

SHARED CO-OPERATIVE PARENTING: ACHIEVABLE THROUGH POST DIVORCE FACILITATION?

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1. Essential differences between mediation and facilitation:

Facilitation:

- the facilitator is responsible for the quality of the decisions
- the facilitator enforces the process (e.g. may choose not to go into detail of the parties' past),
- limits the exchange between the parties,
- limits the scope of information and communication
- assess the facts

Mediation:

- the parties are responsible for the quality of the decisions
- the mediator encourages exchanges between the parties
- broadens the scope of information and communication
- helps the parties to assess the facts for themselves

2. First mention of facilitation in literature: 1855 (Lucy Stone & Henry Blackwell)

3. Terminology found in literature to describe roles similar to that of the facilitator: arbitrator, referee, Child custody special master

4. Does the facilitator subvert the authority of the Court? No, the parties can always go to Court to vary a ruling/directive issued by the facilitator.

5. Who can facilitate? Human service professionals, e.g. lawyers, psychologists, social workers. Facilitation clauses usually request a level of experience and

expertise. FAMAC is looking into training accredited mediators to become facilitators

6. Why appoint a post divorce facilitator?
 - Cheaper and quicker than litigation
 - Option of agreement between the parties
 - Supports the shared co-operative parenting model

7. Is facilitation likely to be more effective if the parties successfully mediated their divorce? Yes, parties are familiar with the process

8. Even better: pre-divorce education/counselling involving the following:
 - Emotional, legal, parental, spousal and economic aspects of divorce
 - Stages of loss and grief
 - Alternative dispute resolution mechanisms, e.g. mediation
 - Children's responses to divorce, based on a developmental psychology approach

9. Could the mediator and facilitator be the same person? Yes, the facilitator is familiar with the dynamics of the couple, but the parties can always choose their own facilitator.

10. The Children's Act, mediation and post divorce facilitation have assisted divorced parents in South Africa to move from parallel → shared → shared co-operative parenting.

11. Shared co-operative parenting is assumed to best meet the children's needs, parental responsibilities and the preservation of meaningful, active and ongoing parent-child relationships.

12. Contra-indications for the shared co-operative parenting model:

- Child abuse, neglect or exploitation
- Physical or psychological incapacity of a parent
- Chronic alcoholism or drug addiction
- A stated disinterest in caring for the children

13. Good predictors of outcome success for the shared co-operative parenting model:

- Commitment to parenting
- Reasonable communication skills
- Flexibility (following the “spirit” of the Parent Plan rather than the “letter” of the agreement)
- Accepting that shared parenting arrangements will change over time due to children’s changing developmental needs and parents’ own changing circumstances. Such changes are not indicative of failure of the original plan, rather an indication of growth and evolution of a living agreement over time.
- The ability to separate previous marital conflicts from matters concerning the children
- Good faith with regard to agreements made

14. **Post divorce facilitation clauses:** Zenobia du Toit presented a basic *pro forma* facilitation clause last year at a Cape Law Society meeting. Many variations have developed from this, some have been useful, others not. I would like to present a comprehensive general facilitation clause distilled from facilitations where I have been appointed as facilitator. It must be regarded as a work in progress. A specific facilitation may require specific paragraphs unique to the parties’ concerned circumstances.

Appointment of facilitator

- i. In order to facilitate co-parenting and joint decision making, the parents shall appoint a facilitator (or: name the facilitator) who shall be a qualified psychologist or family lawyer with at least five (or more?) years experience as well as an accredited mediator with at least five (or more?) years experience, conversant with working with children and families in the context of disputed care and contact matters (referred to herein as “the facilitator”). If the parents fail to reach agreement regarding the appointment of a facilitator, he/she shall be appointed by the Chairman for the time being of FAMAC. The facilitator shall continue to act until he/she resigns, or both parents agree in writing that his/her appointment shall be terminated, or his/her appointment is terminated by an order of the High Court. If the facilitator’s appointment is terminated, he/she shall be substituted by another facilitator appointed by FAMAC in consultation with the parents and the provisions in regard to his/her appointment shall apply *mutatis mutandis* as set out herein. Neither party may initiate Court proceedings for the removal of the facilitator or to bring to the Court’s attention any grievances regarding the performance or actions of the facilitator without first meeting and conferring with the facilitator in an effort to resolve the grievance and/or asking the facilitator to resign.
- ii. The facilitator is authorized to:
 - a. Facilitate joint decisions in respect of the child/children
 - b. Regulate, facilitate and review the residence and contact arrangements in respect of the child/children
 - c. Make recommendations in respect of any issue concerning the welfare and/or affecting the best interest of the child/children, including maintenance
 - d. Issue directives binding on the parties on any issue concerning the child/children’s welfare and/or affecting his/their best interest (subject to a Court of competent

- jurisdiction holding that such a directive is not in the child/children's best interests).
- e. Resolve conflicts relating to the clarification, implementation and adaptation of the Parenting Plan
 - f. Require the parties and/or the child/children to participate in psychological evaluations or assessments
- iii. In so far as the facilitator has the power to make decisions in respect of the child/children, the power shall be exercised in the child/children's best interests and shall be binding on the parties, unless the High Court, as upper guardian of the child/children, orders otherwise
- iv. The facilitator's services involve elements of mediation, expert opinion and counseling, but do not purely fall into any of these categories. The facilitator is not appointed as a psychotherapist, counselor or attorney for the child/children or the parties. No psychotherapist/patient or attorney/client relationship as created by this appointment or otherwise exists between the facilitator and any of the parties or the child/children.

Procedure to resolve disputes and/or the issue of directives by the facilitator

- v. If the parties are unable to reach agreement on any issue where a joint decision is required in respect of the child/children or on an issue concerning the child/children's welfare which has become contentious, the dispute shall be referred in writing to the facilitator who shall attempt to resolve the dispute as speedily as possible and without recourse to litigation.
- vi. If the facilitator, in the exercise of his/her sole discretion, regards a particular issue raised by one of the parties as trivial or unfounded, he/she is authorized to decline the referral of such issue.

- vii. If the facilitator is unable to resolve a dispute by way of mediation he/she may resolve the dispute by issuing a directive which shall be binding on the parties subject to the provisions herein.
- viii. Each party and the child/children (if necessary) shall participate in the dispute resolution process as requested by the facilitator.
- ix. The facilitator shall conduct proceedings which are informal in nature and is entitled to receive information by means of telephone, correspondence, electronic mail, etc. The facilitator will use his/her discretion in considering the weight and sufficiency of information provided and may expand his/her enquiry as he/she deems necessary.
- x. The facilitator shall determine the protocol of all communications, interviews and sessions, including who shall or may attend meetings. Legal representatives are not ordinarily entitled to attend such meetings, but a party shall be permitted to caucus with his/her legal representatives, either in person or by telephone, during such meetings. The parties and their attorneys shall have the right to initiate or receive oral communication with the facilitator. Any party or counselor may communicate in writing with the facilitator provided that copies are provided to the other party, and, if applicable, their legal representatives.
- xi. The facilitator may confer individually with the parties and with others, including, but not limited to step-parents, step-siblings, extended family members and friends, permanent life partners, household members, school and educational personnel, care providers, therapists and healthcare providers of the child/children or the parties and authorize such persons to provide information to the facilitator.
- xii. The parties shall not be entitled to insist that any meeting or session is tape-recorded, videoed or recorded in any manner whatsoever.

- xiii. No record need be kept by the facilitator, except of the findings, decisions and directives of the facilitator.
- xiv. The facilitator shall be entitled to engage the services of professionals to assist him/her in coming to a considered decision.
- xv. The parties shall be bound by the decision of the facilitator.

Meetings with the child/children and information

- xvi. Each party shall ensure that the facilitator may meet and/or confer with the child/children at reasonable times and places without either party being present, if the facilitator so decides.
- xvii. Each party shall provide the facilitator with all information requested by them pertaining to the child/children.
- xviii. No information, observations of the facilitator or communications made to the facilitator shall be deemed to be privileged as to the Court, the participants, their legal representatives and experts or any mental health professional assessing or treating any of the immediate members of either household or the child/children.
- xix. All participants, including the facilitator, the parties and legal representatives, shall use their best efforts to preserve the privacy of the family and, more particularly, the child/children, and restrict dissemination of information related to decisions to those who need to know the information.

Costs of the facilitator

- xx. Unless otherwise determined by the facilitator in his/her sole discretion, the parents shall be responsible for the facilitator's costs in equal/(determine ratio) shares The costs of the facilitator in respect of dealing with e-mails, faxes or telephone calls from a party shall be borne by the party concerned.

15. Some facilitation clauses have, in addition to the general clauses, added very specific ones, obviously pertinent to the parties' involved specific circumstances.

e.g. *"...until such time as the dropping off arrangement is varied by agreement or by the facilitator..."*,

"... reasonable telephonic contact by agreement between the parties or as determined by the facilitator...",

"... determine whether the children's participation in extra-mural, sport, cultural, church and social activities unreasonable impact on Defendant's contact time, including but not limited to their attendance at Friday youth meetings..."

16. Not all facilitation clauses relate purely to disputes around the children and some leave the power of the facilitator somewhat vague.

e.g. *"In the event of a dispute arising in respect of the implementation or variation of the above maintenance obligations which the parents are unable to resolve with the assistance of the facilitator, then the father agrees to submit to the jurisdiction of a competent South African Court to determine this issue"*. In this instance, should the facilitator have issued a directive, either party could have approached the Court for relief in any event?

17. Sometimes the facilitator can be requested to assist with the drawing up of a Parent Plan.

e.g. *"...regulate, facilitate and review the residence and contact arrangements in respect of the child/children ... draw up a parenting plan containing such recommendations.."*

18. Sometimes the facilitator is instructed to co-opt a co-facilitator

e.g. "...in this regard the facilitator shall co-opt in each instance that maintenance needs to be determined, a co-facilitator who shall be a legal practitioner..."

19. Sometimes the attorneys attempt to pre-empt difficulties which they clearly foresaw.

e.g.: "...the parties shall be bound by the decision of the facilitator and each party waives the right to challenge such decisions provided they are made in the best interest of the child, save and except if such a decision is challenged in a court of competent jurisdiction..."

20. Some clauses are very restricted i.t.o. that which the facilitator can facilitate. This can be problematic if one of the parties would like the facilitator to have had wider powers.

e.g.: "...X is hereby appointed by the parties as a facilitator to assist in the implementation of the access provisions between the children and Plaintiff as set out in this agreement..."

21. Difficulties in facilitation

- i. One party refuses to attend: the facilitation process needs to continue in their absence
- ii. If parties are in different countries or live far apart: appoint two facilitators
- iii. Minimize the need for the facilitator to have to obtain legal opinion regarding his/her role or the interpretation of a paragraph
- iv. One party refuses to adhere to a directive and the other party cannot afford to go to court: the facilitator can meet with the attorneys involved?

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