue or issues;
- (d) a certificate to the effect that the person began attending family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to continue the family dispute resolution.

It is further noted in this section that the court may take the kind of certificate into account in considering whether to make an order referring to parties to family dispute resolution and in determining whether to award costs against a party.⁴⁵¹

In terms of section 60I (7)⁴⁵² a court exercising jurisdiction under this act must not hear an application for a Part VII order in relation to a child unless the applicant files

451 Section 60I (8) of the *Family Law Act* 53 of 1975.

452 Section 60I (7) of the *Family Law Act* 53 of 1975.

in the court a certificate given to the applicant by a family dispute resolution practitioner under subsection (8).

In addition to the above mentioned the Family Law Rules, 2004 require parties to attend pre-action procedures. Before starting a case, each prospective party to the case must comply with the pre-action procedures, including attempting to resolve the dispute using dispute resolution methods.⁴⁵³ According to De Jong they however fall short of making it compulsory for the parties to attend mediation.⁴⁵⁴ Some academics and practitioners have praised the Family Law Rules as having made a considerable impact on family law practice in Australia.⁴⁵⁵ The Rules require that:

- (1) Each prospective party to a case in the Family Court of Australia is required to make a genuine effort to resolve the dispute before a case by:
 - (a) Exchanging a notice of intention to claim and exploring options for settlement by correspondence; and
 - (b) Complying, as far as practicable, with the duty of disclosure.⁴⁵⁶

Furthermore, the Rules states that if there are good reasons for not complying with these rules then all parties are expected to have started or have filed for a pre-action procedure; otherwise the parties may suffer adverse consequences for non-compliance.⁴⁵⁷

4.1.5.4 Mandatory / voluntary mediation

Australia is a modern society that enjoys freedoms that are fundamental to health, wealth and happiness.⁴⁵⁸ The Australian Federal Government is changing the way

453 Rule 1.05 of the Family Law Rules, 2004.

454 De Jong M *Giving children a voice in Family separation issues: a case for mediation* 785.

455 Schultz A *Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 118.

456 Family Law Rules, 2004.

457 Schultz A *Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 119.

458 Holtring *Mandatory Mediation in Australian Family Law* 1-2.

divorcing couples with children settle their disputes. Amongst these changes is compulsory dispute resolution or mandatory mediation.⁴⁵⁹

It is often said that the concept of mandatory mediation is a contradiction in terms as the essence of the mediation process is its voluntary or consensual nature.⁴⁶⁰ However, the rules of the Federal Court and the Supreme Court of each state and territory in Australia have been amended to empower the courts to order parties to participate in mediation against their will.⁴⁶¹

Compulsory mediation is where the parties are required to attend mediation as a compulsory first step before they may approach the court with the matter or application.⁴⁶²

In reality, entry into mediation is sometimes voluntary, but in other cases it is affected by differing degrees of pressure or duress, for example where the parties are required to attend or face sanctions if they fail to do so.⁴⁶³ One of the leading practical concerns is that if persons are coerced into mediation against their will and better judgement, it could result in their participating in a perfunctory fashion. Such participation would reduce the likelihood of a settlement being reached and the mediation could constitute an expensive exercise in futility.⁴⁶⁴

The above mentioned then suggests that the parties would enter into agreements with the purpose to simply get the mediation over with. This would mean that these agreements would easily be broken as the parties had time to reconsider. If voluntarism is an essential component of mediation, it may be seen as a pseudo court process when voluntary contrasts with mandatory or coercive as these terms apply for example in the litigation process where parties are compelled to attend, to participate and to comply with the outcome.⁴⁶⁵ The entry into mediation must essentially be voluntary, as well as deciding to continue with the process. Once the

459 Holtring *Mandatory Mediation in Australian Family Law* 2.

460 Holtring *Mandatory Mediation in Australian Family Law* 5.

461 Holtring *Mandatory Mediation in Australian Family Law* 5.

462 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 115.

Holtring *Mandatory Mediation in Australian Family Law* 5; Boule 1996 *Mediation Principles Processes and Practices* 17.

464 Holtring *Mandatory Mediation in Australian Family Law* 5.

465 Holtring *Mandatory Mediation in Australian Family Law* 5.

parties have entered mediation, voluntarism requires them to be able to withdraw from the process at any time before a settlement is reached.

Part VII of the *Family Law Act*⁴⁶⁶ deals with children as well as family dispute resolution. Section 60I⁴⁶⁷ requires all persons who have a dispute regarding a matter dealt with under Part VII to attend family dispute resolution before approaching the court for a parenting order.⁴⁶⁸ Section 63B of the *Family Law Act*⁴⁶⁹ emphasizes that parents should use the courts as a last resort. It further states that the parties are to reach an agreement and take responsibility for such agreement reached in respect of their children.⁴⁷⁰ The parents of a child are also encouraged in reaching their agreement, to regard the best interest of the child as a paramount consideration.⁴⁷¹

The *Family Law Act*⁴⁷² places an obligation on legal practitioners, such as lawyers and advocates, as well as the courts to inform the parties about the possibility of the use of family dispute resolution services available to them.⁴⁷³ The Rules also place an obligation on the parties and their legal representatives to achieve the main purpose as set out in Rule 1.04 read with Rule 1.08. The main purpose of the Rules is to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case.⁴⁷⁴ These provisions are a clear indication of the commitment to protect the institution of marriage rather than emphasise its dissolution.

466 53 of 1975.

467 Section 60I of the *Family Law Act* 53 of 1975.

468 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 115-116.

469 53 of 1975.

470 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 116.

471 Section 63B of the *Family Law Act* 53 of 1975.

472 Sections 12E and 13C of the *Family Law Act*, 53 of 1975.

473 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 127.

474 Rule 1.04 and 1.08 of the Family Law Rules, 2004.

In terms of section 60I (9) there are exceptions with regards to requiring the parties to first attend family dispute resolution proceedings. These exceptions are if the court is satisfied that there are reasonable grounds to believe that:

- (a) There has been abuse of the child by one of the parties to the proceedings; or
- (b) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or
- (c) there has been a family violence or a risk of family violence by one of the parties to the proceedings; or
- (d) the application is one of urgency
- (e) one or more of the parties is unable to participate effectively in family dispute resolution.

The parents also do not need to attend Family Dispute Resolution if they are able to agree on their issue without external assistance. If a matter is assessed as inappropriate, the practitioner may provide a certificate to this effect.⁴⁷⁵ The client may be referred directly to court if they meet one of the exceptions under the Act.

4.1.5.5 Advantages and disadvantages

Mediation has several advantages and clients who reach resolutions throughout the mediation process experience enhanced relationships, increased compliance to parental agreements and emphasis on shared parenting.⁴⁷⁶

There are however a few problems with the Australian family law system. It is argued that many family dispute resolution practitioners are practicing in isolation and subsequently they do not communicate with other components.⁴⁷⁷ A further problem relates to the need for confidentiality during mediation. Where there is a possibility of

475 Holtring *Mandatory Mediation in Australian Family Law* 18.

476 Holtring *Mandatory Mediation in Australian Family Law* 18.

477 De Jong 2007 *XL CILSA* 297.

harm to any of the parties it would be advisable for the matter to be adjudicated in a court.⁴⁷⁸

4.1.5.6 Conclusion

It is apparent that mediation plays a very important role in the resolution of disputes relating to divorce.⁴⁷⁹ It is further noted that community based mediation services proves to be very popular in Australia.⁴⁸⁰ In reality, entry into mediation is sometimes voluntary, but in other cases it is affected by differing degrees of pressure for example where the parties are required to attend or face sanctions if they fail to do so.⁴⁸¹ One of the leading practical concerns is that if persons are forced into mediation against their will, it could result in their participating in an automatic fashion.

It is clear that the Australian legal system has been well set out and structured to give Australians plenty of encouragement to attend family dispute resolution sessions. The *Family Law Act*⁴⁸² places an obligation on legal practitioners, such as lawyers and advocates, as well as the courts to inform the parties about the possibility of the use of family dispute resolution services available to them.⁴⁸³

4.2 *Court-based family mediation in California*

4.2.1. *Introduction*

Since the introduction of no-fault divorce in America in 1970, family courts have moved increasingly towards a philosophy that supports collaborative interdisciplinary dispute resolution processes and limited the use of litigation.⁴⁸⁴ Family Court service agencies started developing mediation out of existing processes such as custody

478 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 20.

479 De Jong 2007 *XL CILSA* 304.

480 De Jong 2007 *XL CILSA* 304.

Holtring *Mandatory Mediation in Australian Family Law* 5; Boule 1996 *Mediation Principles Processes and Practices* 17.

482 Sections 12E and 13C of the *Family Law Act*, 53 of 1975.

483 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 127.

484 Salem 2009 *Family Court Review* 372.

evaluation and conciliation counselling.⁴⁸⁵ Of all the types of alternative dispute resolution, mediation has emerged as the primary ADR process in the federal district courts.⁴⁸⁶

4.2.2 Historical background

In recent years, mediation of family law cases was well-established in American Courts.⁴⁸⁷ In 1980, California became the first state to mandate all parents in the state with custody or visitation disputes to participate in family mediation either prior to or concurrent with, the court hearing.⁴⁸⁸ All Superior Courts were directed to provide mediation services. California also introduced “special masters” - which allow for access by both parties to a trained non-judicial decision maker assigned to their case. The said non-judicial decision maker is to mediate or make recommendations to the parties and the court concerning parenting disputes.⁴⁸⁹ This system was implemented in a number of other states under different titles for example Family Court Advisor or Family Court Master in Arizona and Parenting Coordinator in Colorado.⁴⁹⁰

4.2.3 Courts with jurisdiction in family matters

The Second Appellate District in California has provided for a mediation and settlement program with volunteers serving as settlement officers and/or mediators.⁴⁹¹ The Second District, through collaborative efforts with the Los Angeles Superior Court and the Los Angeles County Bar Association, has created a way of providing and encouraging alternative dispute resolution for civil disputes on appeal.⁴⁹²

4.2.4 Mediation in family matters

485 Boyarin 2012 *Family Court Review* 379.

486 McManus and Silverstein 2011 *Cadmus journal* 104.

487 Murphy and Rubinson 2005 *Family Law Quarterly* 53.

488 Folberg, Milne and Salem (eds) *Divorce and Family Mediation* 398.

489 Braver, Cookston and Cohen 2002 *Family Relations* 327.

490 Braver, Cookston and Cohen 2002 *Family Relations* 327.

491 <http://www.courts.ca.gov/documents/2DCA-mediation-instructions.pdf>

492 <http://www.courts.ca.gov/documents/2DCA-mediation-instructions.pdf>

Mediation appears to have evolved in family court service agency settings from both conciliation counselling and evaluative/investigative processes⁴⁹³ as court counsellors attempted to develop a method of helping parents end marriage with integrity, grace and an opportunity to determine their family's future.⁴⁹⁴ Despite the development of a variety of services, mediation remains at the heart of the family dispute resolution continuum and the tiered services model.⁴⁹⁵ There are several possible reasons for this. Firstly mediation is more available in both the private and public sector⁴⁹⁶ than other family dispute resolution processes as numerous statutes and local court rules require mediation.⁴⁹⁷

Court service agencies usually provide mediation services for a small fee or without charge making it more accessible for those with limited resources.⁴⁹⁸ Secondly mediation results in faster settlement, greater levels of party satisfaction and improved post-separation family relationships.

California has special rules for conducting mediation. Rule 5.210 concerning sets forth the standards of practice and administration of court-connected child custody mediation services⁴⁹⁹

4.2.5 Regulatory framework

4.2.5.1 Purpose and nature of family mediation

Many jurisdictions have court connected family court service agencies and offer a variety of services including parent education, mediation, judicially moderated settlement conference and high-conflict interventions.⁵⁰⁰ The afore-mentioned services are offered in a linear or tiered manner where the families begin with the least intrusive and least time consuming service and, if the dispute is not resolved,

493 Boyarin 2012 *Family Court Review* 379.

494 Milne 1978 *Conciliation Courts Review* 16; Salem 2009 *Family Court Review* 373.

495 Salem 2009 *Family Court Review* 373.

496 Johnston 2000 *University of Arkansas at Little Rock Law Review* 453-479.

497 Tondo et al 2001 *Family Court Review*. 439; Salem 2009 *Family Court Review* 373.

498 Salem 2009 *Family Court Review* 373.

499 Rule 5.210 2015 California Rules of Court.

500 Salem 2009 *Family Court Review* 372.

proceed to the next available process.⁵⁰¹ For decades mediation has been central to the tiered service model in America.⁵⁰²

The triage process, occasionally referred to as differentiated case management, are beginning to emerge in family court service agencies.⁵⁰³ The objective is to match families to the most appropriate services rather than simply referring them to mediation.⁵⁰⁴ In the triage system parents may complete an initial screen or participate in an interview and agency representatives will then assist in identifying the service that will best meet the needs of the family.⁵⁰⁵

The screening process differs in certain jurisdictions for example in Connecticut, the screening interview is confidential, after which family court counsellors recommend the parties participate in mediation, confidential conflict resolution conference, an issue focussed evaluation or comprehensive evaluation.⁵⁰⁶ Should the parties disagree with a recommendation, they may contest it to the court.⁵⁰⁷ In Pinal County however, the orientation interview is not confidential and as a result the parties choose between mediation and a non-confidential dispute resolution and assessment process⁵⁰⁸

The Northern District of California has adopted the triage approach in that a court employee will make a recommendation to the court, which has the authority to bind the parties to the particular process.⁵⁰⁹ However, the process of assignment itself is tiered as the manner of assignment to the process progresses from the least coercive.⁵¹⁰

4.2.5.2 Structures

501 Edwards 2007 *Pace Law Review* 627; Salem 2009 *Family Court Review* 372.

502 Salem 2009 *Family Court Review* 373.

503 Salem 2009 *Family Court Review* 380.

504 Boyarin 2012 *Family Court Review* 386. Salem 2009 *Family Court Review* 380.

505 Salem et al 2007 *Pace Law Review* 741-783; Boyarin 2012 *Family Court Review* 386.

506 Salem 2009 *Family Court Review* 380.

507 Boyarin 2012 *Family Court Review* 386.

508 Salem 2009 *Family Court Review* 380.

509 Boyarin 2012 *Family Court Review* 389.

510 Boyarin 2012 *Family Court Review* 389.

If the parents did not come to an agreement about their custody and visitation issues during mediation, the judge if it is in the best interest of the children may issue an order to have a child custody evaluation.⁵¹¹ A child custody evaluation is an investigation into the facts of the case. The investigation usually includes interviews with the parents, children and other people who may have information about the situation, like teachers, doctors or counsellors.⁵¹² When the investigation is complete the evaluator will write a report with recommendations to the court for a parenting plan. Each parent will then be able to read a copy of the report.⁵¹³

4.2.5.3 Procedure

All court-connected mediation processes must be conducted in accordance with state law. The California Rules of court make provision for the court-based mediation process. The rules provide for the review of the intake form and court file, if available, before the start of mediation, oral or written orientation or parent education that facilitates the parties' informed and self-determined decision making.⁵¹⁴ The mediator may interview the child alone or together with other interested parties.⁵¹⁵ The parties are assisted in developing a parenting plan that protects the health, safety, welfare and best interest of the child that optimize the child's relationship with each party.⁵¹⁶ The mediation is terminated if the mediator believes that they are unable to achieve a balanced discussion between the parties.⁵¹⁷ The mediation is concluded with a written parenting plan summarising the parties' agreement or mediator's recommendation that is given to counsel or the parties before the recommendation is presented to the court.⁵¹⁸

511 Family Code section 3110-3118; <http://www.courts.ca.gov/1189.htm#acc11728>

512 Family Code section 3110-3118; <http://www.courts.ca.gov/1189.htm#acc11728>

513 Family Code section 3110-3118; <http://www.courts.ca.gov/1189.htm#acc11728>

514 Rule 5.210. Court-connected child custody mediation 2015 California Rules of Court.

515 Rule 5.210. Court-connected child custody mediation 2015 California Rules of Court.

516 Rule 5.210. Court-connected child custody mediation 2015 California Rules of Court.

517 Rule 5.210. Court-connected child custody mediation 2015 California Rules of Court.

518 Rule 5.210. Court-connected child custody mediation 2015 California Rules of Court.

The tiered service model can include a variety of processes. Typically, these services commence with parents attending an educational program, in order to educate them on the impact of separation and divorce both on the parents and the children.⁵¹⁹ Thereafter the parents are referred to a confidential mediation process. Many jurisdictions have however, made exceptions where an allegation exists of domestic violence.⁵²⁰ Should the mediation process not be successful the court may order a custody evaluation with an evaluator conducting an independent assessment or investigation and in many instances compiling a report and making certain recommendations.⁵²¹

The afore-mentioned written report may be used as a basis for future settlement negotiations, either by lawyer-assisted negotiations or a judicially moderated settlement conference.⁵²² If the issues remain unsolved, a trial will be conducted.⁵²³ Under the tiered system triaging consists of ADR interventions with different levels of self-determination opportunities and defectiveness such as providing information, pressuring to settle, predicting court outcomes etcetera.⁵²⁴

Alternatively, the court services evaluator may hold a meeting with the parties and their lawyers to review the recommendations and attempt to facilitate a settlement.⁵²⁵

4.2.5.4 Mandatory / voluntary mediation

A few of the family court services agencies⁵²⁶ have begun to explore variations of triage or differentiated case management as an alternative service delivery model. In triage the parties are referred to the most appropriate service for the particular circumstances instead of directly being referred to mediation.⁵²⁷ It is argued that by identifying the most appropriate service in the particular circumstances may result in

519 Salem 2009 Family Court Review 372.

520 Salem 2009 Family Court Review 372.

521 Salem 2009 Family Court Review 372.

522 Salem 2009 Family Court Review 372 – 373.

523 These services may differ across jurisdictions in terms of available services and the rules and methods by which these services are delivered.

524 Boyarin 2012 *Family Court Review* 386.

525 Salem 2009 *Family Court Review* 373.

526 The family court services include Connecticut, Arizona and British Columbia.

527 Salem 2009 *Family Court Review* 371.

a more effective service delivery and more efficient use of court resources.⁵²⁸ Mediation is practiced widely throughout the United States in both the private and public sectors.⁵²⁹

Many jurisdictions have court connected family court service agencies and offer a variety of services including parent education, mediation, judicially moderated settlement conference and high conflict interventions.⁵³⁰ By 1980, California had mandated mediation in all child custody disputes, and within a decade family mediation had spread to thirty eight states and Washington D.C.⁵³¹

In California, custody and visitation mediation can be mandated as a prerequisite to a court hearing.⁵³² Parties who are unable to reach an agreement on their own or through their attorneys and seek court hearings are first compelled to try court connected mediation before their scheduled court dates.

4.2.5.5 Advantages and disadvantages

Practitioners in favour of the triage system suggest a departure from the common practice of referring all parents to mediation, but instead they argue that identifying the most appropriate service from the onset may result in a reduced burden on the families, more effective provision of services and a more efficient use of court resources.⁵³³ Several arguments can be proffered in favour of the tiered services model. These benefits are subsequently explored and discussed.

Crucial to the support for a tiered services model is that prior to participating in an adversarial litigation process parents should at least be granted the opportunity of participating in mediation in order for them to create their own agreement.⁵³⁴

528 Johnston 2000 *University of Arkansas at Little Rock Law Review* 453-479; Salem 2009 *Family Court Review* 372.
529 Emery, R.E., Matthews, S.G. and Kitmann, M. 1994 *Journal of Consulting and Clinical Psychology*, 62, 124-129.
530 Salem 2009 *Family Court Review* 372.
531 Boyarin 2012 *Family Court Review* 377.
532 Folberg 1985 *Colum. J.L. & Soc. Probs.* 423.
533 Johnston *University of Arkansas at Little Rock Law Review* 22.
534 Salem 2009 *Family Court Review* 374.

Mediation lessens hostility and creates opportunities for better agreements through self-determination, which is better for the children.⁵³⁵ Welsh⁵³⁶ argues that self-determination, which is anchored in party empowerment, was critical to the support for the contemporary mediation movement. If parents are able to participate in mediation, they will be better able to explore their options, truly hear each other and be empowered to make their own decisions that determine their future.⁵³⁷ If the parents participate in the process they will experience a greater sense of ownership and satisfaction with the outcomes which reduces further conflict which in turn is in the interest of the children⁵³⁸

The main argument against a tiered services model requiring mediation is that the landscape has changed dramatically since mandatory mediation first emerged.⁵³⁹

Salem argues that:

There is a serious question as to whether court connected mediation continues to deliver on the promise of family self-determination. Many court-connected mediation programs struggle with growing caseloads, reduced staffing levels and complex cases and they simply lack the resources to provide five to six hour mediations.⁵⁴⁰

With triage however, there is potential for reallocating resources, avoiding duplication of services and create a more efficient service delivery system.⁵⁴¹ Lacking sufficient resources, it is not clear that the mediation process in family courts can embody the vision of self-determination that dominated the original mediation movement and inspired its facilitative approach.⁵⁴²

If mediators lack sufficient time for conducting mediation, it is not possible to honour and protect parties' self-determination.⁵⁴³ The complexity of cases combined with lack of adequate time for mediation makes it more difficult for court connected mediation programs to deliver on the promise of self-determination and

535 Salem 2009 *Family Court Review* 374.

536 Welsh 2004 *Divorce Mediation: Models, techniques and applications* 420-443.

537 Salem 2009 *Family Court Review* 375.

538 Kelly 2004 *Conflict Resolution Quarterly* 22; Salem 2009 *Family Court Review* 375.

539 Salem 2009 *Family Court Review* 376.

540 Salem 2009 *Family Court Review* 377.

541 Salem 2009 *Family Court Review* 377.

542 Welsh 2001 *Harvard Negotiation Law Review* 6.

543 Salem 2009 *Family Court Review* 377.

empowerment⁵⁴⁴ One option for the mediators is to become more directive, making recommendations, predicting court outcomes and pressuring parties into agreement.⁵⁴⁵ Edwards⁵⁴⁶ argues that mediation services that can only offer the parents an hour or even less to resolve their differences is insufficient time to devote to the mediation process and grant the parents an opportunity of expressing their views fully and to reach a lasting resolution.

Both civil and family ADR programs are dealing with increasing caseloads and decreasing resources.⁵⁴⁷ The argument for triage in family court services rests mainly on a need for systems that are most receptive to court services users while recognising the limited resources available to agencies.⁵⁴⁸

Triage holds the potential to preserving precious resources by eliminating participation in some services that may not be successful.⁵⁴⁹ Mediation is not always the correct intervention for all disputes, which may involve parties who lack the ability or desire to self-determine. This does, however, not mean that ADR interveners cannot play a significant role within court ADR programs other than as mediators.⁵⁵⁰ A second argument in support of triage is that it reduces the burden on users of family court services. In a tiered service system, if parents are referred to mediation and do not settle they are often required to participate in additional processes until matters are resolved.⁵⁵¹ One concern related to the triage system is its potential of empowering court staff to direct parents to participate in the correct dispute resolution process and to deny the parties access to a mediation process which would otherwise have been available to them.⁵⁵²

4.2.5.6 Conclusion

544 Salem 2009 *Family Court Review* 378.

545 Welsh 2004 *Divorce Mediation: Models, techniques and applications* 420-443; Salem 2009 *Family Court Review* 378.

546 Edwards 2007 *Pace Law Review* 650.

547 Boyarin 2012 *Family Court Review* 379.

548 Salem 2009 *Family Court Review* 381; Schepard *Children, courts and custody: Interdisciplinary models for divorcing families* 5.

549 Salem 2009 *Family Court Review* 381.

550 Boyarin 2012 *Family Court Review* 382.

551 Salem 2009 *Family Court Review* 382.

552 Salem 2009 *Family Court Review* 383.

In America, and specifically California, mediation is no longer the only alternative to the adversarial litigation process. New processes have emerged to address the multiple challenges that families bring them to court and new models of service delivery must be implemented to support the effective use of these processes.⁵⁵³

4.3 Court-based family mediation in Canada

4.3.1 Introduction

Family mediation in Canada is defined as a process whereby a neutral third party, the mediator, helps parties agree on a variety of issues including support payments, division of property or access to children.⁵⁵⁴ Proponents have identified mediation as a less adversarial alternative to court that can reduce costs, improve fairness and satisfaction.⁵⁵⁵ Over the past two decades most Canadian provinces have reformed their legislation to minimise court intervention.⁵⁵⁶

4.3.2 Historical background

In Ontario the courts have experimented with and expanded various forms of mandatory mediation. Rule 24.1 of the *Rules of Civil Procedure*, enacted in 1999, implemented a two-year pilot mediation project at Toronto and Ottawa.⁵⁵⁷ The pilot project was found to be successful and was extended indefinitely and extended to apply in Windsor.⁵⁵⁸ The intention was to evaluate the impact of mandatory mediation on the administration of justice with particular regard to reduction of costs and delay and the facilitation of early and fair settlement of cases.⁵⁵⁹

4.3.3 Courts with jurisdiction in family matters

553 Salem 2009 *Family Court Review* 384.

554 <http://www.attorneygeneral.jus.gov.on.ca/english/family/divorce/mediation/>.

555 Lawrence, Nugent and Scarfone 2007 *Serving Canadians* 7.

556 Richler 2011 *Judges Journal* 14

557 Richler 2011 *Judges Journal* 14.

558 Richler 2011 *Judges Journal* 14.

559 Richler 2011 *Judges Journal* 14

The rules of Civil Procedure apply to all civil proceedings in the Court of Appeal and in the Superior Court of Justice and can be read together with the Family Law Rules.⁵⁶⁰ The Family Law Rules apply to all family law cases in the Family Court of the Superior Court of Justice, in the Superior Court of Justice and in the Ontario Court of Justice.

4.3.4 Mediation in family matters

In recent years, there has been an increase of family mediation programs in the public as well as private sector.⁵⁶¹ These programs are often directly connected to the courts or are community-based.⁵⁶² Section 9(2) of the *Divorce Act*⁵⁶³ requires that every lawyer discuss with the spouse the advisability of negotiating the matters that may be the subject of a support or custody order and to inform the spouse of the mediation facilities that might be able to assist the spouses in negotiating those matters.⁵⁶⁴ Section 31(3) of the *Children's Law Reform Act*⁵⁶⁵ authorises the court, upon application for custody of or access to children and at the request of the parties, to appoint a person selected by the parties to mediate any matter specified in the order.

4.3.5 Regulatory framework

4.3.5.1 Purpose and nature of family mediation in Canada

In terms of Rule 24.1 of the *Rules of Civil Procedure* each centre assigns mediation coordinators and establishes local mediation committees consisting of representatives of judges, lawyers, mediators, the public, and persons employed in the administration of justice.⁵⁶⁶ The committee monitors the performance of

560 Rule 1.02 of the *Rules of Civil Procedure* 1990.

561 Goundry, Peters, and Currie 1998 <http://www.oaith.ca>

562 Goundry, Peters, and Currie 1998 <http://www.oaith.ca>

563 *Divorce Act*, 1985.

564 Goundry, Peters, and Currie 1998 <http://www.oaith.ca>

565 *Children's Law Reform Act* R.S.O 1990, c, C12

566 Richler 2011 *Judges Journal* 14-15.

mediators and receives and determines complaints made against mediators.⁵⁶⁷ The coordinator monitors and regulates the mediation process in all actions to which the rule applies and reports to the court.⁵⁶⁸ Family Mediation Canada (FMC) has developed rigorous certification programs for family mediators. In order to become FMC certified, a mediator has to demonstrate a high degree of competency as well as possess high ethical standards. FMC-certified mediators all agree to accept the complaint and disciplinary process that FMC has developed to protect public interest in the proper and ethical practice of family mediation.⁵⁶⁹

4.3.5.2 Structures

The Family Law Rules in Ontario also make provision for the office of the Children's Lawyer. The Office of the Children's Lawyer is a law office in the Ministry of the Attorney General which delivers programs in the administration of justice on behalf of children with respect to their personal and property rights.⁵⁷⁰ Lawyers within the office represent children in various areas of law including child custody and access disputes, child protection proceedings and civil litigation.⁵⁷¹ Clinical investigators prepare reports for the court in custody/access proceedings and may assist lawyers who are representing children in such matters.⁵⁷²

The aim Children's Lawyer's in custody/access cases is to provide a legal representative for the child or to prepare a report, or a combination of the two aspects.⁵⁷³ Rule 21 of the *Family Law Rules* sets out the guidelines for the children's lawyer when investigating the custody or access to a child in terms of section 112 of the *Courts of Justice Act*. The Children's Lawyer shall serve a notice on the parties informing them of the investigation. The parties shall then serve all necessary documents on the Children's Lawyer to enable them to compile a report. The report shall then be served on the parties and filed at court. Should any party disagree with

567 Richler 2011 *Judges Journal* 14-15.

568 Richler 2011 *Judges Journal* 14-15.

569 Anonymous <http://www.fmc.ca>

570 <https://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.php>.

571 <https://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.php>.

572 <https://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.php>.

573 <https://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.php>

the content of the report they may file papers indicating what the dispute is where after the court will make a judgment.⁵⁷⁴

4.3.5.3 Procedure

In Ontario, the divorce procedure is instituted with an application in the applicable form setting out the issues to be decided upon. The application is served upon the respondent and they are afforded 30 days to file their answer.⁵⁷⁵ The first appearance at court is usually before a Dispute Resolution Officer. A case conference is held in order to identify issues in dispute and discuss a possibility of settlement. The rules require each civil case to go to mediation after a statement of defence has been filed unless an exemption from the requirement to mediate is granted.⁵⁷⁶ The Rules further state that mediation must occur within 180 days of the filing of the first defence, but this time period may be extended by consent.⁵⁷⁷ Once the mediator is appointed the mediation must occur within 90 days unless otherwise ordered by the court.⁵⁷⁸ Upon completion of the mediation the mediator's report back to the mediation coordinator and the parties within 10 days of the mediation session.⁵⁷⁹ In the event of a settlement the settlement agreement must be signed by the parties and their counsel and filed with the court.⁵⁸⁰ In the event that a party fails to comply with a settlement agreement reached at mandatory mediation, any other party to the agreement may move for judgment in terms of the agreement or proceed with the action as if no agreement was reached.⁵⁸¹

Where a party fails to attend the mediation the mediator will file a certificate of non-compliance where after the matter will be referred to a judge or case management

574 Rule 21 O. Reg 114/99: *Family Law Rules*
575 Rule 24.1 *Rules of Civil Procedure*
576 Unknown 2012 www.justice.alberta.ca.
577 Rule 24.1.09 of the Rules of Civil Procedure; Richler 2011 *Judges Journal* 15.
578 Richler 2011 *Judges Journal* 15.
579 Rule 24.1.15 Rules of Civil Procedure; Richler 2011 *Judges Journal* 15.
580 Richler 2011 *Judges Journal* 15.
581 Rule 24.1.15 Rules of Civil Procedure,

master who may convene a case management conference.⁵⁸² They may further establish a timetable for the action, strike out a written pleading or affidavit filed by the defaulting party, dismiss the action or strike out the defence, order the defaulting party to pay costs, or make any other order that is just.⁵⁸³

4.3.5.4 Mandatory/voluntary mediation

The rules require each civil case to go to mediation after a statement of defence has been filed unless an exemption from the requirement to mediate is granted.⁵⁸⁴ There is no mandatory mediation in Manitoba, New Brunswick, Nova Scotia, and Prince Edward Island. In Quebec, although mediation is mandatory in family law matters, it is not prescribed in civil litigation in general.⁵⁸⁵ *The Canadian Federal Divorce Act*⁵⁸⁶ places a duty on lawyers to inform parties of facilities that promote conciliation and reconciliation.

The procedure as well as sanctions in the event of non-compliance has been discussed in the paragraphs above. The Ontario Mandatory Mediation Program is designed to help parties involved in civil litigation and estates matters attempt to settle their cases before they go to trial.⁵⁸⁷ Rule 24.1 provide that civil actions that are subject to case management must be referred to mandatory mediation.⁵⁸⁸ Case management is a system in which the court supervises cases and imposes strict timelines on their movement through the pretrial and trial process.⁵⁸⁹ Certain civil actions, such as family law cases, are excluded from mandatory mediation.⁵⁹⁰ Under

582 Rule 24.1.13 *Rules of Civil Procedure*.

583 Rule 24.1.13 *Rules of Civil Procedure*.

584 Unknown 2012 www.justice.alberta.ca.

585 Richler 2011 *Judges Journal* 15.

586 Section 9 of the Canadian Federal Divorce Act 1986.

587 Rule 24.1.13 of the *Rules of Civil Procedure*,
<http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.php>

588 Rule 24.1.13 of the *Rules of Civil Procedure*;
<http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.php>

589 Rule 24.1.13 of the *Rules of Civil Procedure*;
<http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.php>

590 Rule 24.1.13 of the *Rules of Civil Procedure*.

Rule 75.1, contested estates, trusts and substitute decisions matters are referred to mandatory mediation.⁵⁹¹

4.3.5.5 Advantages and disadvantages

Some authors argue that a forced process of mediation has the potential to diminish the respect for the rule of law.⁵⁹² It is important to note that mandatory mediation does not force the parties to settle. As discussed in the chapters above the parties decide if they want to sign any settlement agreement reached.

4.3.5.6 Conclusion

From the discussion above it is clear that court-based mediation plays a significant role in the resolution of divorce disputes in Canada. Various legislation provide for mediation in the resolution of divorce disputes. The *Divorce Act*⁵⁹³ places a duty on lawyers to inform parties of facilities that promote conciliation and reconciliation.

The *Divorce Act*⁵⁹⁴ places a duty on lawyers to inform parties of facilities that promote conciliation and reconciliation. The Family Law Rules in Ontario also make provision for the office of the Children's Lawyer who compiles a report with recommendations on the welfare of the children. Despite several advantages, some argue that a forced mediation process diminish the rule of law.

591 Rule 24.1.13 of the *Rules of Civil Procedure*.

592 <http://www.legco.gov.hk/yr01-02/english/panels/ajls/papers/aj0422-1574-1e-scan.pdf>

593 Section 9 of the Canadian Federal Divorce Act 1986.

594 Section 9 of the Canadian Federal Divorce Act 1986.

Chapter 5. Comparison between South Africa and Australia, America and Canada

5.1 Introduction

In this chapter the legal systems of South Africa, Australia, California and Canada will be compared in respect of how they have provided for court-based mediation. The comparison will be based on the previous chapters where the legal systems have been discussed.

In all of the legal systems provision has been made for court-based mediation. As mentioned in chapter 1.4, court-annexed mediation is currently only being implemented on a pilot basis in South Africa. It is therefore essential to examine how other countries implement and manage court-annexed mediation processes. This chapter will show a comparison of the legislative instruments that are used to encourage mediation. Thereafter any criticisms and/or recommendations of each of the legal systems will be discussed.

5.2 Regulatory framework

As discussed in paragraphs 3.2.2, 4.1.5 and 402.5 above, In all of the above legal systems the legislatures have created a legislative framework to encourage or even compel divorcing parties to use mediation as a method to resolve the disputes between them.⁵⁹⁵

5.2.1 Mandatory mediation

In South Africa Sections 21 and 33 of the *Children's Act*, dealing with the acquisition of parental responsibilities and rights and parenting plans respectively, require that parties first attend mediation before they may approach a court for the resolution of the dispute.⁵⁹⁶ Similarly, Section 60I of Australia's *Family Law Act* requires that both

595 South Africa: Mediation in Certain Divorce Matters Act 24 of 1987; Children's Act 38 of 2005 together with the regulations thereto; Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa; Australia: Family Law Act 53 of 1975; Family Law Regulations; Canada: Rules of Civil Procedure; Commercial Mediation Act 2010.

596 Children's Act 38 of 2005.

parties attend compulsory mediation before approaching the court for an order in terms of the Act. In Canada mediation is compulsory in certain matters in Ottawa and Toronto but not in Manitoba, New Brunswick, Nova Scotia and Prince Edward Island. In Quebec, although mediation is mandatory in family law matters but not prescribed in general civil litigation. California as well as thirty-eight other states have mandated mediation in all child custody disputes. There are however exceptions to the requirement of attending compulsory mediation, for example where there are allegations of family violence the parties do not have to attend mediation as a first step in an action or application. The Australian *Family Law Act* provides for certain exemptions. The parties do not have to attend mediation by consent if the application is urgent or one or more of the parties are unable to attend the mediation.⁵⁹⁷ Rule 24.1 of Canada's *Rules of Civil Procedure* also exempts certain matters from mandatory mediation.

Despite the various benefits and success rate in these countries, there is still critique regarding compulsory mediation. Some argue that there may be a problem with regards to a power imbalance between the parties such as the personal wealth of each party or even abuse between the divorcing parties.⁵⁹⁸

These countries have various remedies where the parties have refused to attend the mediation. In South Africa these remedies include cost orders being made against the unwilling party.⁵⁹⁹ Sections 49 and 19 to 71 of the *Children's Act*⁶⁰⁰ further state that the unwilling party may be held in contempt of court if mediation was ordered by the court.⁶⁰¹ In Australia section 13D of the *Family Law Act*⁶⁰² provides that the court may make such an order under its own initiative or in terms of an application brought

597 Family Law Act 53 of 1975.

598 Schultz 2011 *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 164.

599 Section 48(1) of the Children's Act 38 of 2005; Schultz 2011 *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 166.

600 38 of 2005.

601 Schultz 2011 *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 166.

602 53 of 1975.

by the parties or independent lawyer.⁶⁰³ In Canada where a party fails to attend the mediation the matter will be referred to a judge or case management master who may convene a case management conference.⁶⁰⁴ They may further establish a timetable for the action, strike out a written pleading or affidavit filed by the defaulting party, dismiss the action or strike out the defence, order the defaulting party to pay costs, or make any other order that is just.⁶⁰⁵

5.3 Family Advocate or similar institutions

In an effort to reduce the trauma and to ensure that the best interest of the child is served, South Africa introduced the office of the Family Advocate⁶⁰⁶ through the Mediation in Certain Divorce Matters Act.⁶⁰⁷ In terms of this Act the Family Advocate holds enquiries with all the parties concerned and is assisted by a family counsellor. During the enquiries the Family Advocate performs a mediatory-like function.⁶⁰⁸ Based on the outcome of the enquiry the Family Advocate makes recommendations to the court with relation to the best interest of the child. The Family Advocate is not appointed as the representative of any party to a dispute, but as a professional and neutral channel of communication between the disputing parents, the child and judicial officer.

The criticism on the office of the Family Advocate is that it is difficult to reach some sort of well thought-out opinion based on the information contained in the forms completed and submitted by the parties.⁶⁰⁹ There is no requirement that the defendant be present in court to question statements made by the plaintiff and the plaintiff's replies are geared towards achieving the purpose of the divorce.⁶¹⁰ The role of the Family Advocate and other relevant advisors is only to make a

603 Schultz 2011 *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 166-167.

604 Rule 24.1.13 of the *Rules of Civil Procedure*.

605 Rule 24.1.13 of the *Rules of Civil Procedure*.

606 Van Wyk 1992 *Beleidsvoorsig* 29.

607 24 of 1987.

608 Mediation in Certain Divorce matters Act 24 of 1987; Schultz 2011 *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 161.

609 Clark 2000 *Stell LR* 7.

610 Clark 2000 *Stell LR* 7.

recommendation and the court's ultimate decision as to what is in the best interest of the child is based on inadequate evidence.⁶¹¹ There have been further complaints that the office of the Family Advocate can delay the process because their recommendations are not given timeously.

Unlike the position in South Africa, Australia does not have a dedicated official appointed in terms of legislation to automatically safeguard the best interest of the child. In Australia, where the needs of the child need to be protected in any matter that arises, an independent children's lawyer is appointed on the child's behalf by the court.⁶¹²

Canada only makes provision for the office of the Children's Lawyer which is a law office in the Ministry of the Attorney General which delivers programs in the administration of justice on behalf of children with respect to their personal and property rights.⁶¹³ The Children's Lawyer may compile a report on the custody of, or access to, a child but the report is not necessarily binding as the parties may dispute the content and the judge has discretion to make a final order.

In America, and specifically California, mediation is no longer the only alternative to the adversarial litigation process. New processes have emerged to address the multiple challenges that families bring them to court and new models of service delivery must be implemented to support the effective use of these processes.⁶¹⁴

611 Clark 2000 *Stell LR* 7.

612 Sections 68L – 68M of the *Family Law Act* 53 of 1975.

613 <https://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.php>.

614 Salem 2009 *Family Court Review* 384.

Chapter 6: Conclusion and recommendations

6.1 Conclusion

This study focussed on the role of court-based mediation in the resolution of divorce disputes and specifically how court-based mediation is implemented in South Africa, Australia, California and Canada. The first chapter contains a brief introduction and problem statement. In the second chapter mediation was defined as a confidential process in which a neutral third party assists the disputing parties by facilitating the negotiation between them in order to resolve the dispute. The general principles of mediation as well as the key characteristics of mediation such as the fact that it is voluntary, confidential and a multi-disciplinary process are discussed.

Additionally the various benefits to mediation such as improved communication, confidentiality and flexibility are highlighted. From the discussion of the benefits of mediation it is clear that divorcing couples will certainly benefit from the mediation process. Divorce mediation is future-oriented and improves communication and understanding. This is important as the parties with minor children will still have to communicate with each other after the divorce has been finalised.

There are however, also a few disadvantages to mediation in divorce disputes. Mediation is not always appropriate where there is no equal bargaining power for example in divorce matters with allegations of domestic violence. In these cases litigation proceedings might be more appropriate. A further disadvantage to mediation in divorce disputes is that there is no formal procedure. Should the parties not be satisfied with the outcome of the mediation proceedings, there is no review or appeal procedure available to them as in litigation proceedings. Although there are still some disadvantages to court-based mediation, it is clear that the courts in South Africa are lending more support to alternative dispute resolution methods, especially mediation in cases where children are involved. The Rules *Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa* specifically make provision

for the referral of certain matters, such as divorce disputes, to court-based mediation and can be seen as an important resource to promote a non-adversarial resolution in divorce disputes.

The third chapter contained the function of the Family Advocate in court-based mediation. It was concluded that the Family Advocate does not practice mediation in the true sense of the word as the mediatory function would be in conflict with the evaluative function.

The fourth chapter continued to set out the position of court-based mediation in California, Canada and Australia. Reference is made to the best interest of the child is made in legislation in Canada and California, but in both South Africa and Australia the best interest of the child is of utmost importance. It was further established that South Africa, America, Canada and Australia all make provision for mandatory mediation in family law matters. They all have within their legislature provided for opportunities for the parties to attend mediation. South Africa's Mediation in Certain Divorce Matters Act⁶¹⁵ and Children's Act⁶¹⁶ require divorcing parties with minor children to attend mediation. Australia's Family Law Act⁶¹⁷ as well as Canada's *Family Law Rules* as well as *Rules of Civil Procedure*⁶¹⁸ require mandatory mediation.

In California, family courts have moved increasingly towards a philosophy that supports collaborative interdisciplinary dispute resolution processes and limited the use of litigation.⁶¹⁹ Many jurisdictions have court-connected family court service agencies and offer a variety of services including parent education, mediation, judicially moderated settlement conference and high conflict interventions. In Australia family relationship centres provide assistance for separating families by offering, *inter alia*, mediation services for the resolution of all separation issues.⁶²⁰

615 24 of 1987.

616 38 of 2005.

617 53 of 1975.

618 Rules of Civil Procedure Regulation 194 1990.

619 Salem 2009 *Family Court Review* 372.

620 De Jong 2007 *XL CILSA* 285; Family Relationships at: www.familyrelationships.gov.au/Family_Relationship_Centres.html (accessed on 30 November 2015).

Unfortunately mediation services in Australia are not properly regulated on a national level.

In California family dispute resolution services are offered in a linear or tiered manner where the families begin with the least intrusive and least time consuming service and, if the dispute is not resolved, proceed to the next available process. A few advantages and disadvantages of the tiered and triage model of service delivery were also discussed. Benefits of triage system included a departure from the common practice of referring all parents to mediation, but instead identifies the most appropriate service from the onset may result in a reduced burden on the families, more effective provision of services and a more efficient use of court resources.⁶²¹ The arguments in favour of the tiered services model were that before participating in an adversarial litigation process parents should at least have the opportunity to participate in mediation in order for them to create their own agreement. It was also concluded that many court-connected mediation programs struggle with growing case-loads, reduced staff and complex cases and they therefore lack the resources to provide five to six hour mediations.⁶²² With triage however, there is potential to reallocate resources, avoid duplication of services and create a more efficient service delivery system.⁶²³

The fifth chapter contains a comparison of the position of court-based mediation in South Africa, America, Canada and Australia.

From the discussion on the role of court-based mediation in the resolution of divorce disputes in Australia it is apparent that mediation has played a very important role in the resolution of disputes relating to divorce.⁶²⁴ It is further noted that community based mediation services have proved to be very popular in Australia.⁶²⁵ In reality, entry into mediation is sometimes voluntary, but in other cases it is affected by differing degrees of pressure for example where the parties are required to attend or

621 Johnston University of Arkansas at Little Rock Law Review 22.

622 Salem 2009 *Family Court Review* 377.

623 Salem 2009 *Family Court Review* 377.

624 De Jong 2007 *XL CILSA* 304.

625 De Jong 2007 *XL CILSA* 304.

face sanctions if they fail to do so.⁶²⁶ One of the leading practical concerns is that if persons are forced into mediation against their will, it could result in their participating in an automatic fashion. It is clear that the Australian legal system is well set out and structured to give Australians plenty of encouragement to attend family dispute resolution sessions. The *Family Law Act*⁶²⁷ places an obligation on legal practitioners, such as lawyers and advocates, as well as the courts to inform the parties about the possibility of the use of family dispute resolution services available to them.⁶²⁸

During the discussion of the role of court-based mediation in the resolution of divorce disputes in California the triage process, occasionally referred to as differentiated case management, are beginning to emerge in family court service agencies,⁶²⁹ was examined. The objective of the triage system is to match families to the most appropriate services rather than simply referring them to mediation.⁶³⁰ In the triage system parents may complete an initial screen or participate in an interview and agency representatives will then help identify the service that will best meet the needs of the family.⁶³¹ The Northern District of California has adopted the triage approach in that a court employee will make a recommendation to the court, which has the authority to bind the parties to the particular process.⁶³² However, the process of assignment itself is tiered as the manner of assignment to the process progresses from the least coercive.⁶³³

Australia, California and Canada have successfully implemented court-based mediation into their divorce procedure. In the premises it is recommended that should the pilot program launched in certain South African courts be successful, law reform be modelled after these countries with regards to the role of court-based mediation in the resolution of divorce disputes.

Holtring *Mandatory Mediation in Australian Family Law* 5; Boule 1996 *Mediation Principles Processes and Practices* 17.

627 Sections 12E and 13C of the *Family Law Act*, 53 of 1975.

628 Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with comparisons drawn mainly in the South African Law System* 127.

629 Salem 2009 *Family Court Review* 380.

630 Boyarin 2012 *Family Court Review* 386. Salem 2009 *Family Court Review* 380.

631 Salem et al 2007 *Pace Law Review* 741-783; Boyarin 2012 *Family Court Review* 386.

632 Boyarin 2012 *Family Court Review* 389.

633 Boyarin 2012 *Family Court Review* 389.

6.2 Final recommendations

From the discussions above it is apparent that court-based mediation could play a significant role in the resolution of divorce disputes where children are involved. It is suggested that like America, Australia and Canada there be a central starting point in the resolving of divorce disputes.

It is also suggested that the office of the Family Advocate be expanded to provide the services similar to the triage model of service delivery in America as well as the family relationship centres in Australia. It should however be noted that the office of the Family Advocate should not exercise too many functions but should incorporate the services of suitably qualified and experienced social workers, family counsellors, and/or independent mediators.

As discussed in the chapters above the office of the Family Advocate already makes use of an inter-disciplinary approach to the resolution of disputes. An assessment should be done to establish what particular service is required by the parties and to establish if court-based mediation would be appropriate in those specific circumstances to promote an equal distribution of power between disputing parties in mediation proceedings. There after the parties could be referred to the appropriate service and the Family Advocate could like the mediation coordinator in Canada monitor the outcome of the mediation process in order to safeguard the best interest of the children. It is further suggested that South Africa standardise training and accreditation of mediators in order to prevent some of the concerns as discussed in Chapter 2.

It is clear that court-based mediation can play an important role in resolving divorce disputes without adding to the psychological, emotional and social consequences of traditional divorce proceedings. As mediation is future-oriented it is very appropriate to divorce matters where children are involved because it promotes and constructive communication. The commencement of the Rules that provide for mediation in certain civil and divorce matters is a crucial step to promoting a non-adversarial system to deal with divorce matters in South Africa. It is however necessary to further develop and refine the court-based mediation processes that are currently implemented as a pilot programme before it can be implemented nationally. The

court-based mediation proceedings of countries such as America (California), Australia and Canada provide valuable insights that can assist to refine these proceedings in South-African courts.

BIBLIOGRAPHY

Literature

Alexander N "Global trends in mediation" *ADR Bulletin* 41-42

Barratt A and Domingo W (eds) *Law of Persons and the Family* (Pearson Education South Africa Cape Town 2012) 367 -374, 389

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

Bollen KNL, Verbeke AL and Euwema MC "Money or children? Power sources in divorce mediation" 2013 *Journal of Family Studies* 159-173

Boulle, Laurence *Mediation Principles Process Practice*, (1996 Butterworths, Australia)

South African Journal on Human Rights

Boulle L "Promoting rights through court-bases ADR?" 2012 *SAJHR* 1-17

De Jong "*Child-focused Mediation*" in Boezaart (ed) *Child Law in South Africa* (Juta Claremont 2009)

Boyarin Y "*Court-connected ADR – A time of crisis, a time of change*" 2012 *Family Court Review* 386 - 404

Brand J, Steadman F and Todd C *Commercial Mediation: A User's Guide* 1st ed (Juta Cape Town 2012)

Braver, Cookston and Cohen 2002 *Family Relations* 325

Brown HJ and Marriot QC *ADR Principles and Practice* 3rd ed (Sweet & Maxwell 2011)

Burman S and McLennan F “*Providing for children? The Family Advocate and the legal profession*” 1996 *Acta Juridica* 69-81

South African Journal on Human Rights

Burman S, Derman L and Swanepoel L “*Only for the wealthy? Assessing the future for children of divorce*” 2000 *SAJHR* 535-557

Stellenbosch Law Review

Butler D and Finsen E *Arbitration in South Africa: law and practice* 1st ed (Juta Kenwyn 1993)

Carnelley M “The right to legal representation at state expense for children in care and contact disputes – A discussion of the South African legal position with lessons from Australia” 2010 *Obiter* 638 - 661

Charlton and Dewdney *The Mediator’s Handbook Skills and Strategies for Practitioners* 1995 123-126

Stellenbosch Law Review

Clark B “A “Golden Thread”? Some aspects of the application of the standard of the best interest of the child in South African Family Law” 2000 *Stell LR* 3- 20

Comparative and International Law Journal of Southern Africa

De Jong “Divorce mediation in Australia – valuable lessons for family law reform in South Africa” 2007 *XL CILSA* 280-305

Tydskrif vir die Suid-Afrikaanse Reg

De Jong “A pragmatic look at mediation as an alternative to divorce litigation” 2010 *TSAR* 515-522

De Jong “Judicial stamp of approval for divorce and family mediation in South Africa”
2005 *THRHR* 95

Tydskrif vir Hedendaagse Romeins-Hollandse Reg

De Jong “Opportunities for mediation in the new Children’s Act 38 of 2005” 2008
THRHR 630

Davis G Mediation in Divorce: A theoretical perspective *Journal of Social Welfare
Law* 1983 131-140

Edwards L “Comments on the Miller Commission report: A California Perspective”
Pace Law Review 627 -676

Emery RE, Sbarra D & Grover T “Divorce mediation: Research and reflections.”
2005 *Family Court Review* 22 – 37

Garner T “Child Custody Mediation: A proposed alternative to litigation” 1989
Journal of Dispute Resolution 139 – 155

Glasser N “*Taking children’s rights seriously*” 2002 *De Jure* 223-235

Johnston JR “Building multi-disciplinary professional partnerships with the court on
behalf of high conflict divorcing families and their children: Who needs what kind of
help?” *University of Arkansas at Little Rock Law Review* 453-479

Kelly JB “Family mediation research: Is there empirical support for the field?” 2004
Conflict Resolution Quarterly 3-35

McManus M and Silverstein B “Brief History of Alternative Dispute Resolution in the
United States” *Cadmus journal* 100 -105

Macnab DS and Mowatt JG “Mediation and arbitration as alternative procedures in
maintenance and custody disputes in the event of divorce” 1986 *De Jure* 313-324

Milne A "Custody of Children in the divorce process: A family self determination model." 1978 *Conciliation Courts Review* 16, 1-10

Moloney L *et al* "The Family Relationship Centre Legal Assistance Services Partnerships Program: Evolution and evaluation" 2011 *Journal of Family Studies* 258-277

Moloney L, Weston R and Hayes A "Key social issues in the development of Australian family law: Research and its impact on policy and practice" 2013 *Journal of Family Studies* 110-138

Moloney L "From Helping Court to Community-based Services: The 30 Year Evolution of Australia's Family Relationship Centres" 2013 *Family Court Review*

Murphy JC and Rubenstein "Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens" 2005 *Family Law Quarterly* 53-58

Noone M *Essential Legal Skills Mediation* (Cavendish Publishing Limited 1996)

Parkinson L *Family Mediation* (Sweet & Maxwell London 1997)

Parkinson P "The Idea of Family Relationship Centres in Australia" 2013 *Family Court Review* 196-213

Paterson TJM Eckard's Principles of Civil Procedure in the Magistrate's Court (Juta Claremont 2009)

Peté S *et al Civil Procedure A Practical Guide* 2nd ed (Oxford University Press Southern Africa 2011)

Pretorius P *Dispute Resolution* (Juta Law Lansdowne 1993)

Relis T *Perceptions in Litigation and Mediation* (Cambridge University Press 2009)
165 – 181

Roberts M *Mediation in Family Disputes* (Wildwood House Aldershot 1998)
Schepard A I *Children, courts and custody: Interdisciplinary models for divorcing families* (New York: Cambridge University Press 2004)

Sourdin T “ADR in the Australian court and tribunal system” 2003 *ADR Bulletin* 1-4

Schneider C Mediation in the Children’s Act 38 of 2005, and mediation in family law in Sloth-Nielsen J and du Toit Z (eds) *Trials & Tribulations, Trends & Triumphs* (Juta Cape Town 2008)

Schultz H *A Legal Discussion of the Development of Family Law Mediation in South African Law, with Comparisons drawn mainly with the Australian Family Law System* (LLM-dissertation University of Kwazulu-Natal 2011)

Stitt AJ *Mediation: A practical guide* (Cavendish Publishing Limited 2004)

Sukhraj-Ely P The development of family/divorce mediation in South Africa in Sloth-Nielsen J and du Toit Z (eds) *Trials & Tribulations, Trends & Triumphs* (Juta Cape Town 2008)

Tondo C.A, Coronel R & Drucker B 2001 Mediation trends: A survey of the states
Family Court Review 431-435

Trollip AT *Alternative Dispute Resolution* (Butterworths Durban 1991)

Van der Berg BC “Court –annexed mediation: Should it be embraced by the legal profession?” 2015 *De Rebus* 25 Van Schalkwyk L and Louw AS *General Principles of the Family Law* 4th ed (LN van Schalkwyk 2011)

Welsh “The thinning Vision of self-determination in court connected mediation: The inevitable price of institutionalization?” 2001 *Harvard Negotiation Law Review* 1-96

Welsh NA “Reconciling self-determination, coercion and settlement in court connected mediation” in J Folberg, AL Milne & P Salem (Eds) *Divorce mediation: Models, techniques and applications* (New York Guilford 2004) 420-443

Wessels C and Steyn S “Assessment of parental responsibilities and rights: care contact and guardianship” in Roos V, Scholtz JG and Wessels C (eds) *Introduction to Forensic Psychology* (Verbum Potchefstroom 2015) 155-181

Case Law

South Africa

MB v NB 2010 (3) SA 220 (GSJ)

PD v MD 2013 (1) SA 366 (ECP) C

S v J (695/10) 2010 ZASCA 139

Townsend-Turner v Morrow (524/2003, 6055/2003) [2003] ZAWCHC 53

Van den Berg v Le Roux [2003] 3 All SA 599 (NC)

P v P 2007 (5) SA 94 (SCA)

Van Vuuren v Van Vuuren 1993 (1) SA 163 (T)

Whitehead v Whitehead 1993 3 SA 72 (SEC)

Cheever & Barrie [2012] FMCAfam 869

Independent Children’s Lawyer & SS and Anor [2009] FamCA 519

Paine & Seaford [2013] FCCA 854

Ex parte Critchfield 1999 3 SA 132 (W)

Legislation and government publications

Voluntary Court-Annexed Mediation Rules of the Magistrates' Courts

Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court

South African Law Commission *Alternative Dispute Resolution* (Discussion doc 8 Project 94 1997) 22-23

ALRC 73 For the sake of the kids – Complex contact cases and the Family Court

Rules of Civil Procedure R.R.O 1990 Regulation 194

Family Law Rules Ontario Regulation 114/99

Children's Act 38 of 2005

Mediation in Certain Divorce Matters Act 24 of 1987

Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991

Conducting Your Case: Family Law and Child Support Notice to Litigants and Practitioners

Family Law Act 53 of 1975

Family Law Reform Act 167 of 1995

Family Law Rules 2004

Family Law Amendment (Shared Parental Responsibility) Bill 2005 Explanatory Memorandum – Schedule 4

Operational Framework for Family Relationship Centres September 2006

Magistrates' Court Act 32 of 1944

Magistrates' Courts Amendment Act 120 of 1993 (section 54)

Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa (rule 25)

Rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa (rule 37)

Family Law Rules 2004

Federal Circuit Court Rules 2001 – Reg 15.02, 27.01

2015 California Rules of Court.

Conducting Your Case: Family Law and Child Support Notice to Litigants and Practitioners

Family Law Amendment (Shared Parental Responsibility) Bill 2005 Explanatory Memorandum – Schedule 4

Internet resources

Unknown 2012 www.justice.alberta.ca.

Unknown <https://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.php> (date of use 30 November 2015)

Anon 2008 <http://federalcircuitcourt.gov.au>

Anonymous Dispute Resolution in Family Law Proceedings

<http://federalcircuitcourt.gov.au> [date of use 30 September 2013]