

## **THE DEVELOPMENT OF FAMILY/DIVORCE MEDIATION IN SOUTH AFRICA**

I have been requested to address you on the progress of the research and envisaged legislation on the mediation project, or so it has come to be known, in South Africa. Hence, my task today is not to try and convince you how advantageous the tool of mediation is, and more especially so in disputes involving the family. Nor, am I going to give you a summary of international experiences and lessons on mediation in divorce and family matters. Rather, my aim is to ensure that all of us here understand the results of the investigation thus far, on how the best interests of the child is going to be effectively protected, and how parents rights, responsibilities and awareness of how to conduct themselves in a dispute involving the custody and access of minor children should be managed to obtain the best results for all concerned.

It is common knowledge that there are a limited number of accredited trained mediators within the area of family law in South Africa. This is a huge stumbling block that needs to be addressed if we want to create law, policy and practise within a developed family mediation stream.

There were numerous concerns regarding the impact divorce has on the parties and more importantly minor children when matters are prolonged and made stressful through means of litigation. It is an adversarial process which does not lend itself to the institution of the family. It is clear that children's lives are affected and parties have to continue to interact with each other long after any court battle until the child reaches adulthood and even thereafter.

Due to these concerns being raised, the SALRC in 2003 began an investigation on review of aspects of the law of divorce. However, the researcher responsible for the project became extensively involved in the Children's Bill and this project could not be given adequate priority. Since May last year, I have been working on this project and I decided that the projects name and focus needed to change because the interests of all minor children needed to be protected and not only those who were fortunate to be born within a marriage relationship. Hence, the name of the project is currently being changed to Review of Aspects related to the custody of and access to minor children.

Thus far, the investigation envisages that a new piece of legislation entitled the Family Mediation Act or something along those lines will be drafted in the near future. We are currently in the process of consultation and gathering information on how the content of the legislation should be constituted. Questionnaires to different role players are currently being distributed via various methods and 2 more are in the process of being developed. To date intensive consultations have been conducted with offices of the family advocate across the country, and consensus has been reached as regards their stance on the progress and development of mediation within the office of the family advocate and within the private mediation sector.

The office of the family advocate is cognisant of the fact that costing is a crucial factor that has to be considered when drafting legislation. However, they steadfastly believe that they have to be freed from the limitations imposed on them by the Mediation in Certain Divorce Matters Act and the lack of human resources, office space, and limited offices in the outlying areas. They also unanimously feel that their functions, role and character need to be changed in order for them to offer a holistic and effective service to all people in South Africa. The arguments of lack of funding, lack of capacity, immense

cultural/economic/social diversity and the great urban rural divide which results in practical constraints on implementation has to be pushed to the background in favour of an argument for development, protection of the interests of our children and a progressive effective service which is in accordance with the principles of our constitution. Hence, legislation that will help facilitate this development is essential as it is better to start somewhere and try and curb and eventually prevent harmful practises, than not starting at all and allowing problems to grow to such an extent that they cannot be cured. Mediation will invariably help to extinguish the adversarial antagonistic atmosphere currently common in divorce and custody and access proceedings which creates a continually unhealthy environment for the child.

Possible strategies which were derived from consultations with the Office of the Family Advocate regarding the content of the legislation will now be discussed. As we are still in the consultation stage of the project, any views, opinions or contentions that you want to raise is welcome. This will actually help with clarifying issues prior to drafting.

It has been agreed that procedures related to divorce matters and matters dealing with the custody and access of minor children need to change. The aim of the new procedures is not to create difficulties for parties seeking assistance from the court for an order of divorce or pronouncing upon arrangements of custody and access in the case of unmarried parties, but rather aims at creating an atmosphere that accommodates for the rights and responsibilities of parents to be ensured and the best interests of the child to be protected.

It has been decided that the best arrangement will be for the Office of the Family Advocate to have two distinct streams which work in conjunction with each other. One

stream will focus solely on mediation, and the other will focus on assessment and evaluation. This would allow family advocates and family counsellors to focus on a particular function and to dedicate the amount of time required to obtain the best results. To ensure objectivity and affectivity, if mediation fails, parties will be referred from the mediation stream to the assessment stream where a new team of family advocate and counsellor will then engage in the assessment and evaluation of what would be in the best interests of the child.

When a party serves summons for an order of divorce, or a notice of motion applying for custody and access arrangements to be determined, prior to any order being granted, it will be compulsory for parties to attend a parent information/education programme. This education programme will last for an hour or an hour and a half and comprise of a video, a short lecture and literature. The content will involve education around the advantages and availability of mediation, information about parental alienation, the best interest's principle, etc. These information/education programmes will be uniformly implemented across the country to ensure that all persons have an equal and quality service. The service will be managed by family advocate's offices and due to capacity constraints and the fact that the programme is compulsory, it will be outsourced to NGOs, and other community organisations and offices. Only once parents attend the parent education/information programme can they proceed with the next step which would either be entering into a settlement agreement which will be endorsed or rejected by the assessment stream of the family advocates office, or in the case of a dispute, the parties have to attend a mediation session with the mediation stream of the office of the family advocate. Hence, mediation will be compulsory in all matters where the family advocate believes that on the face of the settlement agreement, the best interests of the child are not being protected or in the case where parties cannot reach an agreement. Where

parties after the parent education programme enter into a settlement agreement and it is endorsed by the family advocate's office, the order being sought will be granted. If one parent fails to attend a parent education programme, that will weigh negatively against him/her in an assessment as it will indicate the lack of his/her interest in ensuring the best interests of the child are met. Where one party fails to attend a mediation session due to domestic violence, a restraining order, rape etc, then mediation will not be compulsory. In those instances the matter will move onto the assessment stream immediately. Further, if one party fails to attend a mediation session more than once, or if a mediation fails and the mediator submits a failed mediation certificate, the matter will be transferred to the assessment stream for evaluation.

The compulsory parent education/information programmes will be funded by the State. No provisions as regards funding has to be provided in the new legislation as funding for early intervention and development of parents is discussed in a chapter in the Children's Act. The provisions and programmes that the State has to fund is very broad in this chapter and this sort of information/education programme for all intents and purposes fall into this category. All parents would have to attend this session as there will be no exceptional circumstances clause.

All mandatory mediations will be funded by the state which will be conducted by the office of the family advocate. Family advocates offices hence have to be given more capacity in order for them to even attempt to carry this work load. Where however, parties do not want to wait for the service offered by the family advocates office, they are welcome to attend a mediation session with a private mediator who must be accredited. Where the work load becomes too heavy for the Family Advocates Office, they have the discretion to outsource certain matters to private mediators to lighten the burden.

Hence, the extent of the funding for this mandatory mediation is the increased human resources, and increased office space and offices in the outlying areas.

Matters that will be mediated on will not be limited to issues of care and contact. Rather, mediation will be holistic and include issues of maintenance and matrimonial property as well. It has been argued that holistic mediation prevents the determination of issues in a piece meal fashion which often results in issues that were already decided being stone walled once other issues become problematic at a later stage. The mediators will have to use their discretion to determine whether all or certain issues cannot be mediated and negotiated, whereafter, in the instance of care and contact, the matter will be referred to the assessment stream, or in the case of maintenance and matrimonial property, the matter will be referred to court. This sort of holistic mediation will help parties save costs on long drawn out litigation battles.

A co-mediation model would be the best in instances of determining care and contact issues as it allows for the perception of objectivity, impartiality, different backgrounds and experiences. It will be beneficial for co-mediators to include some diversity in their constitution, for example, a male and a female, a lawyer and a psychologist, an experienced mediator with someone who is less experienced. It still has to be investigated whether co-mediators will have to be used when parties hire private mediators as this will accelerate their costs.

Considering the fact that mediation is going to be holistic, one has to ask, who then will qualify to be a mediator in these matters.

It has been agreed that if we want mediation to form an integral means by which disputes arising from family matters are settled, we need to have properly trained skilled mediators. Not all professionals are trained to have the skills of a mediator and hence no training to prepare persons to assume this role is a recipe for disaster, as all this will be would be a time wasting exercise. It has been stressed by the office of the family advocate that training needs to be specialised and have both theoretical and practical depth. They argue that the skills to be a properly qualified mediator cannot be acquired in a week, but rather should extend over a longer time frame of about 3 to 6 months. Some of the components that should be contained in the training course must encompass basic mediation techniques, sections on various principles, aspects and legislation related to family law, emotional psychology, and management of cultural/religious/racial diversity. Only if mediators have attended this sort of accredited training course, will parties be able to obtain mediated agreements that will be endorsed by the family advocate's office. Hence, if a party wishes to utilise a mediator from the private sector, for him/her to have complied with the compulsory attendance of a mediation session, the mediator who mediated such agreement must be an accredited mediator.

The question then arises, should there be any pre-requisite experience or qualifications that persons must have in order to attend training as a mediator? Any suitable person should be allowed to attend training to qualify as a mediator. However, whether they need to attend a 3 month training course, or a 6 month training course, or even a 1 year training course will depend on the amount of experience they have in family law matters, mediation techniques and tertiary qualifications. Part of becoming accredited could include a few hours of voluntary mediation sessions to help with the large case loads of the family advocate's office. It is necessary that Justice College collaborates with private

training institutions to develop a training course for the new accredited family mediator. Training must be made accessible to all persons and mechanisms must be put in place to ensure this.

A regulatory national administrative body needs to be established to manage accreditation of mediators, training programmes, liaisons with the family advocates office the Department of Justice and the Department of Social Development, ethical obligations, rights and duties of mediators, fee ranges etc. Mediators must be affiliated to the national body and pay a subscription fee in order to ensure that both their rights and the interests of their clients are protected.

As I indicated to you at the outset, we are still in the midst of consultations and several brainstorming sessions. Hence, any submissions, opinions, and contentions can still be made for consideration by the Commission. None of these findings are cast in stone and the research process is currently still in progress. The basic research process it is hoped will be concluded by July this year, whereafter, a discussion paper will be drafted with possible legislative principles which will be made available for further public comment and consultation.

I urge you to become more involved in the investigation as your inputs are essential and are most welcome.

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