

An acceptable, applicable and accessible family-law system for South Africa - some suggestions concerning a family court and family mediation

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1 *Problems with the current family-law system*

1.1 The adversarial nature of our divorce process

It is common knowledge that divorce or family breakdown is not only a legal problem, but also a social problem where many nonlegal issues are encountered.¹ Because many family-law lawyers are often caught in the trap of viewing divorce solely as a legal event and of simply ignoring all these nonlegal issues,² divorce has become a critical problem over the years. 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 important, intimate, emotional and psychological aspects of divorce.³ It has actually become clear that the adversarial system, in which divorcing parties are pitted against each other throughout the entire divorce process, tends to encourage and exacerbate a sense of bitterness and irreconcilability between divorcing parties.⁴ In these circumstances one can hardly speak of reaching a satisfactory settlement agreement that can accommodate

¹ McEwen, Mather & Maiman "Lawyers, mediation and the management of divorce practice" 1994 *Law and Society Review* 169.

² Lind "The changing face of divorce (1): background" 1989 *Businessman's Law* 152; Grobler "The Mediation in Certain Divorce Matters Act, 1987" 1990 *Consultus* 133.

³ See for example the comments of Smith J in *G v G* 2003 (5) SA 396 (Z) at 412A-D.

⁴ Mowatt "Are we ready to mediate?" 1988 *SALJ* 316; Goldberg "Family Courts in South Africa and the implication for divorce mediation" 1995 *THRHR* 277.

changing circumstances after divorce - and in the process, everyone is prejudiced: the divorcing parties and their children are emotionally shattered and the state ends up with ongoing family problems which may well require intervention by social welfare institutions sooner or later.

Due to human nature it is unlikely that the number of families breaking up will ever decrease.⁵ It has therefore become compelling to explore ways in which the numerous problems arising at and resulting from divorce or family breakdown can be reduced or ameliorated. In this regard a variety of alternative dispute resolution methods have been developed, of which mediation in particular is in great demand at divorce or family breakdown.⁶ It was accordingly recommended in both reports of the Hoexter Commission that a family court with a social component should be introduced in South Africa to offer support and mediation services.⁷ Furthermore, the Magistrates' Courts Amendment Act 120 of 1993 which was published on 20 July 1993 provides for the establishment of a family court at lower-court level. Certain family-court pilot projects have already been launched in terms of this Amendment Act in Gauteng, Cape Town, Durban, Port-Elizabeth and Lebowakgoma,⁸ but in spite of all the song and dance about a family court, South Africa still does not have one.

⁵ Schäfer *Family Courts in SA* (PhD thesis University of Natal 1981) 4; Burman & McLennan "Providing for children? The Family Advocate and the legal profession" 1996 *Acta Juridica* 81.

⁶ Van Zyl *Divorce mediation and the best interests of the child* (1997) 137; Scott-MacNab & Mowatt "Mediation and arbitration as alternative procedures in maintenance and custody disputes in the event of divorce" 1986 *De Jure* 314-320; Cohen "The many faces of arbitration: why not use it for property disputes in divorce?" 1993 *De Rebus* 642; Altobelli "Mediation: primary dispute resolution 1996: mandatory dispute resolution in 2000?" 1997 *Australian Journal of Family Law* 67.

⁷ *Commission of inquiry into the structure and functioning of the courts* (fifth and final report RP78/1983) vol III part 7; *Commission of inquiry into the rationalisation of the provincial and local divisions of the Supreme Court* (third and final report RP200/1997) vol I part 2.

⁸ Burman, Dingle & Glasser "The new Family Court in action: an initial assessment" 2000 *SALJ* 114; Glasser "Can the Family Advocate adequately safeguard our children's best interests?" 2002 *THRHR* 84.

Although there is talk of mediation being offered by some private mediators in South Africa and by various community-based organisations and institutions, it appears that these mediation services are either under-utilised or seriously hampered by a lack of funds and human resources.⁹ It also seems that mediation services in the private sector and at community level are totally unregulated and presently not incorporated into the South African family-law system. At present, only the limited and small-scale mediation services offered by the office of the family advocate¹⁰ are regarded as being part of the divorce process and it is clear that there remains very little talk of mediation in South Africa, whether on public, private or community level.

1.2 Cultural concerns

A further problem with the present divorce system in South Africa concerns cultural issues. For more or less the entire twentieth century, South Africa had a family-law system based exclusively on Western values and principles. Only civil marriages were recognised and customary marriages of blacks, marriages concluded in terms of certain religious practices and other cohabitation relationships fell outside the ambit of family law. Although the Recognition of Customary Marriages Act 120 of 1998 now gives full legal validity to the customary marriages of blacks, religious marriages and other cohabitation relationships are still not fully recognised by South African family law. It seems therefore that the judicial system does not really reflect or relate to the cultural diversity of South Africa's population.

Furthermore, it appears that the formalism of the adversarial family-law system is so foreign to people with Afrocentric backgrounds that, despite the provisions of the Recognition of Customary Marriages Act, they still turn to traditional, informal dispute

⁹ Van der Merwe "Overview of the South African experience" 1995 (Apr) *Community Mediation Update* 3.

¹⁰ In terms of s 4 of the Mediation in Certain Divorce Matters Act 24 of 1987.

resolution procedures at community level in the case of family breakdown rather than relying on the formal family-law system.¹¹ These dispute resolution procedures are, however, not recognised by the South African family-law system and the question arises whether it would not be better to incorporate them into the South African family-law system. It should not be forgotten that people who grew up in an Afrocentric cultural environment form the majority of the South African population today.

Besides the fact that the strong formalism and Western roots of the family-law system are unacceptable and inapplicable to the indigenous section of the South African population, it also appears that their socio-economic and political circumstances put the family-law system out of their reach. Apartheid not only greatly contributed to the impoverishment of blacks, but also led to the destruction of traditional, indigenous family life.¹² It is, therefore, an unfortunate fact that today the average South African simply cannot afford to make use of the official family-law system, or would not choose to do so.

The legitimacy of a family-law system which is unacceptable, inapplicable and inaccessible to the majority of the population must be seriously questioned. Thus, in South Africa, creative ways must be found to make the family-law system acceptable, applicable and accessible to a broader range of cultural groups.

2 *Possible solutions to the problems in South Africa*

¹¹ SA Law Commission *Alternative Dispute Resolution* (Discussion doc 8 Project 94 1997) 22-23.

¹² Daniels "Reshaping a vision of family mediation" 1995 (Oct) *SAAM News* 1-2; Burman & McLennan (n 5) 81.

Possible solutions to the aforementioned problems with the South African family-law system are in my opinion the establishment of a family court and, of great importance, the institution of mandatory divorce and family mediation. As it is my suggestion that the office of the family advocate should be responsible for organising and regulating the mandatory mediation services in South Africa, the activities of this office should also be extended substantially.

2.1 The establishment of a family court

2.1.1 General

In concurrence with the recommendations made in both of the reports of the Hoexter Commission,¹³ I would like to suggest that a family court be instituted in South Africa as soon as possible. Divorcing parties are demanding that all questions on divorce, including nonlegal issues, should be settled in a more inquisitorial and less formal forum in which they have a greater say in the decision-making process.¹⁴

In both Australia and New Zealand the introduction of no-fault divorce was accompanied by the establishment of family courts with social components where support and mediation services are rendered.¹⁵ In both of these countries, the emphasis in the family courts is on mediation rather than settlement by the courts. Parties to a divorce are therefore actively encouraged to solve their problems with the help of mediators or counsellors before they turn to the courts for a solution.

¹³ See n 7.

¹⁴ Vivier “Black divorce courts to be de-racialised to form Family Courts” 1997 *De Rebus* 144 also points out that “[f]amily disputes had to be removed from the arena of ordinary courts as these disputes needed to be resolved in a different way”.

¹⁵ See ss 21 and 48 of the Family Law Act 1975 (Australia); and the Family Courts Act 1980 and s 39 of the Family Proceedings Act 1980 (New Zealand).

In my view, the Hoexter Commission quite correctly recommended in the *1997 Hoexter Report* that the South African family court should be modelled reasonably closely on the Australian and New Zealand family courts.¹⁶ Therefore, the South African family court should have a social component which offers support and mediation services as a first option. Like the Australian¹⁷ and New Zealand¹⁸ family courts, the South African family court should also have comprehensive jurisdiction over all marriage-related matters and family-law issues. The family court should definitely not be just another forum for the settlement of divorce cases as seems to be the case with the family court envisaged by the Magistrates' Courts Amendment Act. A true family court must be created to deal with all family-law issues, including divorces, maintenance, adoptions, family violence, children's court hearings, mental health, guardianship and curatorship, as well as all disputes arising out of cohabitation and other family relationships which have not been recognised by the family-law system up to now. This will prevent family members from being forced to go from one court to another with the same family problem.

2.1.2 Level on which the family court should function

As far as the level of the court is concerned, it is obvious to me that the family court ought to be a lower court. Although the *1997 Hoexter Report* recommended that the South African family court should be a higher court,¹⁹ the earlier report of the Hoexter Commission²⁰ as well as the Magistrates' Courts Amendment Act²¹ contain clear

¹⁶ (n 7) vol II part 2 par 1.5.

¹⁷ S 31 of the Family Law Act 1975.

¹⁸ S 11 of the Family Courts Act 1980.

¹⁹ (n 7) vol I part 2 par 8.8.

²⁰ (n 7) vol III part 7 par 9.1.

²¹ S 2.

indications that the family court should be instituted at lower-court level.

Furthermore, the open black divorce courts, which are lower courts in terms of the Administration Amendment Act 9 of 1929, were used as the basis for the family-court pilot projects which were launched in 1998 in South Africa. Burman, Dingle and Glasser,²² who made an in-depth study of the activities of the family-court pilot project in Cape Town, show, for example, that there is great demand amongst all race groups and people from all socio-economic backgrounds for this family court in Cape Town. It seems, therefore, that there is a real need for a family court at the level of a lower court.

The experience of foreign jurisdictions also indicates that the family court must be a lower court. The New Zealand family court has operated effectively for more than 20 years at lower-court level.²³ Although the Australian family court is a higher court,²⁴ a federal magistrate's court known as the "federal magistrates service" came into operation in July 2000 to hear a variety of disputes that had previously come before the Australian family court or other federal courts.²⁵ At present, most of the work of the federal magistrates service involves family-law matters such as divorce, custody of children, maintenance and property disputes,²⁶ and it looks as if the federal magistrates service has really developed into a type of family court at lower-court level. These courts are apparently very popular with the public, which seems to indicate that there is a serious need for a family court at the level of a lower court in Australia, even where there is in fact a family court at higher-court level.

²² (n 8) 121-124.

²³ S 4 of the Family Courts Act 1980.

²⁴ S 21 of the Family Law Act 1975.

²⁵ The Federal Magistrates Act 1999.

²⁶ Dept of the Attorney-General *Family Law Reforms* (<http://www.ag.gov.au>) 1.

A family court at lower-court level will also be more accessible to the public. In a country like South Africa where the accessibility of the courts and the family-law system as a whole is already under suspicion, any way in which to make the courts and the law more accessible should most definitely be used.

2.1.3 Certain reservations

In both Australia and New Zealand the public is somewhat dissatisfied with the current family courts.²⁷ Despite the fact that in both of these countries the family courts have social components which offer support and mediation services, there is still hopelessly too much litigation and too little alternative dispute resolution and, in particular, mediation taking place.

It is also very important to take into account that the establishment of a proper family-court system, with both a judicial and a social component, will probably prove to be very expensive - perhaps too expensive to become a reality in South Africa in the near future.²⁸

Thus, the establishment of a family court with a social component as such must not be regarded as the most important and only solution to the present problems in the South African family-law system. It is clear that something more or something other than a mere family court with a social component needs to be created. Therefore, I will argue below that the legislator should make mediation compulsory in the case of

²⁷ Bagshaw "Mediation of family law disputes in Australia" 1997 *Australian Dispute Resolution Journal* 182; Dearlove "Court-ordered ADR: sanctions for the recalcitrant lawyer and party" 2000 *Australian Dispute Resolution Journal* 12 and New Zealand Law Commission *Family Court Dispute Resolution* (2002) 5-6, 54.

²⁸ Van Heerden & Clark "Parenthood in South African law: equality and independence? Developments in the law relating to guardianship" 1995 *SALJ* 150.

all divorces and family disputes whether a family court is instituted in South Africa or not.

2.2 The institution of mandatory divorce and family mediation

2.2.1 Reasons why mediation should be mandatory

As divorce and family mediation offers overwhelming advantages to divorcing spouses, the children affected by divorce and the judicial system in general,²⁹ it is desirable that anyone who has to experience the pain of family breakdown should benefit from the advantages of mediation.

Various legal writers also support the notion of mandatory mediation. The Australian writer Klug³⁰ argues that because the court process is an expensive use of public resources, it is acceptable to require parties to make some effort to settle their cases in a cost-efficient way before being entitled to take up the court's time. The South African writer Goldberg³¹ says that "... if the benefits of mediation outweigh the disadvantages, divorcing spouses should be compelled into mediation".

In jurisdictions where mediation services are available to the public on a voluntary basis, it appears that these services are completely under-utilised.³² In Australia, for example, little mediation takes place despite the so-called "primary dispute

²⁹ De Jong "Judicial stamp of approval for divorce and family mediation in South Africa" 2005 *THRHR* 95 96-99.

³⁰ "ADR: trends and directions in commercial disputes" 1997 *Australian Dispute Resolution Journal* 174.

³¹ (n 4) 284.

³² McEwen, Rogers & Maiman "Bring in the lawyers: challenging the dominant approaches to ensuring fairness in divorce mediation" 1995 *Minnesota Law Review* 1350.

resolution” provisions of the Family Law Act 1975,³³ which strongly recommend mediation and other alternative dispute resolution methods and place a duty on the court and legal practitioners to advise parties about these alternative dispute resolution services. Therefore, where mediation is available on a voluntary basis, far too many people still miss out on its benefits.

Consequently, it is recommended that mediation should quite simply be made compulsory by legislation in the case of all divorces and family disputes so that the parties, their children, the community and the judicial system may all benefit from the overwhelming advantages of mediation. In this way the very difficult process of family breakdown, which so many people unfortunately experience, will be made somewhat easier. Although the legal process can in practice do little to avoid the effects which divorce may have on the children of a marriage, this sad and traumatic situation is not exacerbated and exploited by divorce mediation as presently happens in the case of the adversarial system of litigation. In the mediation process matters are put into perspective and emotions are soothed so that there can be meaningful negotiation between the parties.

Legislation that makes mediation compulsory must be seen in the same light as legislation that obliges motorists and passengers to wear seatbelts or that forces motor-bike riders to wear crash helmets.³⁴ The objective of the legislation is to promote and protect the individual’s constitutional rights to dignity, life and to freedom and security of the person³⁵ rather than to infringe on these rights. The *ratio*

³³ Ss 14 to 19Q (Part III).

³⁴ Regs 213 and 207 issued in terms of the National Road Traffic Act 93 of 1996.

³⁵ Ss 10, 11 and 12 of the Constitution of the Republic of South Africa 108 of 1996.

for legislation making divorce and family mediation compulsory is therefore that, as a rule, it is good for society.³⁶

In spite of the fact that some of the supporters of mediation believe that mediation should always be voluntary because it is a consensual process,³⁷ Goldberg³⁸ indicates that even unco-operative couples, with strained relationships, complex disputes and severe financial pressures are able to mediate and come to an agreement. Even parties who are initially unwilling to submit their dispute to mediation may therefore benefit from a mandatory mediation model.

Hence, it is not surprising that many of the states in the United States of America have already adopted legislation allowing, or even compelling courts to refer divorcing parties to mediation before divorce claims and related applications may be brought before them.³⁹

In a country like South Africa, the statutory establishment of mandatory mediation in the case of divorce and all other family-law matters will definitely also contribute to making the law more acceptable, applicable and accessible to ordinary people. Since the mediation process is adaptable to different cultural value systems and/or religious convictions, and since specific customs, practices and perspectives can easily be built into the mediation process as well as into the agreements parties may

³⁶ Spencer “Mandatory mediation and neutral evaluation: a reality in New South Wales” 2000 *Australasian Dispute Resolution Journal* 250.

³⁷ Mowatt (n 4) 321; Scott-MacNab & Mowatt “Family mediation: South Africa’s awakening interest” 1987 *De Jure* 47-49; Van Zyl (n 6) 142; Rogers & Palmer “A speaking analysis of ADR legislation for the divorce neutral” 2000 *St Mary’s Law Journal* 881.

³⁸ (n 4) 287.

³⁹ McEwen, Rogers & Maiman (n 32) 1396-1403; Goldberg (n 4) 284 and “Family mediation is alive and well in the United States of America: a survey of recent trends and developments” 1996 *TSAR* 369-370; Rogers & Palmer (n 37) 886.

reach,⁴⁰ mediation that is integrated into the official family-law process by legislation will give people from all cultural backgrounds a meaningful way in which to participate in the legal process. As I already indicated earlier, any means of making the courts and the law more accessible to the people must most definitely be put to the test.

Further, it is very important to note that mediation has always formed an integral part of the traditions of the indigenous population groups of South Africa.⁴¹ A family-law system in which mediation is made compulsory by law should therefore be welcomed by the majority of the South African population.

Lastly, it would appear that in South Africa the idea of compulsory mediation is not a new one. In terms of section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 divorcing parties can be forced first to submit to an investigation by the office of the family advocate into matters concerning the custody of, access to and guardianship of children, before being granted a divorce order by the court. Since the Mediation in Certain Divorce Matters Act is also applicable to the dissolution of customary black marriages in terms of section 8(3) of the Recognition of Customary Marriages Act, a large number of the South African population should already have come across the idea of compulsory mediation upon divorce.

2.2.2 The form and the timing of mandatory mediation

⁴⁰ Moodley “Mediation: the increasing necessity of incorporating cultural values and systems of empowerment” 1994 *CILSA* 46-38; Goldberg “Practical and ethical concerns in alternative dispute resolution in general and family and divorce mediation in particular” 1998 *TSAR* 754-758; Wan “Mediating family property disputes in New Zealand” 1999 *Dispute Resolution Journal* 76-77.

⁴¹ SA Law Commission (n 11) 5-6; Mowatt (n 4) 318.

In most of the countries in which mediation is legislatively mandated, the mediation is usually limited or restricted to certain issues, like in the case of the Mediation in Certain Divorce Matters Act. However, it is suggested that the reformed compulsory mediation model envisaged for South Africa should provide for comprehensive mediation. It should not concentrate solely on certain issues but offer a holistic process of negotiation covering all aspects related to divorce including the custody of, access to and guardianship of children, the maintenance of children and spouses, the division of assets, housing and costs.⁴²

It is generally accepted that the earlier mediation takes place, the more favourable the outcome for the parties. Goldberg⁴³ refers to, for example, the findings of a study on the social component of the Australian family court in which it was concluded that "... early intervention is the key to success ...". Hence, the sooner the parties are referred for mediation, the greater the chances that they themselves will come to a mutually acceptable solution to their problems.

In South Africa, therefore, comprehensive mediation must be offered as the first means of solving all divorce-related and other family disputes. Mediation should consequently take place before the parties end up in the relatively unpleasant, adversarial atmosphere of the court.⁴⁴

2.2.3 Providers of mandatory mediation services in South Africa

a. The role of the state

⁴² See Burman & Rudolph "Repression by mediation: mediation and divorce in South Africa" 1990 *SALJ* 272, 276-277; Clark "No holy cow - some caveats on family mediation" 1993 *THRHR* 460; Goldberg (n 4) 287; Burman, Dingle & Glasser (n 8) 123.

⁴³ (n 4) 284.

⁴⁴ See n 64 below for the circumstances in which parties should, however, be referred directly to litigation in the courts.

Where mediation is made compulsory through legislation, it is obviously the state's responsibility to ensure country-wide, high-quality mediation services to all its citizens. There are, however, different opinions on the question whether the state itself should offer the mediation services.

On the one hand, there are those who believe that mandatory mediation should be offered and paid for by the state.⁴⁵ They are therefore of the opinion that public mediation services should be attached to the formal courts. The supporters of public mediation or court-annexed mediation argue that people will feel more secure with mediation offered by state institutions since these institutions form part of the state machinery that includes the security services. On the other hand, there are those who feel that mediation should not be offered by the state or the courts themselves since people may be unnecessarily intimidated and inhibited by the power that mediators who are attached to the court may appear to have.⁴⁶ It is said that

... where officials attached to the court "mediate" it is going to be difficult, if not impossible, for them to escape the mantle of authority granted to them by the average member of society. Control of process and outcome of the dispute will be tacitly vested in these officials by the parties themselves. It is therefore apparent that the true concept of mediation in the context of divorce cannot function in a court environment, even where there exists a conciliation component.⁴⁷

⁴⁵ Spencer (n 36) 245.

⁴⁶ Mowatt "The Family Court and divorce mediation" 1991 *TSAR* 297; Goldberg (n 4) 281; Spencer (n 36) 248.

⁴⁷ Mowatt (n 46) 297.

Goldberg⁴⁸ also refers to the following disadvantages of public mediation:

... pressure to reach quick settlement ...; pressure on the couple because of the perceived authority of the district judge, thus influencing the outcome; conflict of interest between the court welfare officer's role to report to court on the best interests of children, and their role in facilitating the parties' agreement.

In South Africa, where government initiatives relating to divorce mediation are regarded with suspicion by most of the population because for so many years these initiatives were focussed on the Western and mostly white section of the population, I believe the second viewpoint should carry the day. In a reformed family-law system, mediation should therefore not be offered by state institutions such as the office of the family advocate.

South Africa is often classified as a third-world country⁴⁹ and, as such, the state in any case does not have the financial capacity to offer large-scale and country-wide mediation services. In fact, there are not even enough funds available to enable the limited and small-scale mediation services offered through the office of the family advocate to function properly.⁵⁰

It is therefore my opinion that the state should rather contract mediation services out to existing community-based and private mediation organisations or institutions. If these community-based and private mediation organisations or institutions meet

⁴⁸ (n 4) 281.

⁴⁹ See Burman & Rudolph (n 42) 274.

⁵⁰ *1997 Hoexter Report* (n 7) vol I part 2 par 4; Van Zyl "The Family Advocate: 10 years later" 2000 *Obiter* 388; Glasser (n 8) 84-86.

certain requirements,⁵¹ the state should conclude accreditation contracts with them in terms of which they will offer the public the newly instituted mandatory mediation services. The state should, however, exercise control over these services through certain new and extended operations of the office of the family advocate, so that family and divorce mediation remains part of the legal structure and the quality of the services is continually evaluated and monitored.

Although the state is therefore expected to arrange for and regulate family and divorce mediation services, it should not be expected to offer these services itself.

b. Community-based organisations or institutions as service providers

Because community-based organisations or institutions such as street committees, community courts, community-based advice centres and traditional leaders today still play the most important role in resolving the family disputes of the majority of the South African population,⁵² there is a serious need to formally recognise the informal dispute resolution procedures offered by these organisations or institutions. The South African Law Commission⁵³ furthermore indicates that there is also a need for “... a move away from what is termed a Eurocentric approach to the law and a need to Africanise the approach with regard to mediation”.

The way to meet both these needs is to build the mediation services offered by existing and respected community-based organisations or institutions into the reformed, compulsory mediation model for South Africa. This will broaden the scope

⁵¹ Ie the mediation services must be of the highest standard and comply with certain process and practice standards which have to be developed; the services must be representative of all ethnic and cultural groups, all religions, all age groups and all socio-economic levels.

⁵² Van der Merwe (n 9) 3; SA Law Commission (n 11) 6, 22-23.

⁵³ (n 11) 23.

of the formal legal system⁵⁴ and address one of the most important problems with the present family-law system, namely the inaccessibility of the law. By involving existing and respected community-based organisations or institutions in the formal legal process, the state will help to nurture a sense of law and justice in the majority of South Africans and systematically restore access to, and a trust in, the legal system.⁵⁵

Another advantage of integrating community-based mediation into the formal legal process is that this form of mediation will then be formally organised and regulated by the state. Faris⁵⁶ makes the following important observation in this regard:

If given a public purpose, community justice should not be regarded as a second rate form of justice. Instead, the private application of community dispute resolution that remains unassisted by the State holds greater potential for rendering an inferior service. Once the structures of community dispute resolution have been brought into a co-ordinate or co-operative relationship with the court system, funding and regulation by the State should ensure that necessary standards are maintained.

In this manner certain built-in minimum standards of human rights will be provided to all South Africans who are involved in the divorce process. This benefit will be particularly meaningful to women and children in traditional indigenous-law communities.⁵⁷ It will no longer be possible to marginalise them completely from the legal process, as happens now.

⁵⁴ Faris “ADR, community dispute resolution and the court system” 1996 (Apr) *Community Mediation Update* 9.

⁵⁵ Van der Merwe (n 9) 3.

⁵⁶ (n 54) 9.

⁵⁷ See Webster “A gender perspective on the role and status of tribal courts” 1996 (Apr) *Community Mediation Update* 16-17.

The integration of mediation services at community level into the formal family-law system is also a relatively cheap option for the state since these services are, to a large extent, already available countrywide.⁵⁸ However, at the moment, most of the mediation services at community level are hampered by a lack of funds and human resources. The state will therefore have to provide funding in some form or another to the community-based organisations or institutions with which it has concluded accreditation contracts. In addition, an attempt can also be made to obtain foreign funding for the extension and upgrading of these organisations and institutions as part of community development projects.

As regards human resources, it is my belief that the state should seriously consider the suggestion that, like medical graduates, newly qualified law graduates should do community service of at least a year.⁵⁹ These law graduates could then work in the community-based organisations or institutions accredited by the state. Service at these community-based organisations and institutions for an uninterrupted period of a year should then surely qualify as approved community service in terms of section 1A(b) of the Attorneys' Act 53 of 1979, which will shorten the compulsory two-year period of articles of candidate attorneys by a year. A similar reduction in respect of other professional admission requirements should also be enacted.

c. Private mediators as service providers

As I mentioned above, mediation is also offered by some private mediators in South Africa.⁶⁰ The mediation services offered by these mediators are, however, not fully

⁵⁸ Lancaster & Nxumalo "Community courts: what role for justice centres?" 1996 (Apr) *Community Mediation Update* 14.

⁵⁹ *1997 Hoexter Report* (n 7) vol I part 2 par 9.15.

⁶⁰ Par 1.1.

utilised by the public. Nevertheless it does seem that those small-scale mediation services offered by private mediators deliver positive results in practice and that they make a unique contribution to the resolution of divorce-related problems.⁶¹ In the recent case of *Van den Berg v Le Roux*⁶² Judge-President Kgomo, in fact, ordered the parties to privately mediate all future disputes with regard to their 10-year-old daughter and said that “only subsequent to the conclusion of the mediation process could either party approach a competent court which has jurisdiction to decide the dispute”. In yet another recent case, *Townsend-Turner and another v Morrow*,⁶³ the full bench of the Cape Provincial Division of the High Court made a similar decision when confronted with an access dispute between the father of a 7-year-old boy and the boy’s maternal grandmother. The parties were ordered to attend mediation offered by private mediators of their own choice or those proposed by the office of the family advocate in an effort to resolve the issues of conflict between them including, of course, the issue of access.

It seems therefore to be a good idea to also incorporate these private mediation services into the reformed mandatory South African mediation model.

An important benefit of incorporating private mediation services into the formal legal process is that this form of mediation will then be organised and regulated by the state, and private mediators will be prevented from offering substandard services to the public. Furthermore, the integration of private mediation services into the formal family-law system offers the state a cheap option since the parties involved will be responsible for the costs of private mediation and the state will not have to provide any facilities or personnel for this kind of mediation.

⁶¹ Van der Merwe (n 10) 3; Bridge “Family mediation and the legal process: an unresolved dilemma” 1997 *New Zealand Universities Law Review* 240.

⁶² [2003] 3 All SA 599 (NC) at 614.

⁶³ [2004] 1 All SA 235 (C).

d. Certain reservations

Unless mediation is inappropriate,⁶⁴ all people faced with marital breakdown or other family problems must first be referred to an accredited mediation service. As a rule, people must be referred to private mediation for which they must pay themselves. However, if financial, cultural or other logistical considerations⁶⁵ justify it, parties may be referred to state-subsidised community mediation services. Such an approach acknowledges the principle that parties must accept responsibility for their own actions, and should also prevent unnecessary state expenditure.

The government must, however, be careful to prevent two competing systems - one for the rich and one for the poor - from developing. Therefore, although the new mandatory mediation model should provide for the use of both community-based and private mediation services, a holistic and comprehensive South African approach to mediation in a family-law context must be developed. In terms hereof, it is recommended that all South African mediators must be set simple and comprehensive process and practice standards and that the office of the family advocate should offer standardised training programmes to all mediators and monitor all mediation services in South Africa to ensure that mediation services of the highest standard are available countrywide to all. Hence, there should be no

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It is often held that mediation would be unsuitable in the following circumstances:

- where there is a tremendous power imbalance between the parties, which the mediator is be unable to redress;
- where there is a risk of child abuse;
- where there is the chance of serious family violence;
- where there are alcohol, drug or mental health problems;
- where large estates are at issue and the formal disclosure of documents is of cardinal importance; or
- where very complicated legal issues are involved.

⁶⁵

Such as distance or language barriers.

difference between the quality of community-based and private mediation in South Africa.

2.3 Extension of the activities of the office of the family advocate

In my view, the office of the family advocate which already has offices in several big cities in South Africa⁶⁶ and which is, in a sense, a pioneer in divorce mediation in South Africa, should carry out the important task of organising and regulating the mandatory mediation services in South Africa.⁶⁷ The office of the family advocate should therefore take responsibility for ensuring that proper, comprehensive community and private mediation services are available to everyone nationwide and that anyone who has family-law related problems is referred to the appropriate services.⁶⁸ In this regard the office of the family advocate should first identify sufficient and appropriate community-based and private mediation services with which the state can conclude accreditation contracts. As proposed above, the office of the family advocate should also be responsible for

- the standardisation of basic divorce and family mediation training programmes and annual continuing education for all accredited mediators,
- the development of certain standards for the mediation process and practice to be met by all accredited mediators, and
- the continual evaluation and monitoring of the quality of all accredited mediation services.

⁶⁶ Offices have been opened at all the divisions of the High Court.

⁶⁷ The *1997 Hoexter Report* (n 7) vol I part 2 pars 3.5.1, 7.5.1, 8.4 and 8.4.6 also supports the idea of extending the operations of this office.

⁶⁸ Be it private or community-based mediation, marriage or family counselling or litigation in the courts.

In addition to these new activities, the office of the family advocate should still be responsible for undertaking investigations and making recommendations to the court in terms of section 4 of the Mediation in Certain Divorce Matters Act where, in the case of divorce or other family-law matters, the interests of children are at stake. It is well known that

... the Family Advocate is particularly well suited to perform the function of identifying and establishing what is in the best interests of children, having at his or her disposal a whole battery of auxiliary services from all walks of life, including family counsellors ... who are usually social workers, clinical psychologists, psychiatrists, educational authorities, ministers of religion and any number of other persons who may be cognisant of the physical and spiritual needs or problems of the children ...⁶⁹

It is very important that this expertise of the family advocate does not go to waste in a new compulsory mediation model in South Africa. Settlements reached in the mediation process which affect the interests of children must therefore still be referred to the family advocate for monitoring.⁷⁰ Where a case in which the interests of children are at stake is not settled in mediation or where mediation of the case would be inappropriate and proceedings must be instituted in court immediately,⁷¹ the relevant parties must still be required to fill in the prescribed form⁷² and file it with the registrar together with the summons or notice of motion. In terms of section 4 of the Mediation in Certain Divorce Matters Act the parties involved, the court, or the

⁶⁹ Van Heerden & Clark (n 28) 150.

⁷⁰ Reg 3(1) issued in terms of the Mediation in Certain Divorce Matters Act 24 of 1987.

⁷¹ See n 64 above.

⁷² This form, which is generally known as “Annexure A”, must indicate inter alia what the monthly gross income and financial obligations of the each party are, where the children presently live, in whose care they are during the day and which arrangements have been made or proposed concerning the custody of, or guardianship over or access to the children.

family advocate itself may thereupon request that an investigation into the best interests of any children involved be launched by the office of the family advocate. It is, however, submitted that the existing legal provisions should be broadened somewhat to provide that the office of the family advocate must institute an investigation and provide the court with a report and recommendations on what would be in the best interests of the children in the case of all divorces and family disputes that are not resolved by the parties themselves in the mediation process or that, according to the office of the family advocate or the court, have not been satisfactorily clarified in the mediation process.

In the case of such an investigation, it is proposed that the office of the family advocate should concentrate solely on monitoring and evaluation, and not on mediation, since in the mandatory mediation model mediation services would be offered by private mediators or community-based organisations or institutions. It is also suggested that the expert report provided by the office of the family advocate should then, as a rule, be the only expert report used in court as evidence on the best interests of the children so as to avoid the untenable situation in which the court is confronted with two completely differing expert reports on the best interests of children in divorce and other family disputes.

Since the present operations of the office of the family advocate are currently hampered by a lack of funds and human resources,⁷³ it is clear that state support and goodwill in the form of funding and human resources will be indispensable to the proposed new and extended activities of the office of the family advocate. In this respect, my earlier suggestion on instituting compulsory community service for all newly qualified law graduates and preferably also all newly qualified graduates from the social and behavioural sciences, is appropriate. The state could then use the

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See n 50 above.

millions of rands it saves, to provide for the new and extended operations of the office of the family advocate. This initiative should also solve the shortage in human resources. Furthermore, establishing a mandatory mediation model in South Africa, as such, should also save the state money by lightening the burden of the courts and limiting the time and money spent by the social welfare services on ongoing family problems.

3. *Conclusion*

From the above discussion it is clear that if a family court at lower-court level is established in South Africa and/or mandatory mediation by private or community mediation services is introduced, the present family-law system will most definitely become more acceptable, applicable and accessible to the average South African. However, it is by no means the intention to sidestep the intervention of the formal courts in divorce and other family disputes. Although parties in the mandatory mediation model are encouraged to solve divorce and other family problems out of court, they may in no way be denied the protection of the courts. All agreements reached in the mediation process must be submitted to the courts for final revision and approval. The courts should, however, not lightly or without sound reasons interfere with agreements reached in the mediation process. Only where it is clear that an agreement is not in the best interests of any children involved or where the interests of one of the parties are seriously affected by such an agreement, should the courts have the authority to rectify this agreement or recommend particular amendments to it. Further, if parties cannot succeed in resolving divorce or other family disputes in the mediation process, or if the disputes involved or the circumstances of the parties are such that divorce or family mediation is not an appropriate first option, it should still fall entirely to the courts to decide these cases.

In these instances⁷⁴ the courts should make their decision on the best solution to the problems at hand on the basis of the evidence of each party, but indeed also with the aid of the report and recommendations of the office of the family advocate in cases where the interests of children are involved.

To conclude, it is of cardinal importance that the emphasis in our family-law system should fall on mediation rather than court adjudication. The supremacy of the early resolution of divorce and family disputes through mediation must, quite simply, prevail.

OPSOMMING

'N AANVAARBARE, TOEPASLIKE EN TOEGANKLIKE FAMILIEREGSTELSEL VIR SUID-AFRIKA - VOORSTELLE AANGAANDE 'N GESINSHOF EN GESINSBEMIDDELING

Daar word dikwels opgemerk dat die adversatiewe stelsel van litigasie nie gepas is by egskedings en ander familieregtelike kwessies nie omrede dit die emosionele spanning en konflik wat gewoonlik met hierdie tipe kwessies gepaardgaan, vererger. Om hierdie rede is van owerheidsweë aanbeveel dat 'n gesinshof met 'n maatskaplike komponent waar bemiddelingsdienste aangebied word vir Suid-Afrika ingestel moet word. Weens finansiële beperkings het Suid-Afrika vandag nog nie 'n gesinshof nie. Die bemiddelingsdienste wat tans wel deur private bemiddelaars en verskeie gemeenskapsgebaseerde organisasies en instellings aangebied word, word egter óf onderbenut óf deur 'n gebrek aan fondse en menslike hulpbronne gekortwiek. Dit blyk verder dat die streng formalisme en die oorwegend Westerse waardes en beginsels van die adversatiewe familieregstelsel so vreemd vir mense uit Afrosentriese kulturele agtergronde is dat hulle hul by huweliksverbrokkeling en ander

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Which represent only a small percentage of all divorce and family matters.

gesinsgeskille eerder tot tradisionele informele dispuutbeslegtingsprosedures op gemeenskapsvlak wend as om hulle op die formele familieregstelsel te beroep. Die gevolge van hierdie probleme is dat die familieregstelsel vandag vir die grootste deel van die bevolking irrelevant, onaanvaarbaar en ontoeganklik is. Moontlike oplossings hiervoor is die oprigting van 'n gesinshof op laerhofvlak met omvattende jurisdiksie in alle familieregtelike kwessies, maar van groter belang, die instelling van verpligte egskeidings- en gesinsbemiddeling. Aangesien die voordele van bemiddeling oorweldigend is vir gades wat besig is om te skei, vir kinders wat deur egskeiding geraak word en vir die regspleging, is dit verkieslik dat almal wat deur die uiters moeilike proses van gesinsverbrokkeling gaan die voordele van bemiddeling moet inoos. Daar word gevolglik aan die hand gedoen dat die staat deur middel van sekere nuwe en uitgebreide werksaamhede van die kantoor van die gesinsadvokaat bestaande en gerespekteerde private en gemeenskapsgebaseerde bemiddelingsdienste moet akkrediteer om die nuut ingestelde verpligte bemiddelingsdienste aan die publiek te lewer. Aangesien private bemiddeling goeie resultate in die praktyk oplewer en 'n unieke bydrae tot die beslegting van probleme by en rondom egskeiding kan maak, en aangesien 'n groot deel van die bevolking hul in ieder geval met hulle familieregtelike kwessies tot bemiddeling op gemeenskapsvlak wend, sal verpligte egskeidings- en gesinsbemiddelingsdienste wat deur private en gemeenskapsbemiddelaars aangebied word die familieregstelsel meer aanvaarbaar, toepaslik en toeganklik maak. Ten einde veral gemeenskapsgebaseerde bemiddelingsdienste se probleme met befondsing en werkkrag die hoof te bied, behoort die instelling van gemeenskapsdiens vir alle pasgekwalfiseerde regsgegradueerdes asook alle pasgekwalfiseerde gegradueerdes uit die sosiale en gedragwetenskappe ernstig oorweeg te word. Dit is egter van kardinale belang dat alle geakkrediteerde bemiddelaars behoorlik opgelei moet word en dat die kantoor van die gesinsadvokaat sekere basiese standaarde vir die bemiddelingsproses en -praktyk moet ontwikkel om bemiddelingsdienste van hoogstaande gehalte te verseker. Hierbenewens moet die kantoor van die gesinsadvokaat steeds daarvoor verantwoordelik wees om ondersoek in te stel wanneer kinders se belange by egskeiding of ander familieregtelike

kwessies ter sprake kom. By sodanige ondersoek moet die kantoor van die gesinsadvokaat egter slegs op monitering en evaluering konsentreer, en nie op bemiddeling nie.