

**ALTERNATIVE DISPUTE RESOLUTION IN THE BEST  
INTERESTS OF THE CHILD  
THESIS**

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## FOREWORD

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The development of private divorce mediation appears to offer a friendly and informal alternative to the "hostile" adversarial divorce. A close analysis of its claims, however, shows them to be largely unproven. Urgent attention should therefore be given to the philosophical base of the movement. There is also a need for empirical research and for standardised training. Further unanswered questions relate to the part to be played by different professions, and to professional ethics.

It is submitted that the appointment of Family Advocates is a step in the right direction but that the establishment of a full Family Court will best protect children's interests.

## CHAPTER 1

### INTRODUCTION

#### 1 BACKGROUND TO THE PROBLEM

After a long period of stagnation, when family law failed to keep pace with changes in society, reforms to this branch of the law have over the last few decades taken place at a bewildering rate, in this country as in most other countries in the developed world. In South Africa, one of the earliest and most important of the reforms was the introduction, in the Divorce Act 70 of 1979, of irretrievable breakdown as the chief ground for divorce. In thus introducing the concept of the no-fault divorce, South Africa was following the example of various Western legislatures.<sup>1</sup> However, not all divorce problems were now resolved. The adversarial divorce procedure, which had seemed appropriate when the supposed guilt or innocence of the divorcing parties was the predominant concern, seemed less so for the no-fault divorce.<sup>2</sup>

In particular, the interests of the children of divorce continued to cause concern. Section 6(1)<sup>3</sup> of the Divorce Act reinforced the concept of "the best interests of the child" as the paramount criterion in divorce cases by providing that

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1 See Hahlo and Sinclair Reform 7.

2 See Hoexter Report 490; Schäfer 1984 De Rebus 17-18.

3 Now section 6(1)(a)

a decree of divorce shall not be granted until the court is 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 that can be effected in the circumstances.

In 1987 the Mediation in Certain Divorce Matters Act, which instituted the office of Family Advocate in South Africa, added a further proviso to section 6(1), namely that a decree of divorce will not be granted until the court

if an enquiry is instituted by the Family Advocate in terms of section 4(1)(a) or (2) (a) of the Mediation in Certain Divorce Matters Act, 1987, has considered the report and recommendations referred to in the said section 4(1).<sup>4</sup>

Even after the Divorce Act came into operation in July 1979, however, the interests of the children of divorce were clearly receiving insufficient attention.<sup>5</sup> The Hoexter Commission of Inquiry into the Structure and Functioning of the Courts, in its Report<sup>6</sup> published in 1983, found that

"in the vast majority of undefended divorce actions.....the investigation into the suitability of the provision for minor or dependent children"

was not being adequately undertaken, and recommended the creation of an office of Children's Friend in South Africa.<sup>7</sup> This recommendation became

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4 Divorce Act s 6 (1)(b). On the office of the Family Advocate, see further Chapters 4 and 5.

5 See Schäfer 1988 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 298.

6 Hoexter Report 489; see also 503.

7 Hoexter Report 510.

a reality in 1990 when the first Family Advocate's Office was established in terms of the Mediation in Certain Divorce Matters Act.<sup>8</sup>

During the 1980s another method of attempting to address the shortcomings of the adversarial divorce procedure emerged in South Africa. This was the private divorce mediation movement, which in this country has modelled itself largely on the English and North American models.

## 2 THE PURPOSE OF THE THESIS

The author of this thesis "Alternative Dispute Resolution in the Best Interests of the Child", will examine the operation of the Mediation in Certain Divorce Matters Act and of private<sup>9</sup> alternative dispute resolution in divorce, in order to determine whether these innovative approaches do adequately protect the interests of the child on divorce.

Before these questions are addressed, however, the "best interests of the child" criterion, which is the one universally applied in divorce cases today, will be analysed in an attempt to determine what it means, who applies it and what its usefulness is. The effects of divorce on children will also be discussed, for in the context of this thesis it is important to know how serious these effects are. There will also be an exposition of the law and of current problems and attempted solutions in respect of custody and access, which constitute the most important child-related issues in divorce.

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<sup>8</sup> Mediation in Certain Divorce Matters Act 24 of 1987.

<sup>9</sup> as opposed to public dispute resolution in divorce.

Of the various forms of alternative dispute resolution, it is mediation which is most often used in divorce matters, so it is more particularly the theoretical basis and the operation of divorce mediation which will be analysed. The operation of the Mediation in Certain Divorce Matters Act will likewise be scrutinised. In addition, because the title and short title of that Act refer to mediation, it will be necessary to determine whether the Family Advocate is indeed practising mediation.

Finally, an attempt will be made to decide whether the introduction of Family Advocates' Offices, and the growth of the divorce mediation movement now offer sufficient protection of the interests of the child on divorce, or whether further reform is still necessary.

## CHAPTER 2

### THE "BEST INTERESTS OF THE CHILD" CRITERION IN DIVORCE CASES

#### 1 INTRODUCTION

The "best interests of the child" or the welfare principle as it is also called, is acknowledged to be the guiding principle in divorce decisions today, one which in South Africa is embodied in divorce legislation.<sup>1</sup> In practice, when parents divorce, children are affected, inter alia, by decisions relating to custody, access and money matters.

Because the "best interests" principle is notoriously indeterminate,<sup>2</sup> it is necessary to try to pin-point exactly what it means. It is also necessary to discuss whether it should be the paramount or the only criterion. What weight is accorded to the parent's wishes or their rights? Is it still acceptable to speak of parent's rights or should we refer only to parental responsibilities? How are parental wishes, rights and responsibilities affected by the recent emphasis on children's rights? It must also be conceded that any pronouncements by outsiders on the best interests of the children constitute interference in the privacy of the family. Is this interference justified because upon divorce the family disintegrates?

1 See s 6 of the Divorce Act 70 of 1989. In England this principle is embodied in s 1(1) of the Children Act 1989.

In Australia its ambit is apparently confined to the issues of guardianship, custody and access. See Dickey Family Law 347. For the application of the criterion in the United States, see Mnookin and Weisberg Child Family and State 636 et seq.

2 See Heaton 1990 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 95-99; Clark 1992 South African Law Journal 391; Schäfer Access 27 footnote 143.

Because of the indeterminacy of the best interests standard, judges in divorce matters have an extremely wide discretion in applying it.<sup>3</sup> This discretion casts on them a burden which many dislike.<sup>4</sup> Certain jurisdictions<sup>5</sup> have addressed this problem by devising guidelines which narrow the scope of the best interests criterion. It will be necessary to consider whether these have succeeded in their aim.

Not only the judge, but many other people, including other professionals, such as social workers and psychologists, the parents and even the child itself, may have a voice in the determination of the child's best interests. How competent they are to do so, independently or in co-operation with others, will be discussed.

Finally, it is necessary to decide whether the best interests test is serving a useful purpose, or whether other criteria should replace it.

## 2 THE PERVASIVE BEST INTERESTS CRITERION

Since the demise of the "fault"-based grounds for divorce, and now that high divorce rates seem to have become an accepted part of modern life, the focus of attention at the time of divorce has shifted from attempts at marriage-saving and from the so-called guilt of the parties to the interests of the children of the marriage.<sup>6</sup> In relation to the custody of the children specifically, older cases such

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3 See Terblanche 1992 1 SA 501 (W).

4 See par 9.1 below.

5 On guidelines see par 3.1 below. See also Chapter par 3.9.

6 Clulow Child's Best Interests 49.

as Fletcher<sup>7</sup>, Cook<sup>8</sup> and Calitz<sup>9</sup> must be disregarded in so far as they treat the innocence or guilt of a parent as relevant in the decision as to who is to have custody. Today, when parents divorce, and arrangements have to be made for the children, a standard generally applied in Western jurisdictions is the "welfare", "interests" or "best interests" of the child. In South Africa, section 6(1) of the Divorce Act provides that a decree of divorce may not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or the best that can be effected in the circumstances; and if the Family Advocate, having conducted an enquiry into the welfare of each minor or dependent child of the marriage or any matter referred to him by the court, has furnished the divorce court with a report and recommendations, the court has considered the report and recommendations. The child-related issues which usually feature in divorce negotiations are custody, access and maintenance. Negotiations between the divorcing parties on financial matters other than maintenance may also affect the child and should not be ignored in the context of the child's best interests. However, it is generally the custody issue which gives rise to the most bitter disputes between parents. Our courts have repeatedly emphasised that, as was stated in Van Oudenhove v Gruber,<sup>10</sup>

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7        1948 1 SA 130(A).

8        1937 AD 154.

9        1939 AD 56. See also Landman v Mienie 1944 OPD 59 65; Dreyer v Lyte-Mason 1948 2 SA 245 (W) 250 - 251.

10       1981 4 SA 857(A) 867 per Galgut AJA; see also Du Preez 1969 3 SA 529 (D & C) 533; Bailey 1979 3 SA 128(A) 142; Dionisio 1981 3 SA 149 (Z) 151; McCall 1994 3 SA 201 (C).

"in all custody matters the Court is primarily concerned with the welfare of the children, that is the paramount consideration."

In Western jurisdictions, the disappearance of the "innocent parent" criterion and the fact that the courts now attempt to avoid gender bias in deciding whether the mother or father should have custody, has resulted in judges having almost unlimited discretion to decide on the best interests of the children and has therefore made their task even more difficult than before.<sup>11</sup>

### 3 INDETERMINACY OF THE BEST INTERESTS CRITERION

Despite the widespread acceptance of the best interests criterion, difficulties arise when we try to decide precisely what is meant by the best interests of the child. The chief disadvantage of the criterion is its essential vagueness.<sup>12</sup> While past events may provide some guidance, the person having to make the decision is looking to what will be best for the child in the future, which can never be clear cut. In addition, each decision on the child's best interests will be influenced by the decision-maker's particular background and values.<sup>13</sup> The case literature, while high-lighting certain guidelines, is nevertheless of limited help because in

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11 See Mnookin 1975 Law and Contemporary Problems 231, 233 et seq. Thus, for example, in England the Children Act of 1989 s 1(1) provides that when a court determines any question with respect to, inter alia, the upbringing of a child, the child's welfare is to be the court's paramount consideration. On the introduction of guidelines to narrow the scope of the best interests criterion, however, see par 3.1 below.

12 See Mnookin 1975 Law and Contemporary Problems 229; Jones 1984 Family Law Quarterly 44; Heaton Best Interests 16; Shipley in Landau Children's Rights 164.

13 See Mnookin 1975 Law and Contemporary Problems 229; King 1987 Family Law 189; Katz in Wilkerson Rights of Children 270.

each case different persons and different personal circumstances are involved.<sup>14</sup> Nor does research on the effects of divorce on children provide guidelines for the disposition of custody.<sup>15</sup> Because of the inherent vagueness of the criterion it is usually difficult for parents or their legal advisers to predict the outcome of custody litigation, with the result that litigation is encouraged.<sup>16</sup> Ironically, the ensuing bitterness between parents is certainly not in the best interests of the child.<sup>17</sup>

Obviously custody disputes occur, or should occur, only when both parents have some chance of obtaining custody.<sup>18</sup> There is unlikely to be a custody battle where there is incontrovertible proof of, for example, alcoholism or child abuse or neglect on the part of one parent. In litigated cases, which parent should have custody of the child is usually a far more clouded issue.

The award of custody should not constitute a form of punishment of either parent.<sup>19</sup> An English author has spoken of the expensive ritual in which courts sometimes have to engage merely to help parents accept that they cannot have their children

14 Mnookin 1975 Law and Contemporary Problems 253.

15 Paquin 1987-88 Journal of Family Law 286.

16 Berry 1984 Family Law 168; Mnookin 1975 Law and Contemporary Problems 262.

17 Houlgate Family and State 127.

18 See Hall 1977 Cambridge Law Journal 253. Goldstein, Freud and Solnit Beyond the Best Interests 63 speak of the cases where "each parent is equally suitable in terms of the child's most immediate predictable developmental needs". Forder and Ward 1987 Cambridge Law Journal 494 say that the reason underlying the frequent refusal of appeal courts to interfere in custody decisions is that in most custody disputes there is no "right" answer.

19 See Forder and Ward 1987 Cambridge Law Journal 501.

living with them.<sup>20</sup> This ritual seems particularly wasteful when one considers that the parent who loses a custody dispute is seldom persuaded by the court to do so with a good grace.

It is sometimes debated whether the relevant interests of the child are short-term or long-term interests, and whether the child's interests necessarily coincide with its immediate happiness.<sup>21</sup> The child's interests are considered of such importance to the State that the Supreme Court is appointed Upper Guardian of all minors within the area of its jurisdiction. Thus the paternalistic and protective view with which we are concerned here, would favour long-term,<sup>22</sup> rather than short-term interests, and happiness in the long term rather than the gratification of temporary whims of the child.

### 3.1 Do guidelines resolve the problem of the vagueness of the "Best Interests" criterion?

In Fletcher<sup>23</sup> Schreiner JA confirmed that the interests of the children furnish the guiding principle to be observed in custody cases. He also referred to earlier decisions in which it had been said that to lay down strict rules on how the judicial discretion was to be exercised was not advisable. However, many states in the United States as well as several provinces in Canada have taken steps to counteract

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20 King 1987 Family Law 188.

21 Mnookin 1975 Law and Contemporary Problems 260; Bailey 1979 3 SA 128(A) 132; Van Oudenhove v Gruber 1981 4 SA 857 (A) 861.

22 See Manning 1975 4 SA 659 (T).

23 1948 1 SA 130 (A) 143,144.

the vagueness of the "best interests" criterion by laying down statutory guidelines.<sup>24</sup> In the United Kingdom, until recently, the vague<sup>25</sup> criterion laid down by the Guardianship Act<sup>26</sup> was followed, namely that in any proceedings concerning the custody, upbringing or property of a minor the child's welfare was the "first and paramount" consideration. Statutory guidelines were laid down for the first time in the Children Act of 1989.<sup>27</sup> Now, whenever a court is considering whether to make, vary or discharge an order with respect to children in family proceedings, and the making, variation or discharge is opposed,<sup>28</sup> or it is considering whether to make a care or supervision order,<sup>29</sup> it must have regard in particular to the following factors:

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding:)
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;

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24 Mnookin 1975 Law and Contemporary Problems 236; Shipley in Landau Children's Rights 163.

25 See Bainham Children, Parents and State 3.

26 The Guardianship of Minors Act 1971.

27 S 1(3) of the Children Act 1989.

28 See s 8 of the Children Act 1989.

29 See Part IV of the Children Act 1989.

- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- (g) the range of powers available to the court under the Act in the proceedings in question.

Particularly in respect of custody orders, the disappearance of preferences or presumptions which were applied in the past, such as the paternal or maternal preference or the "tender years" presumption, has meant that the judicial discretion has become extremely wide. Laying down guidelines to reduce the judicial discretion seems, at first blush, an excellent idea but all these factors are ones which courts routinely consider anyway. The only striking innovation is that the "ascertainable wishes and feelings of the child" is the first factor to be listed.<sup>30</sup> This highlights the importance which, in England, is now attached to ascertaining the wishes of the child itself. It might even appear to indicate that this is now regarded as the paramount consideration, but this was not the legislature's intention.<sup>31</sup>

In order to provide any solution to the vagueness of the best interests criterion, guidelines would have to be more specific than the above. However, in matters relating to children each case differs from all others and the more specific the guidelines are, the less likely they are to be appropriate in a particular case. The same difficulty arises if any indication is given that certain factors are more important than others. It seems that very careful thought is required of legislators before they lay down guidelines.

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<sup>30</sup> On the child's wishes, see pars. 5 and 9.5 below.

<sup>31</sup> See Bainham Children - the New Law 14; Bainham Children - the Modern Law 139-140.

#### 4 WHAT PART SHOULD THE PARENTS' RIGHTS AND WISHES PLAY?

The child's interests cannot be determined in a vacuum. For this reason the stipulation that the provisions be satisfactory or "the best that can be effected in the circumstances" (author's emphasis) are of importance. No court can ensure an ideal upbringing for a child,<sup>32</sup> and in deciding which arrangements are the "best that can be effected in the circumstances" it is, after all, usually the life-style and circumstances of the parents which are the only available options. In Bailey,<sup>33</sup> Van Oudenhove v Gruber<sup>34</sup> and Byliefeldt v Redpath,<sup>35</sup> all of which concerned applications for variations of custody orders, the court, while acknowledging that the child's welfare was the paramount consideration, nevertheless stressed that the opinions and wishes of the custodian parent ought not to be disregarded. Clearly the wishes and opinions of both parents should similarly be taken into consideration in custody applications at the time of divorce. It seems logical to treat the "child's best interests" as the paramount, but not the only criterion. However, it should be noted that in Fletcher<sup>36</sup> Schreiner JA confirmed the decision in Milstein,<sup>37</sup> which,

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32 Mnookin and Kornhauser 1979 Yale Law Journal 957-958 point out that parents should largely be given the freedom to decide custody matters between themselves, for after divorce a child's relationships with both parents normally continue and parents continue to be responsible for child-rearing decisions..

33 1979 3 SA 128 (A) 136.

34 1981 4 SA 857 (A) 867.

35 1982 1 SA 702 (A) 712.

36 1948 1 SA 130 (A).

like Fletcher, concerned a custody dispute, that factors other than the welfare of the child must be taken into account only when it is not clear what is best for the children; that it is not a balancing of various factors against each other which is required here.

Interestingly, in 1988 the English Law Commission in its review<sup>38</sup> of the law relating to guardianship and custody, also rejected the idea that there should be a balancing of various factors. It discussed the criterion which then applied in English law, namely that when the legal custody or upbringing of a child was in question the welfare of the child should be the first and paramount consideration.<sup>39</sup> It stated that the word "first" had caused confusion in the past in leading some courts to

"balance other considerations against the child's welfare rather than to consider what light they shed upon it."

It also argued that the interests not only of the child whose future was in issue in the proceedings, but also those of other children who might be affected by the decision, ought to be considered. It therefore suggested that the rule should be modified so as to provide that the welfare of any child likely to be affected by a decision be the court's only concern. Subsequently, however, in the 1989 Children Act, it was provided that the child's welfare would be the court's paramount consideration (own emphasis).

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37      1943 TPD 227.

38      English Law Commission Report 172 17-18.

39      s1 of the Guardianship of Minors Act 1971.

In the sphere of parent/child relationships the emphasis used to be on parental and more particularly paternal authority. Today more importance is attached to the child's welfare. Nevertheless it is a basic principle of our law that, subject to certain limitations, the parents have the rights of custody and control of a child.<sup>40</sup> As stated above<sup>41</sup> we have seen, our courts have often emphasised that the parents' rights and wishes cannot be left out of reckoning.<sup>42</sup>

## 5 WHAT PART SHOULD THE CHILDREN'S RIGHTS AND WISHES PLAY?

In recent times the children's rights movement, which followed on the heels of the women's rights movement,<sup>43</sup> has come to the fore.<sup>44</sup> Foster and Freed<sup>45</sup> point out that the women's liberation movement.

"raised and confirmed the suspicion that some legal disabilities have been imposed under the guise of protective measures for ulterior purposes",

and suggest that paternalistic measures may be more concerned with parental prerogatives than with children's interests. The child's right to self-determination

40 Petersen v Kruger 1975 4 SA 171(C)173; Boberg Persons and Family 410.

41 See p 12 above.

42 See Fletcher 1948 1 SA 130 (A)132; Petersen v Kruger 1975 4 SA 171(C)174; Bailey 1979 3 SA 128 (A)141; Van Oudenhove v Gruber 1981 4 SA 857 (A) 867.

43 See Minow 1986 Harvard Women's Law Journal 3.

44 On children's rights see Foster and Freed in Katz Youngest Minority 318 et seq.; Olmesdahl Best Interests 4.

45 In Katz Youngest Minority 344.

has been stressed. The move away from the parental autocracy of previous centuries is to be welcomed, but where children's rights advocates would leave decisions on practically all aspects of the child's life to the child itself their views seem unbalanced. Taken to its logical conclusion this viewpoint would cast all the burdens of adult life and its responsibilities on immature persons while depriving them of adult protection. It is true that in the late 20th Century it has become apparent that the family is not always the safe haven that it has been claimed to be. Adult protection often falls short of the ideal, but this does not mean that it is superfluous. The better approach would surely be to weigh up the child's wishes against the suggestions of adults bearing in mind that they will usually display more maturity, wisdom and balance than the child itself.

#### 5.1 Children's rights and human rights instruments

In recent years various human rights instruments have alluded to children's rights. Amongst the fundamental rights specified in the draft Bill of Rights which the South African Law Commission included in its Working Paper on Group and Human Rights, was the right to the integrity of the family.<sup>46</sup> No special provision was made for the protection of the rights of children, because the Commission believed that children were adequately protected by the general provisions of the bill and the existing rules of common law and statute law. However, the general opinion of those who responded to the bill was that the rights of juveniles should feature in a bill of rights. The Commission therefore reviewed the position, and in its Interim Report on Group and Human Rights,<sup>47</sup> it referred to the International Convention

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<sup>46</sup> Article 11 of Working Paper 25 on Group and Human Rights.

<sup>47</sup> South African Law Commission Interim Report on Group and Human Rights August 1991 478.

on the Rights of the Child,<sup>48</sup> other international conventions and the constitutions of various countries, all of which make provision for the protection of children and/or the family. It should of course be borne in mind that the interests of the child and the interests of the family do not necessarily always coincide.<sup>49</sup>

In Chapter 3 of South Africa's Interim Constitution,<sup>50</sup> which is the Chapter on Fundamental Rights, section 30(1) provides, inter alia, that every child has the right to parental care, to security and basic nutrition; and the right not to be subject to neglect or abuse. Section 30(3) provides that in all matters concerning a child his or her best interest is paramount. It remains to be seen whether these provisions do indeed improve the quality of children's lives, or whether they remain pious wishes. It is remarkable that reference was made to these children's rights although no reference was made to the protection of the family. The whole concept of "family" is today in such a state of flux<sup>51</sup> and what constitutes a family so debatable, however, that failure to refer to its protection in the Chapter may prove a wise avoidance of controversy.

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48 International Convention on the Rights of the Child.

49 See Bainham 1986 Cambridge Law Journal 267.

50 Constitution of the Republic of South Africa, Act 200 of 1993.

51 S 14 (3) of the South African Interim Constitution provides that nothing in the Chapter on Fundamental Rights will preclude legislation recognising

- (a) a system of personal and family law adhered to by persons professing a particular religion; and
- (b) the validity of marriages concluded under a system of religious law subject to specified procedures.

## 6 THE "LEAST DETRIMENTAL" ALTERNATIVE

In their book Beyond the Best Interests of the Child Goldstein, Freud and Solnit<sup>52</sup> argue that the phrase "the least detrimental available alternative for safeguarding the child's growth and development" is preferable to the expression "the best interests of the child".<sup>53</sup> They contend that their criterion, unlike the "best interests" one, stresses, firstly, the need for a speedy resolution of the custody issue; secondly that the child's interests must prevail over the interests and rights of adults, and thirdly that the law is unable to supervise inter-personal relationships and that its ability to predict is limited. Today these are all factors which one might justifiably expect professionals involved in custody disputes to take into account, even if they did not do so in 1973 when the above-mentioned book was published.<sup>54</sup> It is of interest to note that the English Children Act<sup>55</sup> provides that

"in any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child."

In practice it will surely make little difference which of the two criteria is applied. Mnookin<sup>56</sup> points out that the "least detrimental" criterion is, like the "best interests" one, indeterminate.

<sup>52</sup> For an analysis of the views of these authors see Crouch 1979 Family Law Quarterly 49.

<sup>53</sup> Goldstein Freud and Solnit Beyond the Best Interests 53.

<sup>54</sup> On the "least detrimental alternative" standard see also Stone Child's Voice 94.

<sup>55</sup> Children Act 1989 s1(2).

<sup>56</sup> Mnookin 1975 Law and Contemporary Problems 287.

7     THE LONG-TERM EFFECT OF AN ORDER IN THE BEST INTERESTS  
OF THE CHILD

Whatever the merits or demerits of the "best interests" criterion may be, in the long term it may not influence a child's life much; for once the court has made an award it is not in a position to supervise the child's custodian. After the resolution of the dispute family circumstances are likely to change from time to time, but the court will not be there to monitor the changes.<sup>57</sup> The Supreme Court, as the child's Upper Guardian, always has the power to re-examine the question of custody, but is seldom called on to do so.<sup>58</sup>

8     IS OUTSIDE INTERFERENCE IN THE FAMILY JUSTIFIED?

An important issue here is whether it is really for anybody outside the family to decide what the best interests of the child are. Discussions of this question usually focus on whether the State may interfere in the family and if so to what extent. In some quarters it is argued that the parents are the ones who know the child best and therefore also should make the decisions. In our law the parents have the right to custody and control of a child, subject always to the Supreme Court's rights as upper guardian of all children.<sup>59</sup>

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57     Mnookin and Kornhauser 1979 Yale Law Journal 955; King 1987 Family Law 187; Berry 1984 Family Law 168.

58     Mnookin and Kornhauser 1979 Yale Law Journal 955.

59     See Petersen v Kruger 1975 4 SA 171 (C)173; Van Oudenhove v Gruber 1981 4 SA 857 (A) 868.

### 8.1 State intrusion into the family

The question of State intervention versus family autonomy is considered to be one of the key issues in family law today. The debate is of relevance to this thesis because it is in the sphere of the relationship between parent and child that the State intervenes most in the family.<sup>60</sup> History demonstrates that in the need to balance the interests of State against those of the family, the pendulum sometimes swings one way and sometimes the other.<sup>61</sup> Thus in England for example, where recent reform sought to reduce State interference in the family, Bainham asserts that the Report of the Inquiry into Child Abuse in Cleveland 1987, which revealed unjustified and large-scale intrusion into families by social workers, was perhaps the most important influence on the reform process.<sup>62</sup> If taken too far, intervention may well be seen as an invasion of the privacy of the family.<sup>63</sup> Until recently, society's view was that there should be the least possible intrusion into the family sphere. In the United States family autonomy has been traditional.<sup>64</sup> Even in recent times, in America and Canada parliamentary debates and legal writers have referred to the need to protect the "family unit". Nowadays, contradictory

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60 Katz cited by Foster and Freed in Katz Youngest Minority 321.

61 Sinclair Reform 2: Church Marriage Chapter 2.

62 Bainham Children - The New Law 3. See also Bainham Children - the Modern Law Chapter 12.

63 Paquin 1987-88 Journal of Family Law 287 points out that in custody cases the courts must balance the child's best interest against the parents' right of privacy.

64 Mnookin 1975 Law and Contemporary Problems 266.

trends may be discerned. In England, recent legislation<sup>65</sup> discourages unnecessary State interference in the family. On the other hand, in today's climate of concern for individual rights, the emphasis in family law is on the rights of individual members of the family rather than on the family as a unit. Feminist writers, in particular, are so averse to the retention of family privacy that they even call for the abolition of the public/private dichotomy.<sup>66</sup> The recent English developments, the current emphasis of individual rights and the feminist stance on interference in the family will be discussed below.

#### 8.1.1 The English law move away from State interference

Recently English family law has been characterised by a move away from State interference in the family, and by a decreasing concern with marriage and divorce and a greater concern with children and with their parents' obligations and responsibilities.<sup>67</sup> In 1985, in the case of Gillick,<sup>68</sup> the majority of the judges adopted the standpoint that parental authority derived from duty or responsibility rather than from rights. According to Bainham, this conceptualisation may well have represented a movement in the thinking of the judiciary towards a more child-

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65 The Children Act 1989. See especially s 1(5) of this Act.

66 See Boyd and Sheehy 1986 Canadian Journal of Women and the Law 26.

67 See Symes 1987 Journal of Law and Society 208; Parry, Broder and Schmitt Custody Disputes 3; Baines Children - the Modern Law 63 et seq, 94 et seq.

68 1985 3 WLR 830 (HL).

oriented view of family relationships.<sup>69</sup> In the same year, in its working paper on guardianship the English Law Commission stated, referring to the Gillick<sup>70</sup> case:

"to the extent that the law enables parents to decide how to bring up their children without interference from others or from the State, it does so principally because this is a necessary part of the parents' responsibility for that upbringing and in order thus to promote the welfare of their children. Hence we have said that the connotations of the word "rights" are unfortunate and that it might well be more appropriate to talk of parental powers, authority or responsibilities."

The English Children Act of 1989 conveys to parents a clear message that they themselves, not the State, are primarily responsible for the upbringing of their children; and demonstrates the State's reluctance to intervene in the family unless there is some danger of harm to the children's interests.<sup>71</sup> The principle that the State should not intervene unnecessarily in children's upbringing is embodied in section 1(5) which provides:

"Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that

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69 Bainham A 1986 Cambridge Law Journal 267.

70 English Law Commission 1985 Working Paper 91 9.

71 This is in accordance with the views of Bala and Redfearn who in Connell-Thouez and Knoppers Contemporary Trends 252 state: "The protection of parental rights is based, at least in part, on a belief that parents will act to promote their child's interests. To protect these rights, therefore, is to promote a child's welfare. Further, as parents in our society have primary responsibility for the care of children whom they have brought into the world, they ought to be given a significant set of rights in regard to those children." See also Houlgate Family and State 168; and Olsen 1985 Journal of Law Reform 841, who says most people believe that the state should not intervene in the family except to correct inequality or prevent abuse.

doing so would be better for the child than making no order at all."

The Act is characterised by Walker<sup>72</sup> as

"a remarkable and radical landmark in family law,..... promoting a fundamental shift in the role of the State in family life."

In the Children Act the principle that the relationship of parents to their children should be characterised as one of responsibility is embodied in section 2, which provides that where a child's father and mother were married to each other at the time of his birth they will each have parental responsibility for the child. The Act also provides that more than one person may have parental responsibility for the same child at the same time.<sup>73</sup> In section 3 "parental responsibility" is defined as

"all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property."

Where parents were not married to each other at the time of the child's birth, the Act stresses parental responsibility, not the child's illegitimacy. Initially only the mother will have parental responsibility for the child but the father may also acquire it,<sup>74</sup> either by application to court or by entering into a "parental responsibility agreement" with the mother.<sup>75</sup>

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72 Walker 1990 Family Law 380. She goes on to say: "The balance between the welfare principle of the duty of the State to protect children, and the philosophy of non-intervention whereby children are generally best cared for within the family, with parents, irrespective of their marital relationship, retaining responsibility for their well-being, is at its heart."

73 s 2 (5).

74 s 2(2).

75 s 4.

### 8.1.2 Individual rights prevail over family unity

In former centuries the family was treated as an autonomous unit, and the rights of individual members of the family received scant attention.<sup>76</sup> In recent years it has rather been the needs and rights of individual family members, including children, which have been strongly emphasised.<sup>77</sup> Today the law interests itself in parenthood more than in marriage. Some writers view the family as little more than a child-producing and -rearing institution. Thus Symes predicts a possible demise of the old family and the emergence of a family relationship based on the fact of having had children, in other words one in which parental status is central.<sup>78</sup>

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76 According to Houlgate Family and State 137, the "anarchical principle that the State should grant to every family complete liberty to do as it wishes, as long as its actions affect or concern only its own interests has some initial plausibility if we regard the family along the lines of the organic model, conceiving it as a distinct entity, the 'parts' of which have no separate interests of their own." His proposed "communal" model of the family, which recognizes "both the importance of moral equality among family members (endorsed by the individualist) and the significance of the attitudes (benevolence, care, solicitude) that characterize the internal relationship of family membership (supported by the organicist)" has much to commend it.

77 See Symes in 1987 Journal of Law and Society 208. Connell-Thouez in 1986 Tulane Law Review 1139 says: "The child, a resource to be protected and nurtured, must now be perceived of and treated as a human being worthy of expressing individual desires and needs and capable of exercising individual rights."

78 Symes in 1987 Journal of Law and Society 209. This accords with Glendon's assertion in Transformation 306 that families are the primary means through which society deals with dependency. Connell-Thouez similarly in 1986 Tulane Law Review 1138 asserts that "The family's purpose is to assure the survival of the species, and this is achieved by creating a protective atmosphere for the birth process as well as for the care of the child until he reaches an age of self-sufficiency."

### 8.1.3 The feminist stance on interference in the family.<sup>79</sup>

Feminist writers, far from seeing the family as sacrosanct, believe that the patriarchal structure and the power imbalance of the traditional nuclear family and violence within the family weigh against retention of family privacy.<sup>80</sup> Their views are supported by statistics on the incidence of child abuse and domestic violence, for example, which have demonstrated that all is not well within the family and that intervention on behalf of its weaker members is often essential.<sup>81</sup>

### 8.1.4 Conclusions on the "State interference versus family privacy" debate

Some writers consider the whole private/public debate to be futile and point out that the State intervenes in the family all the time and in fact determines what the family

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79 According to Billington-Greig, as cited in Kramarae and Treichler A Feminist Dictionary 158, feminism "may be defined as a movement seeking the reorganization of the world upon a basis of sex-equality in all human relations: a movement which would reject every differentiation between individuals upon the ground of sex, would abolish all sex privileges and sex burdens, and would strive to set up the recognition of the common humanity of woman and man as the foundation of law and custom."

80 A typically feminist view of the family is expressed by O'Donovan in Sexual Divisions 12: "In discussions of the privacy of marital relations or of the boundaries of State intervention, the home, the family and the married couple remain an entity that is taken for granted. The couple is a unit, a black box, into which the law does not purport to peer. What goes on inside the box is not perceived as the law's concern. The belief is that it is for family members to sort out their personal relationships. What this overlooks is the power inequalities inside the family which are of course affected by structures external to it. This ideology of privacy and non-intervention has been articulated by legislators, by the judiciary and by legal scholars."

81 See Foster and Freed in Katz Youngest Minority 323.

is.<sup>82</sup> Glendon sees debates "framed in terms of a choice between intervention and non-intervention" as simplistic and unhelpful, and says that modern governments cannot but influence families directly and indirectly in many ways.<sup>83</sup> It is true that the State determines inter alia who may marry and which persons may marry each other; what the consequences of marriage are; which children are children of the marriage; which children may be adopted, and under what circumstances divorce may be granted. But the State's influence does not stop at family law; for as Rhode and Minow<sup>84</sup> point out:

"public policies concerning child care, tax, inheritance, property, welfare and birth control have influenced ostensibly private family arrangements."

If we confine the debate to the question of interference in the upbringing of children, it is submitted that the optimum solution will always be an attempt to balance family autonomy on the one hand and State interest in the family on the other, for children's interests may suffer if either of the two is given free rein. A question which is often asked is why the State considers it necessary to intervene in parents' exercise of their authority or responsibility and to protect children at the time of divorce specifically. The adverse effect on children of conflict between

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82 See generally Olsen 1985 Journal of Law Reform. In South Africa, in terms of section 14(3) of the Interim Constitution (see footnote 51 above), there is no limit placed on the number of systems of personal and family law which the State may now recognise by means of legislation.

83 Glendon Transformation 307.

84 Rhode and Minow in 1990 Sugarman and Kay Divorce Reform 192.

their parents cannot be the reason, for, as Richards<sup>85</sup> reminds us,

"disagreements and at least some degree of conflict are present between parents in almost all marriages and, indeed, between all parents and children".

As Minow<sup>86</sup> says, "Public power becomes relevant only in exceptional circumstances, when parents default". An explanation which is often advanced is that divorcing parents are so engrossed in their own troubles that they are in no fit State to make decisions about their children. One wonders how many parents, apart from those who expressly wish the decisions to be taken out of their hands, would agree that at this time other people are better qualified than they to decide what is in the best interests of the child. Fineman<sup>87</sup> warns;

"I am not sure we should be satisfied by unadorned assertions of wanton parental self-absorption and blatant sacrifice of childrens' interests, no matter the degree of professional assurance or force with which they are made."

The real reason must be that the State sees the disintegration of the family unit at the time of the divorce as potentially harmful to the child to an extent that warrants interference by it.

#### 8.1.5 State intervention in the family in South Africa

The Supreme Court has always, in its capacity as Upper Guardian of all minors, had the power to intervene in the family to protect children where there was good reason to do so.

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85 Richards 1986 Journal of Social Welfare Law 86.

86 Minow 1986 Harvard Women's Law Journal 7.

87 Fineman 1989 University of California Davis Law Review 853.

In addition, when it comes to divorce, special provision has been made for the protection of childrens' interests. In terms of section 6 of the Divorce Act,<sup>88</sup> the Supreme Court, representing the State, must be satisfied that the interests of the minor and dependent children in a divorce action have been safeguarded before it grants a divorce. In terms of section 6(3) of the Act the court may make orders concerning the maintenance, custody and guardianship of and access to the children of divorcing parents.

However, it is not only at the time of divorce that legislative measures provide for intervention by the Supreme Court on behalf of children. Section 5(1) of the Matrimonial Affairs Act of 1953 provides that where parents are already divorced or merely living apart, any provincial or local division of the Supreme Court or any of its judges may on the application of either parent make any order it deems fit in respect of the custody or guardianship of or access to the minor. This section does not apply to the parents of illegitimate children.<sup>89</sup> However, the Supreme Court as the upper guardian of all children may intervene to protect them too. The State may also intervene in the upbringing of children in terms of the Child Care Act.<sup>90</sup> Thus it is not only at the time of divorce that the court may intervene, but it is only then that it is obliged to concern itself with the best interests of the children.<sup>91</sup>

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88 Divorce Act 70 of 1979.

89 See Ex parte Van Dam 1973 2 SA 182(W) 183; Boberg Persons and Family 336; Hahlo Husband and Wife 388.

90 Child Care Act 74 of 1983.

91 in terms of s 6(1) of Divorce Act 70 of 1979, as amended by s 6 of the Mediation in Certain Divorce Matters Act 24 of 1987.

Why outside interest should be focused on the child at the time of divorce in particular has been discussed above.<sup>92</sup>

## 9 WHO SHOULD DECIDE WHAT THE BEST INTERESTS OF THE CHILDREN ARE?

The vagueness of the criterion and the problem of outside interference in the family are not the only difficulties surrounding the best interests standard. There is also the question of who should decide what the child's best interests are. Apart from the parents and children themselves, there is the judge who may have to exercise his discretion and make the final decision if family members cannot decide the issue. There are also various other professionals who may be called on to make an input during divorce proceedings, for example in terms of the Mediation in Certain Divorce Matters Act.<sup>93</sup> The part played by each in coming to the decision will now be examined.

### 9.1 Judges

Because custody is the most bitterly disputed<sup>94</sup> of the divorce-related issues concerning children, most judicial pronouncements on their best interests relate to it. These days the judicial discretion in custody cases is particularly wide.<sup>95</sup> Despite what members of the social and behavioural-science professions may think,

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<sup>92</sup> See par 8.1.4 above.

<sup>93</sup> Act 24 of 1987.

<sup>94</sup> See par 1 above. See also Goldzband Consulting in Child Custody ix.

<sup>95</sup> See Abella 1981 Ottawa Law Review 12; Katz Youngest Minority 1.

judges are well aware of the heavy responsibility they bear in these matters. They know it is difficult to make decisions in these matters <sup>96</sup> and that the legal profession is ill-equipped to try to predict the future.<sup>97</sup> Judges often express their worry over and dislike<sup>98</sup> of these cases; and it has even been suggested that this dislike leads to bad decisions.<sup>99</sup> Judges are not alone in disliking custody cases; behavioural scientists are said to do so too, and many avoid the legal arena for this reason.<sup>100</sup> It should be borne in mind that although other professionals may make suggestions for the resolution of the dispute, in the end it is the judge who bears the responsibility of making the decision.<sup>101</sup>

Judges do realise that for the sake of all concerned, but more particularly for the sake of the children, they must reach a decision as soon as possible,<sup>102</sup> which makes these cases all the more stressful for them.

96 See Paquin 1987-88 Journal of Family Law 288; Murch Justice and Welfare in Divorce 219 et seq.

97 Olmesdahl Best Interests 6; see also Parkinson 1988 Family Law 30; Massel, Weiner and Simons 1986 Family Advocate 43.

98 See Stone Child's Voice 92; Berry 1984 Family Law 168; Massel, Weiner and Simons 1986 Family Advocate 43; Manning 1975 4 SA 659 (T) 663; Bailey 1979 3 SA 128 (A) 131; Stock 1981 3 SA 1280 (A) 1286; Schlebusch 1988 4 SA 548 (E) 551.

99 Paquin 1987-88 Journal of Family Law 289.

100 Goldzband Consulting in Child Custody Cases ix.

101 See Levine in Katz Youngest Minority 31; Massel, Weiner and Simons 1986 Family Advocate 43.

102 See Forder and Ward 1987 Cambridge Law Journal 490; and see also discussion of the views of Goldstein Freud and Solnit above at par 6.

Much criticism is levelled at judges for their approach to custody and access disputes. They are said to represent a conservative element of society; to be uninformed about children's needs during and after divorce, and always to come down on the side of well-entrenched community views.<sup>103</sup> It is even said that their decisions often display personal prejudices and bias.<sup>104</sup> It is true that judges are members of a conservative profession, and few of them are young.<sup>105</sup> It is also true that in this country some judges have been slow to accept new concepts such as joint custody or the award of custody to the father in appropriate circumstances.<sup>106</sup> Nevertheless a careful and conservative approach to the interests of children is not always to be condemned, particularly if this approach is counter-balanced by an input from other professionals who are possibly more aware of new trends. At the same time one must agree that judges should no longer be content to rely on their "common sense" or "intuition", but should make some attempt to familiarise themselves with theories of child development.<sup>107</sup>

103 See Maidment Child Custody 6; Clulow Child's Best Interests 40; Parkinson 1988 Family Law 30; Levine in Katz Youngest Minority 29.

104 Forder and Ward 1987 Cambridge Law Journal 492; Reidy, Silver and Carlson 1989 Family Law Quarterly 75; Katz Youngest Minority 1.

105 See Clulow Child's Best Interests 40.

106 See Chapter 3 par 3.8.1 below.

107 See Maidment Child Custody 6; Jones 1984 Family Law Quarterly 90; Reidy, Silver and Carlson 1989 Family Law Quarterly 79-80. Schäfer Family Court 252 points out that for judges who are not qualified in the behavioural or social sciences to rely solely on their experience as advocates or on the bench would be fair neither to themselves nor to the children concerned.

In the 1980s certain American states set up Task Forces to investigate gender bias among the judiciary and to develop educational programs to counteract it. It was found that "stereotyped myths, beliefs and biases affected decision-making in a number of areas including ---family law."<sup>108</sup> In Canada, too, gender bias courses have been included in judges' seminars, and the need has been expressed to address racial bias in the same way.<sup>109</sup> South Africa would do well to follow the Canadian example, for such courses have proved successful in making the judiciary aware of their own prejudices.<sup>110</sup>

As has been stated above, because personalities and individual circumstances play such a large part in custody disputes, previous decisions can be of only limited help to judges in these matters.<sup>111</sup> For the same reason, on appeal a decision on custody is seldom overturned,<sup>112</sup> except where the appeal court finds that the court a quo's discretion was not exercised judicially.

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108 Canadian Bar Association Touchstones for Change 191.

109 *ibid.*

110 See Boyd 1990 Canadian Family Law Quarterly 12.

105 English Law Commission Working Paper 96 188; Green, Long and Murawski Dissolution of Marriage 239.

112 See Bailey 1979 3 SA 128 (A) 141.

## 9.2 Behavioural scientists <sup>113</sup>

According to Lloyd-Bostock<sup>114</sup>

"psychology's contribution to individual cases is by far the largest practical input of the social sciences to law in practice."

She believes that the law is in some ways an obvious area where psychology may be of benefit, and that many of the problems the law and legal procedure deal with are essentially psychological in nature. It is true that in many reported cases we find judges expressing opinions on issues which would appear to call for psychological rather than legal knowledge and expertise.<sup>115</sup>

Encounters between judges and psychologists in court have not always been happy ones. Nevertheless Trengove, in a paper on the need for social scientific research for the legal practice, argued that the South African courts have always recognised the need for and value of the input of behavioural and social scientists in divorce disputes involving children, and referred to the considerable recent contribution by behavioural scientists in custody matters.<sup>116</sup> According to Schäfer, although there used to be some reluctance on the part of the courts to use these professionals, there is now a reasonably sound base of co-operation between them.<sup>117</sup> Cases which

<sup>113</sup> For examples of co-operation between the law and the behavioural scientists in the field of criminal law see Schäfer Family Courts Chapter Nine passim.

<sup>114</sup> Lloyd-Bostock 1988 British Journal of Psychology 429.

<sup>115</sup> See eg Willers v Serfontein 1985 2 SA 591 (T)593 I and J,594 A; Bailey 1979 3 SA 128 (A) 143 H.

<sup>116</sup> See Trengove in Steyn, Strijdom, Viljoen and Bosman Marriage and family life 613.

<sup>117</sup> Schäfer Family Courts 219, 221 and 253.

illustrate the use which the courts nowadays make of behavioural scientists include Germani v Herf,<sup>118</sup> in which the court a quo had in contempt proceedings arising out of an access dispute, postponed the proceedings and ordered each of the parties to appoint a psychiatrist to examine the child. In the Appellate Division proceedings, Trollip JA referred extensively to the psychiatrists' reports.<sup>119</sup> In another case concerning access, Evans,<sup>120</sup> the court expressed the view that it would be in the interests of both the child concerned and the parents if there was consultation between a psychologist or psychiatrist and parents, as well as consultation with the child himself.

There is room for improvement, however, for it is generally acknowledged that the lawyers on the one hand and the behavioural and social scientists on the other still find communication with each other difficult and view each other with a measure of suspicion and mistrust.<sup>121</sup> Lambiase and Cumes did research in order to establish whether lawyers and psychologists have different approaches to determining the best interests of the child in custody disputes.<sup>122</sup> They sent out a questionnaire to twenty members of each profession asking them to list fourteen criteria in order of importance. Although each profession rated "the mental stability of each parent" first, the lawyers rated "professional advice/recommendations by mental/health professionals" only fifth. This highlights what the authors refer to as the

118 1975 4 SA 887 (A).

119 Germani v Herf 1975 4 SA 887 (A) 899, 900, 904.

120 1982 1 SA 370 (W).

121 Schäfer Family Courts 253; Goldzband Consulting in Child Custody 29.

122 Lambiase and Cumes 1987 South African Law Journal 705 et seq.

"somewhat ambiguous status of the mental-health professionals in the eyes of the lawyers"; for as they point out, the lawyers are unlikely to be able to determine the mental health of the parents themselves, which means that the input of the mental-health professionals is essential.

Although it cannot be denied that psychologists have a better knowledge of child development than members of any other profession, and although they themselves feel that their contribution is the most valuable one in any consideration of the best interests of a child,<sup>123</sup> the legal profession does have certain reservations about their input.<sup>124</sup>

In the first place, it is alleged that the social sciences can never be value-free.<sup>125</sup> This is a criticism which should not be confined to the social sciences, since it is not in the nature of human beings to be completely objective. All classes of persons involved in deciding what is in the best interests of the child bring their own value judgments to bear on the question.

Despite their superior insight into child development, psychologists themselves concede that they are no more able to predict the future than members of other professions.<sup>126</sup> Nevertheless the "best interests" test forces them to attempt to do so, albeit reluctantly.<sup>127</sup>

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123 Mnookin 1975 Law and Contemporary Problems 258.

124 See eg Lambiase and Kunes 1987 South African Law Journal 707; Abella 1981 Ottawa Law Review 18.

125 Maidment Child Custody 8.

126 See Houlgate Family and State 126; Mnookin 1975 Law and Contemporary Problems 258 -259.

127 Lloyd-Bostock 1988 British Journal of Psychology 431.

In addition, although psychologists speak of lawyers' resistance to psychological theories,<sup>128</sup> lawyers counter by pointing out that psychologists change their theories on child development with alarming rapidity,<sup>129</sup> which makes it difficult for members of other professions to know what to believe. It would certainly make the lawyer's task easier if psychological theory were more settled, but the fact that it is not does not exonerate lawyers from paying any attention to it. It is surely preferable for a judge to take note of recent research in the field and then come to his own informed decision, rather than to continue to rely on his intuition and possibly outdated ideas of common sense.

The behavioural scientists in their turn feel that the use which the law will make of their input is "as uncertain as the weatherman's forecast".<sup>130</sup> The relationship between the professions seems to have got off to a bad start when the law sought help from the social sciences too early in their existence, before they deserved to be called sciences and before they could deliver what the law was asking of them.<sup>131</sup>

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128 Goldstein Freud and Solnit Beyond the Best Interests 67.

129 In 1981 Ottawa Law Review 13 Abella referred to the "dizzying speed" with which psychological nostrums about custody had been created, discredited and reconstructed over the preceding 10 years; see also in particular Clulow Child's Best Interests 39 and 40; English Law Commission Working Paper 96 81.

130 Trengove in Steyn, Strijdom, Viljoen and Bosman Marriage and Family life 613.

131 Although Lloyd-Bostock in 1988 British Journal of Psychology 418 claims that attempts to exert real influence on legal decisions can be frustrating, she concedes that it is healthy for lawyers to be somewhat sceptical. She reminds us that the law first made use of the evidence of social science experts sixty or seventy years ago, but that this was too early, before the social sciences could give the law what it asked of them, and that this led to disappointment on the part of lawyers. Schäfer Family Courts 221 reminds us that it is only in fairly recent times

As stated, judges should try to gain some understanding of psychological theory; but behavioural scientists should likewise have some knowledge of court procedure, of the role of lawyers and of what the court requires of them.<sup>132</sup> Too often, they believe that lawyers adopt an adversarial stance for no other reason than innate aggression. In both instances, the optimum time to gain this insight into the other profession is during one's initial training.

Another difficulty is that lawyers and behavioural scientists often do not meet until just before a trial when there is no time for a full conference. Hoffman and Pincus suggest that it become standard practice for a conference to take place before the start of the case, and one takes it that they mean well before its start.<sup>133</sup> They also highlight the need for lawyers to give clear and full instructions to mental health professionals, so that the latter know what is required of them.

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that psychiatry and psychology have been considered to be recognizable sciences, whilst by way of contrast, as Van Rensburg in Steyn, Strijdom, Viljoen and Bosman Marriage and Family life points out, the roots of our law go back more than two thousand years. Van Rensburg also refers to the fact that before the social sciences developed, law to some extent fulfilled their role, drawing inter alia on the community's views on psychological and sociological matters.

132 See Hoffman and Pincus Custody 3. According to Sutton and Moss in Lloyd-Bostock Children and the law 43, 60, nothing in their training has prepared psychologists for their role in the courts, which, like the law, are alien and largely incomprehensible to them.

133 Hoffman and Pincus Custody 3. Sutton and Moss in Lloyd-Bostock Children and the law 60 suggest that the interaction with the psychologist start as early as possible. According to those authors, "lawyers need 'educating' about what to demand and expect (and in their turn psychologists need 'educating' on how to go about ensuring this)".

An illustration of psychologists' preparation being considered inadequate by the court is to be found in the Appellate Division case of Stock.<sup>134</sup> In this case Diemont JA was highly critical of the evidence of two psychologists given in the court a quo. In respect of the issue of the children's education he found neither of them to have informed themselves sufficiently of the situation so as to be in a position to judge. In the court a quo one of the psychologists had expressed the opinion that the mother would function more effectively in France to which she wished to return with the children, than in South Africa. However, after cross-examination the psychologist had conceded that his opinion was "still a speculation". Diemont JA said he did not know why the court a quo had found the psychologist's evidence persuasive.

Olmesdahl<sup>135</sup> has warned of the danger of the judiciary deferring to outside experts; but that the judiciary are not content to defer completely to them in determining child-related issues often emerges from reported judgments. In Greenshields v Wylie,<sup>136</sup> Flemming J, in attempting to explain, for the benefit of the children concerned, the reasons for his decision in a custody matter, referred to considerations which in his subjective view

"have been proven through generations by the experience of psychologists, social workers and ordinary individual experience."

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134      1981 3 SA 295(A).

135      Olmesdahl Best Interests 6.

136      1989(4) SA 898(W)899.

In Manning<sup>137</sup> Franklin J referred to the evidence of a "qualified consulting psychologist" to whose professional view he said some weight should be accorded (own emphasis). In Willers v Serfontein<sup>138</sup> Steyn AJ acknowledged that the two psychologists' reports were informative, but found the psychological observations on which they founded their recommendations, to be less persuasive than the social aspects on which the social worker's recommendations were founded. He said that he based his findings on the impression made by the witnesses in the box, the information in the reports and the totality of the evidence before him. A valuable suggestion which Hoffman and Pincus make is that there should be some type of standardisation of behavioural scientists' reports which, according to those authors, often lack clarity and order and are therefore difficult for the lawyers to use, especially in urgent matters.<sup>139</sup> Such a standard form is indeed being used in the offices of the Family Advocate.

Behavioural scientists must not only be adequately prepared for court cases: they must also be impartial.<sup>140</sup> Everybody is agreed that neutrality is desirable, but in practice, because the behavioural scientist is usually employed by one party to the dispute only, it is difficult to attain, especially in custody cases where the behavioural scientist may have to inform the parent who employed him or her that

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137 1975 4 SA 659 (T) 663.

138 1985 2 SA 591(T).

139 Hoffman and Pincus Custody 2.

140 Spiro in Bennett Family Law 120 points out that experts must be neutral since their function is to assist the court; and that this is particularly true of psychologists and psychiatrists who testify on difficult problems within the family.

it is in the best interests of the child that the other parent should have custody.<sup>141</sup> Thus In Stock<sup>142</sup> two clinical psychologists had been called by one of the parties. Diemont JA criticised one of them for her lack of impartiality. He found that she was leaning too much in favour of the one party and that when found to be wrong she became argumentative.<sup>143</sup> He also pointed out that unless her evidence was neutral it was of no value. Psychologists themselves have said that, rather than appear for one party only, they would prefer to be impartial evaluators,<sup>144</sup> and clearly this is the only way in which they can properly discharge their professional duties. Since the coming into operation of the Mediation in Certain Divorce Matters Act<sup>145</sup> this has now become possible within the context of enquiries by Family Advocates, who, when they make use of the services of mental health professionals, require them to be impartial. Kastan<sup>146</sup> is an example of a case in which behavioural scientists were given the opportunity to be impartial evaluators. In the consent paper it was stated that if the

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141 See Eekelaar Family Law 219; Hoffman and Pincus Custody 2; Stock 1981 3 SA 1280 (A) 1296.

142 *supra* at 1296.

143 He did, however, concede that the fact that she had reached conclusions after a number of sessions with respondent and only one brief one with appellant, might be attributed to her lack of experience since this was her first court appearance.

144 See Reidy, Silver and Carlson 1989 Family Law Quarterly 79; Lloyd-Bostock 1988 British Journal of Psychology 431-432.

145 Act 24 of 1987. On the operation of this Act see further Chapter 3.

146 1985 3 SA 235 (C) 236.

parties were unable to agree on any decision regarding the children, they were to consult a psychiatrist and psychologist as joint arbitrators. King AJ, in deciding to allow joint custody as agreed on in the consent paper, said that he relied in his decision on the opinion of the said psychiatrist and psychologist that joint custody would be in the best interests of the children. He referred to the behavioural scientists' "outstanding professional ability and reputation", their experience in such cases and their knowledge of that particular case.

Stock's case<sup>147</sup> serves to illustrate the difficulties which may arise when behavioural scientists who lack experience in court appearances are involved in child-related disputes. Some at any rate of these might be resolved if the authorities were to take up the suggestion of Hoffman and Pincus<sup>148</sup> that a panel of mental-health experts be appointed to draw up a register of suitable professionals who would be available for consultation by the courts. It is likely that the facts of the cases referred to in this section would have prompted an enquiry by a Family Advocate had there been one at that stage; but even the Family Advocates might be greatly assisted in their task if they had such a register of experts at their disposal.

In spite of all the above-mentioned difficulties, the relationship between behavioural scientists and lawyers has improved of late. Overseas there has been a rapid expansion of co-operation between the law and psychology during the last twenty-five years, as witnessed by publications, the formation of professional bodies, and the holding of conferences. Training in legal/forensic psychology expanded rapidly in the United States during the nineteen-eighties. This development has

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147      1981 3 SA 1280 (A).

148      Hoffman and Pincus Custody 3.

also taken place in Great Britain although not to the same extent.<sup>149</sup> Sutton and Moss have even pleaded for forensic child psychology to be a distinct branch of psychological practice.<sup>150</sup>

As stated above, the misunderstandings between the professions highlight the need for those members of each to gain a better understanding of the work of the other; and this should preferably occur during their initial training.

### 9.3 Social workers

Social workers and lawyers, like behavioural scientists and lawyers, have frequently misunderstood and distrusted each other.<sup>151</sup> Here too some insight into each other's work and, in the divorce context, into the part each plays in the proceedings, would not come amiss. Fortunately, with the present emphasis on an interdisciplinary approach to family problems, these professionals have a better opportunity to get to know and understand each other.

Reference has already been made to section 6 (1) of the Divorce Act which provides that a divorce may not be granted until the court is satisfied that arrangements made for children of the marriage are satisfactory or the best that can be effected in the circumstances. Section 6 (2) further provides that for the purposes of section 6 (1) the court may cause any investigation which it may deem

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149 See Lloyd-Bostock 1988 British Journal of Psychology 418-419.

150 Sutton and Moss in Lloyd-Bostock Children and the law 63.

151 See Forster Divorce Conciliation 35.

necessary to be carried out. According to Schäfer <sup>152</sup>, this investigation could be carried out by a psychologist, psychiatrist, medical practitioner or social worker. Social workers often do custody evaluations for the courts and are skilled in obtaining social histories. Sometimes, importantly, they are also skilled in interviewing small children.<sup>153</sup> However, they are often overworked,<sup>154</sup> which gives rise to the lawyers' perennial complaints about the length of time it takes for social workers to complete reports. This in an area where, as we have seen, time is of the essence. Social workers play a major part in cases handled in Family Advocates' offices, but there is a perception in some quarters that even there the problems of case overloads and delays have not been completely solved.<sup>155</sup> Social workers have to walk a fine line between, on the one hand, ensuring that children's best interests are protected, and on the other intruding unnecessarily on family privacy. The younger the social worker, the more likely it is that the intervention in the family will be resented. In addition, social workers are usually middle class,<sup>156</sup> and families from other classes and especially other cultures will not readily accept what they perceive as attempts by social workers to impose alien

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152 Schäfer Family Courts 246.

153 See Paquin 1987-88 Journal of Family law 297.

154 See Paquin 1987-88 Journal of Family law 297.

155 This is the impression gained by the author from replies from the South African Association of Mediators and from FAMSA to a questionnaire which the author sent them. See further, on the questionnaire, Chapter 5 par. 3.2.2.6 below.

156 Berger and Berger War over the Family 18, 47.

values and ways of doing things on them.<sup>157</sup> In their sketch of the history of social work in the United States Berger and Berger show that for a long time the family was believed to be unable to solve its own problems, but that since about 1975 it has been seen to be more resilient than was at first thought, and is now itself regarded as the basic social service.<sup>158</sup>

While social workers, like all other groups mentioned in this section, are unable to predict the future and thus cannot with any certainty predict what the child's best interests will be, they are at least able to predict future dangers for the child.<sup>159</sup> Given adequate time at their disposal to delve into all angles of a custody dispute, and with their evaluative skills, they should be able to fill in the gaps in lawyers' knowledge of child development.

#### 9.4 Parents

When a legitimate child is born, the parental power or authority vests in both parents.<sup>160</sup> Both parents have guardianship of the child.<sup>161</sup>

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157 See King 1987 Family Law 189; Lyon 1987 California Law Review 687; Monture 1989 Canadian Journal of Women and the Law 12; Boyd 1994 Canadian Journal of Law and Society 62.

158 Berger and Berger War over the Family 35.

159 See Paquin 1987-88 Journal of Family Law 298.

160 Hawthorne in Family Law Service para E32 and authorities cited there; Van Zyl 1990 Comparative and International Law Journal of Southern Africa 231 and authorities cited there.

161 Guardianship Act 192 of 1993 s1(1).

In their "provisions for a model child placement statute" Goldstein, Freud and Solnit stipulate <sup>162</sup> that on birth the child is placed (author's emphasis) with the parents. It is submitted that this proposed provision is one which would seem offensive to most natural parents, and which evinces a desire for State intervention in the family from the very moment of birth. Normally it is accepted in society, not only that parents ought to concern themselves with their children's best interests, but that they are capable of doing so and generally do so. Nevertheless they are not left to fulfil this task entirely unhindered; for the State itself has assumed the duty of protection of children. As we have seen, it has made the Supreme Court the Upper Guardian of all children, and has also made provision for the protection of children in various statutes.<sup>163</sup> Thus when we look at the role of parents in the determination of the best interests of the child the crucial issue is the balance which must be maintained between, on the one hand, the State's right to intrude into the family in order to protect the child's interests, and on the other, the family's right to privacy.<sup>164</sup> In the United Kingdom there is a strong tradition of family autonomy but the State's protective interest is strong too.<sup>165</sup> In the United States, as we have seen, family autonomy has always been emphasised.<sup>166</sup> Reference was made above to one current trend, namely that of increased State intervention in family life in view of the growing incidence of domestic violence and child abuse and neglect, or possibly

<sup>162</sup> Goldstein Freud and Solnit Beyond the Best Interests 99.

<sup>163</sup> See Hawthorne in Family Law service par E40.

<sup>164</sup> See Paquin 1987-88 Journal of Family Law 282 and 287; Katz in Wilkerson Rights of Children 256.

<sup>165</sup> See Bainham Children Parents and State 3 et seq.

<sup>166</sup> See para 8.1 above.

greater public awareness of its incidence.<sup>167</sup> It has been pointed out<sup>168</sup> that State intrusion may have the unwelcome effect of encouraging irresponsibility on the part of parents. As mentioned above,<sup>169</sup> a countervailing tendency to give the family greater autonomy is also evident today.

Another difficulty is to know what precisely we mean when we speak of the family. Until recently, it was generally taken to mean the nuclear family consisting of father, mother, and their children. However, because of the high incidence of divorce over the last, approximately, thirty years various other family forms have come to the fore, such as the family headed by one parent, and the reconstituted family consisting of husband, wife, and his and/or her children. It is, therefore, no longer realistic to consider the nuclear family to be the norm. Even within the nuclear family decision-making is more complex than it used to be. In the past the husband was always the head of the family and therefore the decision-maker. Today the equality of spouses is widely recognised. In South Africa the husband is no longer the head of the family.<sup>170</sup> Another recent development which detracts from the parental power to determine the best interests of children is the call for children's rights. Thus it is not only the wife, but also the children, who are now accorded a voice in family decisions. As Connell-Thouez<sup>171</sup> says, the redefinition

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167 See para 8.1.3 above.

168 by Clulow in Child's Best Interests 17.

169 See para 8.1.1 above; see also Stone Child's Voice 92 et seq.

170 See s 4 of the Guardianship Act 192 of 1993, which repealed s 13 of the Matrimonial Property Act 88 of 1984.

171 Connell-Thouez 1986 Tulane Law Review; see also Olmesdahl Best Interests 3.

of the family as consisting of two guardians of a human being which itself has rights has a high potential for conflict.

In the past, although it was recognised that parental authority comprised the sum of a parent's rights and duties, the emphasis was on parents' rights and children's duties, whereas today the emphasis is on parental responsibility. In 1986, in its working paper on custody, the English Law Commission proposed a new system "designed to reflect the responsibilities involved in bringing up a child, rather than the current proprietorial or "rights"-based concepts of custody and access,<sup>172</sup> and the Children Act refers only to parental responsibility.<sup>173</sup> Mnookin says that over the past two centuries there has been a shift from the view of a child as a thing to a more child-centred view.<sup>174</sup> Other writers have in similar vein referred to the shift away from paternalism;<sup>175</sup> but Whitehead reminds us that, in the West, children have not been viewed as property for a very long time and were never viewed as such by Christianity.<sup>176</sup> Connell-Thouez suggests that although ours is the century of recognition of individual rights, perhaps in certain circumstances, as in the exercise of parental authority, the need for stable citizens should receive more emphasis than the needs of the individual. This statement seems to the writer to

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172 English Law Commission Working Paper 96 (viii).

173 Children Act 1989 s 2.

174 Mnookin 1975 Law and Contemporary Problems 231; see also Foster and Freed in Katz Youngest Minority 320 and 330.

175 See Olmesdahl Best Interests 4; McCormick 1976 Archiv für Rechts-und Sozialphilosophie 305.

176 Whitehead Parents' Rights 86.

contain some dangerous implications of excessive State intervention.<sup>177</sup> Nevertheless Connell-Thouez' innovative recommendations of a contract of parental rights and obligations to replace outdated matrimonial regimes have much merit. It is evident that the parental power, and more particularly the exclusive paternal power, are concepts which are no longer accepted unquestioningly. Nevertheless, during a marriage, and in the absence of child neglect or abuse, the family is largely left to its own devices to decide questions relating to the welfare of children. When a divorce is in the offing, and questions of custody and access arise, the picture changes. Very few divorces are contested,<sup>178</sup> and in the vast majority of uncontested divorces the divorce courts incorporate into the divorce order the parents' written agreement on arrangements for the children. As mentioned above, one current view is that at the time of divorce the arrangements for the children cannot be left to the parents alone<sup>179</sup> for they themselves are in need of support and cannot be relied on to think dispassionately about their children's needs. It is unfortunately true that many divorcing couples use the maintenance, custody and access issues as weapons in their battles with each other. Nevertheless, although

177 Connell-Thouez 1986 Tulane Law Review 1140.

178 In South Africa the Hoexter Commission in its Report Part VII par 7.3.1.1 stated that since the commencement of the Divorce Act 70 of 1979, "defended divorce actions have been extremely rare, and divorce actions heard in the divorce court of the Supreme court are almost without exception undefended." See also Schäfer 1984 De Rebus 18; Schäfer 1988 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 302.

179 See Inker and Peretta in Katz Youngest Minority 39; Kastan 1985 3 SA 235 (C) 236; Berry 1984 Family Law 169; Paquin 1987-88 Journal of Family Law 282,283; Coughlin in Wilkerson Rights of Children 17; Clulow Child's Best Interests 5; Massel, Weiner, and Simons 1986 Family Advocate 9; King 1987 Family Law 188; Maidment Child Custody 22.

the view of the parental role may have changed of recent years, when it comes to divorce the parents' views cannot be ignored.<sup>180</sup>

Although some psychologists would have it otherwise,<sup>181</sup> the biological bond must, even today, be accorded some weight.<sup>182</sup> In addition, of all the experts who may make an input at this time, it is the parents who know the children best. Besides, parental responsibility will continue after the divorce,<sup>183</sup> and in most cases it is desirable that the child maintains a relationship with both its parents.

## 9.5 Children

The divorce of parents is a traumatic event in the lives of children, and often affects them more radically than it does their parents. As has been seen, when couples divorce today the chief focus of attention is on the best interests of their children. The rights of children on divorce are sometimes even spelled out.<sup>184</sup> To formulate

180 See King 1987 Family Law 188; Schlebusch 1988 4 SA 548(E) 551; Bailey 1979 3 SA 128 (A) 135-136.

181 See Goldstein, Freud and Solnit Beyond the Best Interests passim for the view that the claims of the psychological parent should be preferred to those of the biological parent. Lloyd-Bostock refers to the notion of the "psychological parent" as one of those theories which although "rejected, refined or superseded within psychology" continues to influence legal discussion and decisions. Lloyd-Bostock 1988 British Journal of Psychology 435.

182 See Richards 1982 Journal of Social Welfare Law 140-141; reference to Texas Family Code in Mnookin 1975 Law and Contemporary Problems 248 fn118.

183 Mnookin and Kornhauser 1979 Yale Law Journal 958; see also Clulow Child's Best Interests 23-24.

184 See the Bill of Rights of Children in Divorce Actions developed by the Family Court in Milwaukee, as cited by Paquin 1987-88 Journal of Family Law 285 fn 29.

such rights is praiseworthy and may serve to remind divorcing parents of their children's needs at a time when they are likely to be engrossed in their own troubles. It is, however, difficult to see how such rights can be enforced; they are clearly moral rights but not always legal ones.<sup>185</sup>

Children are not usually participants in the divorce process,<sup>186</sup> and their voices are seldom heard on the questions of custody, access and maintenance which will affect the whole future course of their lives.<sup>187</sup> It would seem logical that children should be consulted on these matters. However, difficulties do arise when we try to decide how this is to be done. There seems to be consensus that it is not desirable to question children in open court<sup>188</sup> where they may be overawed by the place and the occasion and consequently too distressed to express their true wishes. Another possibility is that a judge may question children in chambers.<sup>189</sup> This is done regularly in certain jurisdictions, but whether in the course of a short interview it is possible for a judge, who has no particular skills or training in interviewing children,<sup>190</sup> to make a satisfactory assessment of the child's best

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185 See McCormick 1976 Archiv für Rechts- und Sozialphilosophie 305; Masson 1988 Civil Justice Quarterly 142.

186 Mnookin 1975 Law and Contemporary Problems 254.

187 On the child's voice in the divorce process see also Chapter 6 par 5.2.10 below.

188 See Jones in 1984 Family Law Quarterly 49 fn 19; Paquin 1987-88 Journal of Family Law 295.

189 See eg Horsford v De Jager 1959 2 SA 152 (N) 157; Byliefeldt v Redpath 1982 1 SA 702 (A) 713; Martens 1991 4 SA 287 (T).

190 Masson 1988 Civil Justice Quarterly 141; Murch Justice and Welfare in Divorce 212 et seq.

interests is debatable.<sup>191</sup> An alternative solution is to appoint a separate representative for the child,<sup>192</sup> and section 6(4) of the Divorce Act<sup>193</sup> makes express provision for this. It reads:

"For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings".

Such an appointment is also not without its problems, however. Maidment points out that there are issues of principle involved here, namely whether the representative is an officer of the court, and whether it is the child and its wishes or the child's interests as defined by adults which are being represented<sup>194</sup>. A further difficulty is that the child's legal representative, like the judge, may have no background or skills in understanding or interviewing the child, and may therefore be unable to determine what the child's wishes are. It would appear preferable that a social worker who does have the appropriate interviewing skills should conduct the interview; but of course the social worker could not represent the child in court. Our courts have seldom made use of section 6(4) and in this respect the position here resembles that in England,<sup>195</sup> where it is unusual for separate legal representatives to be appointed for the children of divorcing parents. Nor is this provision likely to be applied more often in the future, in the light of the appointment of family advocates in terms of the Mediation in Certain Divorce

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191 See Jones 1984 Family Law Quarterly 68 et seq.

192 See Foster and Freed in Katz Youngest Minority 330; Paquin 1987-88 Journal of Family Law 288.

193 Divorce Act 70 of 1979.

194 Maidment Child Custody 83.

195 See Eekelaar Family Law 219.

Matters Act.<sup>196</sup> The Act, which came into operation on 1 October 1990, makes provision for the appointment of a Family Advocate who when divorce proceedings are instituted may independently apply to the court for authority to institute an enquiry into the welfare of any minor or dependent children of the marriage and must institute such an enquiry at the request of the court or of one of the parties to the suit.

Various writers have argued strenuously that children's wishes, particularly on custody, should not be consulted.<sup>197</sup> Reference has been made to their right to freedom from emotional distress;<sup>198</sup> to the possibility that parents may consciously or unconsciously influence or even blackmail the child to express a certain preference;<sup>199</sup> to the unfair burden which is placed on children if they are forced to choose; to the fact that young children, at any rate, lack the insight and maturity to choose and in particular to choose what is in accord with their long-term interests;<sup>200</sup> to the desirability of their maintaining links with both parents and the possibility that their choice of one parent may jeopardise their relationship with the

196 Mediation in Certain Divorce Matters Act 24 of 1987. For a fuller discussion of this Act see Chapter 4.

197 For arguments for and against doing so see Forder and Ward 1987 Cambridge Law Journal 506; King 1987 Family Law 190 et seq; Paquin 1987-88 Journal of Family Law 288 et seq; Stock 1981 3 SA 1280 (A) 1297; Eekelaar 1982 Oxford Journal of Legal Studies 84; Jones 1984 Family Law Quarterly 45,48; Bishop and Mitchell 1989 Family Law 442.

198 Jones 1984 Family Law Quarterly 52.

199 See Uys 1985 Maatskaplike Werk 102; Schuman 1984 Massachusetts Law Review 17 et seq.

200 McCormick 1976 Archiv für Rechts-und Sozialphilosophie 316; see also Greenshields v Wylie 1989 4 SA 898 (W) 899.

other; to the harm it does children to have an illusion of power; and to the self-reproach children may eventually have if they feel that they determined the course of events after the divorce. On the other hand, in many overseas jurisdictions the wishes of, in particular, the older child, are consulted as a matter of course.<sup>201</sup> In California fourteen is considered to be the age of discretion and the wishes of a child above that age are accorded great weight.<sup>202</sup> It is submitted that the wishes of adolescents should certainly be taken into account. However, in the light of the difficulties listed above, this should be done in the strictest confidence, and perhaps on the basis that it is necessary to find out how every family member feels about the divorce. At no time should a child gain the impression that his or her voice is decisive.

#### 10 DOES THE "BEST INTERESTS" CRITERION SERVE ANY PURPOSE?

From the above it is clear not only that the "best interests" criterion is a vague one, but that none of the persons who may be involved in determining the best interests of children can be guaranteed to come up with the correct decision. In difficult cases the voices of all the persons mentioned above may have to be heard.

Recently this criterion has come under increasing attack. In North America, it has been criticised as being a western, racist standard which is "not culturally relevant" in non-western communities.<sup>203</sup> Fineman<sup>204</sup> has referred to the breakdown of the

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201 On the position under the English Children Act see Chapter 2 par 3.1 above.

202 See Stone Child's Voice 90.

203 See Monture 1989 Canadian Journal of Women and the Law 12 et seq. In this article Monture writes that, in Canada, First Nations children are more likely to be taken into care than other children and also less likely to be

best interest of the child test which she maintains should have been discarded long ago. She says it became unworkable when old criteria such as the maternal preference rule or the question of fault fell away; and argues that for judges to call on the helping professions or children's advocates for help does not solve the problem.

Fixed guidelines may be useful in narrowing the scope of the criterion, but their content needs to be carefully considered.<sup>205</sup> They may be so widely worded that they really do not narrow the scope of the test at all. On the other hand, they cannot be made too specific, for each case involving children is different.

The chief merit of the criterion lies in its emphasis of the welfare of children at a time when the divorcing parties may be engrossed in all sorts of other issues. As

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returned to their parents or placed for adoption. She accuses the child welfare system there of disregarding the "indigenous factor"; and asserts that to remove such children from their culture is an act of genocide. She refers to the case of Racine v Woods 1983 2SCR 173 in which the foster parents of an Indian child applied to adopt her. Since the child had been made a ward of a Children's Aid Society the mother had rehabilitated herself extremely well, and now expressed the belief that her child should grow up within her own culture and tradition. The Supreme Court of Canada, however, disregarded this argument and based their decision on the best interests of the child test. Nor can the criterion be said to be "culturally relevant" in South African customary law, where it is not the welfare of the individual but that of the group which is the focus of attention. See Bennett in 1991 Acta Juridica 19. See also Nhlapo ibid 143.

204 Fineman in 1989 University of California Davis Law Review 835-837 846; see also Boyd 1990 Canadian Family Law Quarterly 29.

205 On guidelines in custody disputes see Chapter 3 par 3.9 below.

King<sup>206</sup> says, principles such as "the child's welfare" and "the best interests of the child" provide :

"a unifying concept which both undermines the subjective values of the contestants and legitimates the court's decision"

and, as he points out,<sup>207</sup> one cannot argue with the principle of putting the children first. It has been known for a long time that divorce does not leave children unscarred, and its impact on them may even be longer lasting than had been thought up until recently.<sup>208</sup> Clulow refers to divorce as a multi-faceted process, spanning years rather than months.<sup>209</sup> Many divorcing parents are unable to reach an agreement which is truly in the best interests of their children, and indeed often seek outside help to resolve the issue. In some cases, more than one of the persons referred to above may have to make an input. In addition, members of the legal profession on the one hand and of the social-work and behavioural-science professions on the other, should be required to gain a better understanding of the purpose and scope of each other's contribution.

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206 King 1987 Family Law 189.

207 *ibid.*

208 See eg Wallerstein and Blakeslee Second Chances 1989. See, however, Chap 3 para 2.2.2.

209 Child's Best Interests 19.

## CHAPTER 3

### EFFECTS OF DIVORCE ON CHILDREN; AND CHILD-RELATED DIVORCE ISSUES

#### 1 INTRODUCTION

Since this thesis considers the interests of children when their parents divorce, and how best those interests may be furthered, it is important to know exactly what effect divorce has on children. Finding this out is largely outside the scope of legal research; we must look to research done by behavioural scientists in other jurisdictions for the information we seek.

Upon divorce, decisions have to be made about child custody and access to children. Children are also affected by any decisions which are made on finance.<sup>1</sup> A brief look will therefore be taken at custody, access, and finance after divorce, and current approaches to them. Custody used to be thought to be the most troublesome of these issues, but access increasingly occasions bitter disputes too.

#### 2 EFFECTS OF DIVORCE ON CHILDREN

During the first half of the 20th century the view was widespread that unhappily married couples should stay together "for the sake of the children".<sup>2</sup> Subsequent experts came to believe that it was better for children that their parents should divorce than that they should have to live

1 Mnookin and Kornhauser 1979 Yale Law Journal 963.

2 See Schäfer 1987 South African Law Journal 149; Clulow Child's Best Interests 19.

in a home where there was on-going conflict, but recent divorce research has revealed that divorce has a far greater impact on children than was at first thought.<sup>3</sup> Over the last approximately twenty years, whilst the divorce rate was rising steeply, the need was felt for scientific studies of the effect of divorce on children.<sup>4</sup> To quote Richards:

"Divorce and its consequences for children and their parents has been a very active field of social research in recent years and we now have a considerable body of evidence on which decisions might be based."<sup>5</sup>

From the findings a picture has begun to emerge of the considerable adverse effects which divorce has on some, but not all children.<sup>6</sup> Nevertheless one school of thought believes that the damage which parental divorce causes children may have been overstated.<sup>7</sup> Another new insight is that divorce is not an event but a long drawn out process which commences before the

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3 See Price and McKenry Divorce 74; Lloyd's-Postbox Law in Practice 92; MacLean and Wadsworth 1988 International Journal of Law and the Family 157; Schäfer 1987 South African Law Journal 149.

4 In South Africa it seems that hardly any research has been done in this area, but see Braude paper read at Colloquium of National Programme for Marriage and Family Life HSRC July 1991.

5 Richards 1989 Family Law 83.

6 See Price and McKenry Divorce 77; Elliott et alii 1990 Family Law 309; Forehand, Long and Brody in Hetherington and Arasteh Impact of Divorce 155.

7 See Maidment Child Custody 174.

formal divorce and continues long after it.<sup>8</sup> Often the most traumatic time for children is when their parents separate, although in some families there are numerous separations before the final one, and neither parents nor children may realise at the time of a particular separation that it is indeed the final one.

At first studies may have been undertaken with the idea that knowledge gained could help reduce the divorce rate,<sup>9</sup> but today most professionals concede that a high divorce rate is part of modern society and that most children will not spend their entire childhoods in the traditional "nuclear" family.

## 2.1 The difficulty of ascertaining the effects of divorce on children

To conduct a reliable study of the effects of divorce on children is extremely difficult for various reasons, the chief of which is that it is not usually possible to be certain that a particular effect on a child is really the result of the divorce rather than of some other factor.<sup>10</sup> The child's personality is one factor which plays a role.<sup>11</sup> Children may have had problems before

8 See Clulow Child's Best Interests 18,19,23; MacLean and Wadsworth 1988 International Journal of Law and the Family 157; Richards 1991 Family Law 71; Hetherington, Cox and Cox in Lamb Non-Traditional Families 234.

9 MacLean and Wadsworth 1988 International Journal of Law and the Family 157.

10 See Maidment Child Custody 174-175; Maidment in Freeman State, Law and Family 176; Elliott et alii 1990 Family Law 310; Eekelaar Family Law 42.

11 See Price and McKenry Divorce 79.

the divorce, or may be affected by parental conflict over a long period prior to the divorce.<sup>12</sup>

We must also look at the particular problems of the custodial parent (who is usually the mother) and how these may affect the children. Often the custodial parent and the children leave the family home upon separation or divorce, so that the children lose the security of the familiar home, neighbourhood, school and friends.<sup>13</sup> Usually there will be a decline in the family's standard of living.<sup>14</sup> It is widely acknowledged today that women suffer more economically after divorce than men<sup>15</sup> and that one-parent families are socially and economically disadvantaged.<sup>16</sup> Thus the explanation for the common finding that children of divorce are under-achievers in the spheres of education and of employment may perhaps be sought in the impoverishment of the family after divorce.<sup>17</sup> Both custodial

12 See Price and McKenry Divorce 74.

13 See Price and McKenry Divorce 75; Maidment Child Custody 211.

14 Clulow Child's Best Interests 18,25; MacLean and Wadsworth 1988 International Journal of Law and the Family; Elliott et alii 1990 Family Law 309.

15 See Maidment Child Custody 192; Maidment in Freeman State, Law and Family 162; Schäfer 1987 South African Law Journal 149.

16 See MacLean and Wadsworth 1988 International Journal of Law and the Family 157,158; Maidment in Freeman State, Law and Family 161; on the particular hardships which divorced men suffer see Richards 1991 Family Law 71; Maidment Child Custody 165.

17 See Wadsworth 1990 Family Practice 108.

fathers and custodial mothers complain of social isolation and work overload, but mothers more so.<sup>18</sup> It has also been found that there is more conflict between parent and child in one-parent than in two-parent families. There also seems to be some evidence that the child's adjustment to living in a one-parent family is more difficult if that parent is of the opposite sex to the child.<sup>19</sup> Then, too, the re-marriage of a parent may adversely affect a child, although it may also prove beneficial.<sup>20</sup>

Studies which have been done on the effects of divorce on children have been criticised, *inter alia*, for adopting too clinical an orientation,<sup>21</sup> restricted sampling, a concentration on subjects with psychological problems,<sup>22</sup> concentration on white, middle-class children<sup>23</sup> and lack of

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18 See Price and McKenry Divorce 80.

19 See MacLean and Wadsworth 1988 International Journal of Law and the Family 157; Kelly 1991 Family Law 54. The relationships between children and their step-parents and step-brothers and -sisters is a study on its own which is beyond the scope of this thesis.

20 On this subject see Eekelaar Family Law 41.

21 See Price and McKenry Divorce 74; and see the criticism by Kelly and Emery of Wallerstein and Blakeslee Second Chances in 1989 Family Law 489.

22 See Elliott et alii 1990 Family Law 310.

23 See Hetherington, Cox and Cox in Lamb Nontraditional Families 235; Clulow Child's Best Interests 23.

control groups.<sup>24</sup> Wallerstein and Kelly were criticised because their sample was self-selected.<sup>25</sup> Sometimes, as in the Virginia Longitudinal study, children of divorced parents have been compared with children from intact families.<sup>26</sup> The comparison which would yield the most useful information would be one between the children of divorced parents and the children of unhappily married parents, but of course such a study is not feasible. Kelly and Emery point out that no purpose is served by comparing the lives of the children of divorce with the lives of "some idealised nuclear family".<sup>27</sup>

## 2.2 The findings

Although not all the findings of the studies have been consistent, certain threads run clearly through most of them.

Of late it had been thought that divorce was becoming so common-place that children, surrounded as they usually are by other children of divorce, might take it more lightly than they had in the past,<sup>28</sup> but the studies reveal that this has not happened.

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24 See Kelly and Emery 1989 Family Law 490; and on methodological problems generally see Kelly 1991 Family Law 52.

25 See Kelly and Emery loc cit.

26 See Hetherington, Cox and Cox in Lamb Nontraditional Families 235.

27 Kelly and Emery 1989 Family Law 490.

28 See MacLean and Wadsworth 1988 International Journal of Law and the Family 164.

### 2.2.1 Consistent findings

Although Paquin, writing on children's experience of divorce, reports that

"The psychological research in this area seems to be consistent on only one point: continued, non-conflictual contact with both parents reduces the negative impact that divorce may have on a child,"<sup>29</sup>

certain other effects are reported by many researchers. Children are consistently reported to experience feelings of sadness and of anger.<sup>30</sup> Smaller children may fear that the parent remaining to them may disappear too, and older children may fear unhappy marriages for themselves. This fear is not without justification, for it seems divorce is more common among those from divorced families.<sup>31</sup> Small children are inclined to feel that they are in some way to blame for the divorce.<sup>32</sup>

Often, behavioural problems and regression in behaviour are reported. Children may be clinging, withdrawn, aggressive or delinquent,<sup>33</sup> and the

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29 Paquin 1987-88 Journal of Family Law 279.

30 See Hoffman and Pincus Custody 6. On anger, see Richards 1982 Journal of Social Welfare Law 144.

31 Wadsworth 1990 Family Practice 106.

32 See Price and McKenry Divorce 78.

33 See Wadsworth 1990 Family Practice 106.

standard of their school work may deteriorate.<sup>34</sup> Truancy may occur. There may even be somatic disturbances or medical problems.<sup>35</sup>

It has been found necessary to distinguish between short-term and long-term effects, since these may differ markedly.<sup>36</sup> It has also been found that the effects differ according to the age and sex of the child.<sup>37</sup> Wallerstein and Kelly distinguished differing effects in four age groups.<sup>38</sup> The first year after the divorce has been found to be a turbulent and disturbed one for all parties concerned.<sup>39</sup> It is alleged by some writers that the divorce crisis differs from others, when parents' first thoughts are usually for their children,<sup>40</sup> for during this period parents may be so engrossed in their own problems that they may be unable to give much attention to those of their

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34 See Mudie 1989 De Rebus 687; Hoffman and Pincus Custody 14.

35 Price and McKenry Divorce 76.

36 See Maidment Child Custody 195.

37 See Wallerstein, Corbin and Lewis in Hetherington and Arasteh Impact of Divorce 211; Eekelaar Family Law 42.

38 Wallerstein and Kelly Surviving the Breakup; for a brief résumé of Wallerstein's findings see Bishop and Mitchell 1989 Family Law 441-442.

39 Lloyd-Bostock Law in Practice 90; Richards 1989 Family Law 83; Hetherington, Cox and Cox in Lamb Nontraditional Families 234; Maidment Child Custody 194.

40 Braude Paper read at Colloquium of National Programme for Marriage and Family Life HSRC July 1991 3.

children.<sup>41</sup> After that first year, however, their parenting capacity usually improves.<sup>42</sup> A danger during this period and subsequently is that children may be burdened with responsibility beyond their years, and some are made to feel too responsible for the welfare of the custodial parent.<sup>43</sup>

### 2.2.2 Inconsistent findings

Though there are findings which recur in the writings of most researchers, many inconsistent conclusions are also drawn.<sup>44</sup>

Thus many researchers find that divorce affects boys more seriously than girls.<sup>45</sup> Aggressive behaviour on the part of boys is often reported.<sup>46</sup> In the first two years after the divorce it is said that a small boy's relationship with the custodial mother is often a troubled one.<sup>47</sup> Wallerstein, Corbin

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41 Clulow Child's Best Interests 26; Price and McKenry Divorce 80.

42 See Maidment Child Custody 195; Maidment in Freeman State, Law and Family 169.

43 See Price and McKenry Divorce 80; Garber in Cohen, Cohler and Weissman Parenthood 188.

44 See Elliott et alii 1990 Family Law 309.

45 See Maidment Child Custody 194.

46 See Clulow Child's Best Interests 20; Price and McKenry Divorce 78; Lloyd-Bostock Law in Practice 90; MacLean and Wadsworth 1988 International Journal of Law and the Family 157; Richards 1989 Family Law 83; Maidment in Freeman State, Law and Family 163, 170; Kelly 1991 Family Law 53; Maidment Child Custody 192.

47 Maidment Child Custody 192.

and Lewis, however, found in a ten-year study that girls, especially older girls, were most affected.<sup>48</sup>

In 1984 Wallerstein stated that the younger the children at the time of divorce the better they adjusted to it in the long term.<sup>49</sup> Yet according to Richards the findings of several studies show that

"some of the long-term disruptive effects on children whose parents divorce are most marked if the separation comes earlier"<sup>50</sup>

and according to Price and McKenry

"In general, younger children exhibit more severe social and emotional reactions to parental divorce".<sup>51</sup>

There is considerable disagreement among researchers on the long-term effects of divorce.<sup>52</sup> The book, Second Chances, by Wallerstein and

48 Wallerstein, Corbin and Lewis in Hetherington and Arasteh Impact of Divorce 211.

49 See Clulow Child's Best Interests 20; see also Wallerstein, Corbin and Lewis in Hetherington and Arasteh Impact of Divorce 211.

50 Richards 1982 Journal of Social Welfare Law 142.

51 See Price and McKenry Divorce 77; see also Wadsworth 1990 Family Practice 105.

52 See Hetherington, Cox and Cox in Lamb Nontraditional Families 285; Price and McKenry Divorce 77; Eekelaar Family Law 43. MacLean and Wadsworth 1988 International Journal of Law and the Family 160 -164 refer to the findings of "a very long-term follow-up study of a nationally representative sample of children" born in Britain during one week in 1946. These demonstrated that the incidence of various long-term emotional problems amongst children of divorce was far above average. Their educational attainments, employment record and income were also affected. On the

Blakeslee concerns a ten-year follow-up of some of the parents and children whom Wallerstein and Kelly had previously interviewed on their reactions to a divorce in the family.<sup>53</sup> Some of the information in the book is also based on a fifteen-year follow-up. The authors conclude that for most children the effects of divorce are very serious and long-lasting. The authors have attracted criticism, more particularly for being unscientific, for ignoring contradictory research and for emphasising the negative,<sup>54</sup> and for the drawing of conclusions not justified by the evidence.<sup>55</sup>

Richards asserts that current findings definitely do not indicate that all children of divorce are affected in the long term.<sup>56</sup> Other writers have claimed that in our present state of knowledge the ill-effects for children may not be as widespread nor as serious as has been believed, and may be mitigated, reversed or avoided by satisfactory post-divorce arrangements.<sup>57</sup>

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latter problems see also Richards 1989 Family Law 71-72; Wadsworth 1990 Family Practice 106.

According to Richards, the findings of three British cohort studies suggest that some, at any rate, of the effects of divorce on children last into adulthood.

53 The results of this first study were published in Wallerstein and Kelly Surviving the Breakup.

54 See eg book review by Kelly and Emery in 1989 Family Law 489 and 490.

55 See Elliott et alii 1990 Family Law 309.

56 Richards 1991 Family Law 72.

57 See Maidment in Freeman State, Law and Family 177; see also Schäfer 1987 South African Law Journal 149; Eekelaar Family Law 64-67.

### 2.3 Mediating factors in children's adjustment to divorce

Certain factors have emerged as crucial in children's adjustment to their parents' divorce.<sup>58</sup>

Firstly, it is important for parents to explain the divorce to children, and also to explain to them, in so far as is possible, what will happen to them after the divorce.<sup>59</sup> The manner of explaining is also important.<sup>60</sup> Parents find this a daunting task and often do not tackle it. Braude says her years of clinical experience have shown her that parents prepare children for divorce and its outcome inadequately if they do it at all.<sup>61</sup> Some parents in Mitchell's sample simply assumed that their children must have known what was happening, whilst others said they had not told the children anything because the children had not asked.<sup>62</sup> Divorce usually takes children by surprise, even where there has been much conflict in the home. Parents often assume that children must feel as they do that divorce is desirable, whilst in reality the children would prefer the family to remain intact, even

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58 See Maidment Child Custody 209.

59 Clulow Child's Best Interests 21; Price and McKenry Divorce 75; Mitchell Children in the Middle Chapter 4.

60 Price and McKenry Divorce 75;

61 Braude paper read at Colloquium of National Programme for Marriage and Family Life HSRC July 1991 11.

62 Mitchell Children in the Middle 56- 58.

where there has been much conflict in the home, and they may even continue to wish for their parents' reconciliation for many years.<sup>63</sup>

Parents may think that children are not upset by the divorce when in truth they are carefully concealing their feelings from their parents.

Secondly, the degree of conflict between parents, both before and after the divorce, has a marked impact on children;<sup>64</sup> and so, thirdly, does the psychological adjustment of the custodial parent.<sup>65</sup>

Fourthly, it has been asserted that continued contact with both parents usually has a beneficial effect on the child, and may be the most important element in the child's adjustment to divorce.<sup>66</sup> It has been found that the quality of parent- child relationships prior to the divorce is not an entirely

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63 Clulow Child's Best Interests 23; Price and McKenry Divorce 75; Lloyd-Bostock Law in Practice 91.

64 See Forehand, Long and Brody in Emery and Arasteh Impact of Divorce 155; Clulow Child's Best Interests 20, 21; Price and McKenry Divorce 79; Lloyd-Bostock Law in Practice 92; Richards 1989 Family Law 84; Bishop and Mitchell 1989 Family Law 441; Maidment in Freeman State, Law and Family 169,172; Kelly 1991 Family Law 53; for more recent findings on conflict see also, however, Kelly 1991 Family Law 54. See also Duncombe v Willies 1982 3 SA 311 (D) 317.

65 See Kelly 1991 Family Law 54.

66 See Maidment Child Custody 215 and 282; Richards 1982 Journal of Social Welfare Law 141-144; Richards 1989 Family Law 83; Richards 1991 Family Law 71; Kelly 1991 Family Law 56; Bainham Children, Parents and State 11; Elliott et alii 1990 Family Law 309. See par 3.6 for the differing views expressed on this issue by Goldstein, Freud and Solnit.

reliable predictor of post-divorce relationships.<sup>67</sup> Kelly reports that "significant links" have been found between the father's role after divorce and the child's social and academic adjustment. In a small minority of cases contact with the non-custodial parent should be avoided and the children may feel relief more than anything else when that parent leaves.<sup>68</sup>

Children also benefit from confiding in someone other than the parent. This might be a grandparent, sibling, or friend.<sup>69</sup> However, it has been found that children are often too ashamed or embarrassed to confide in school friends, and many confide in nobody.<sup>70</sup>

### 2.3.1 Factors which might mitigate the adverse effects of divorce on children

On the basis of the findings of the studies cited, a few preliminary observations may be made:

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<sup>67</sup> See Maidment Child Custody 201.

<sup>68</sup> See Arendell Mothers and Divorce 81; Maidment Child Custody 271.

<sup>69</sup> See Price and McKenry Divorce 81; Braude paper read at Colloquium of National Programme for Marriage and Family Life HSRC July 1991 20 et seq.

<sup>70</sup> See Braude paper read at Colloquium of National Programme for Marriage and Family Life HSRC July 1991 16.

(a) The role of the school and the church<sup>71</sup>

At a time of many confusing changes in a child's life, school is usually a constant and stable element. It has been estimated that children spend approximately 15,000 hours at school from the age of five until they complete their schooling.<sup>72</sup> Teachers are thus in a position to be objective observers of a child's behaviour and of any learning problems it may have.<sup>73</sup> In South Africa, Braude has engaged in research into the supportive role of the school for children of divorce; but has also stated that she is not aware of other similar research anywhere, most studies having focused on the role of the home. In the light of the numbers of school-going children of divorce there are today, it seems advisable to give teachers some guide-lines on coping with these children and even some training in divorce counselling.<sup>74</sup> Children may very well find some comfort in knowing that other children have similar problems.<sup>75</sup> On the other hand, some of the children in Mitchell's study preferred the school not to know about the

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71 See Clulow Child's Best Interests 23.

72 Braude paper read at Colloquium of National Programme for Marriage and Family Life HSRC July 1991 3 citing Rutter.

73 See Lloyd-Bostock Law in Practice.91; Braude paper read at Colloquium of National Programme for Marriage and Family Life HSRC July 1991 3.

74 See Wadsworth 1990 Family Practice 108.

75 See Braude paper read at Colloquium of National Programme for Marriage and Family Life HSRC July 1991 22.

divorce and felt that it was a private matter.<sup>76</sup> However, in her study Braude found that when teachers had spoken to children from her sample about the divorce the majority of both children and mothers expressed satisfaction with emotional support given by the school. The children concerned felt that such support was what was needed, rather than formal lessons on divorce. Braude states:

"It appears that children expect that they would not like their teachers talking to them about the divorce; when their teachers do, however, a high percentage feel comfortable".<sup>77</sup>

Most churches today offer counselling services to members. Clinical psychologists may even be employed in large congregations.

(b) Divorce mediation<sup>78</sup>

If parents participate in divorce mediation the mediators invariably will tell them that it is important to explain the divorce and its consequences to the children, and to do so in an appropriate manner. They will emphasise parental responsibility and the role of both parents after divorce; and the importance of explaining that the divorce is between the adults and not between parent and child. They will help parents realise that the less

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76 Mitchell Children of Divorce 76; see also Braude paper read at Colloquium of National Programme for Marriage and Family Life HSRC July 1991 32.

77 Braude paper read at Colloquium of National Programme for Marriage and Family Life HSRC July 1991 30.

78 On divorce mediation see further Chapters 5, 6 and 7.

conflict there is between parents the better it is for the child, and that one parent should not set the child against the other.

(c) Counselling

It seems that since some of the effects of divorce on children are of long duration,<sup>79</sup> many of them need counselling which may have to continue for a long time after the divorce.<sup>80</sup>

### 3 CUSTODY

#### 3.1 The best interests criterion in custody disputes<sup>81</sup>

The court granting a divorce may, as Upper Guardian of all minor children, at its discretion, in terms of s 6(3) of the Divorce Act, make any order in respect of the custody or guardianship of or access to minor children of the marriage. As was discussed in Chapter 2, the criterion which it must apply in all such cases is the "best interests of the child" <sup>82</sup>. Unfortunately it is not always the children's interests which are uppermost in the mind of parents when they draw up an agreement.<sup>83</sup> They may be focusing on their own anger and resentment, or may be trading custody against financial

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79 Wadsworth 1990 Family Practice 104.

80 See Hoffman and Pincus Custody 15.

81 On this criterion see also Chapter 2.

82 See Nugent 1978 2 SA 690 (R). See also Chapter 2 par 2.

83 See Schäfer 1987 South African Law Journal 154.

support or simply attempting to score points off each other.<sup>84</sup> Where custody disputes are taken to court, all aspects of the problem are aired; but in the overwhelming majority of divorces there is no apparent dispute on these issues and the parents themselves reach an agreement on the children, which the court must scrutinise.<sup>85</sup> The problem which faces the court in such undisputed cases is to identify those agreements which may embody some risk of harm to children.

### 3.2 Definitions of terms

Roman-Dutch law, unlike common-law systems, differentiates between guardianship and custody. It also differs from common-law systems in not distinguishing between legal and physical custody.<sup>86</sup> Our common law furnished no authoritative definitions of custody, access or guardianship.<sup>87</sup> Nevertheless, whereas in overseas jurisdictions there has been much confusion about the meaning of the term "custody", here there is consensus that guardianship is the wider concept and custody only one aspect of it.<sup>88</sup> Guardianship in its widest sense includes the administration of the minor's

84 See Green, Long and Murawski Dissolution of Marriage 287; Maidment Child Custody 196,197; English Law Commission Working Paper 96; Cohen, Cohler and Weissman Parenthood 241; Goldzband Consulting in Child Custody 9.

85 See Maidment Child Custody 68.

86 Schoeman 1989 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 464.

87 Spiro in Bennett Family Law 109.

88 Hahlo Husband and Wife 389,394; Spiro in Bennett Family Law 109.

property and business affairs and the care and control of the minor's person.<sup>89</sup> In terms of recent legislation, unless a court awards sole guardianship to one of the parents, both of them have guardianship of legitimate children.<sup>90</sup> If, on divorce, sole custody is awarded to one parent, it is the custodian who has the care and control of the person of the child.<sup>91</sup> If the mother has custody, the father retains such guardianship rights as are not inconsistent with her custody.<sup>92</sup> The splitting of the control of a child upon divorce is said to be peculiar to South African law,<sup>93</sup> and to serve no useful purpose.<sup>94</sup> Reasonable access is a right which is retained by the spouse who has not been awarded custody, provided, of course, the court has not deprived him of it.<sup>95</sup>

In 1984, in England, Maidment spoke of the fragmentation of parental rights on divorce, and said the legal system should be seen to be encouraging equal

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89 See Hahlo Husband and Wife 389; Van der Vyver and Joubert Persone-en Familiereg 640; Gibson Wille's Principles of South African Law 85.

90 Guardianship Act 192 of 1993.

91 See Simleit v Cunliffe 1940 TPD 67 75-76; Hahlo Husband and Wife 389.

92 See Landman v Mienie 1944 OPD 59 65; Edelstein 1952 3 SA 1(A)10; Schäfer 1987 South African Law Journal 150.

93 Hahlo Husband and Wife 394 fn 38.

94 Oimesdahl 1980 De Rebus 482.

95 See Lecler v Grossman 1939 WLD 41, 44; Spiro in Bennett Family Law 109.

and continuing parental responsibility.<sup>96</sup> The Children Act of 1989 addressed this problem, and substituted the wider concept of parental responsibility for that of parental rights. The Act defines parental responsibility as meaning all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property;<sup>97</sup> and provides that where a child's father and mother were married to each other at the time of his birth, they each have parental responsibility for the child. The terms "custody" and "access" are no longer used either; instead the Act refers to a "residence order" which is an order settling the arrangements to be made as to the person with whom a child is to live; and to a "contact order".<sup>98</sup> In the United States Gardner has similarly suggested that "the word custody implies entrapment, possession and restraint" and would prefer the term "residential and decision-making arrangement".<sup>99</sup>

### 3.3 Particular difficulties of custody disputes

Everywhere today the philosophy underlying the award of custody and the way in which courts make decisions on it are subject to scrutiny and debate.

It has already been mentioned that both judges and mental-health professionals find custody cases extremely worrying and dislike participating

<sup>96</sup> Maidment Child Custody 28, 281.

<sup>97</sup> Children Act 1989 s 3.

<sup>98</sup> On contact orders see further par 4.2 below.

<sup>99</sup> Gardner in Folberg Joint Custody 70.

in them.<sup>100</sup> Apart from the degree of emotion involved and the weightiness of the decision, there are also further aspects which set these apart from other civil matters. As was stated in Shawzin v Laufer

To the Court, as Upper Guardian, the problem of custody is a somewhat singular subject, in which there is substantially one norm to be applied.<sup>101</sup>

According to Mnookin, custody matters are person- rather than fact-orientated and focus on the future rather than on the past.<sup>102</sup> Some of the difficulties relating to custody disputes are the following.

- (a) the lack of a large body of case literature on the problem. There are custody disputes in only a small proportion of divorce cases, and few of those cases are reported;
- (b) custody decisions seldom go on appeal and of those that do few are reversed;
- (c) precedent is in any event of little help in such matters, for in each case circumstances and personalities are different;
- (d) once an order has been made there is little the court can do to ensure compliance with it.

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100 See Chapter 2 pars 9.1 and 9.2.

101 Shawzin v Laufer 1968 4 SA 657 (A) 662.

102 Mnookin 1975 Law and Contemporary Problems 251. See, however, Schneider 1991 Michigan Law Review 2239 et seq., who demonstrates that these characteristics are not peculiar to custody disputes.

The courts have also found it impossible to follow the rules of the law of evidence too closely where this would prevent a thorough investigation of all aspects of a case.

### 3.4 History of custody

#### 3.4.1 History of custody awards in Roman-Dutch and English law

In early Roman law the paterfamilias had absolute authority over his minor children, who were regarded as his property.<sup>103</sup> In later Roman law the position of the children gradually improved,<sup>104</sup> but authority over minor children continued to be paternal, not parental. However, even in Roman law the position altered upon divorce. The two relevant Roman enactments were canvassed in the case of Landman v Mienie.<sup>105</sup> In that case van den Heever J referred to the 117th Novel, which, he said, made it absolutely clear that paternal power and the custody of children were not one and the same concept. The rule was that if parents divorced, custody went to the innocent spouse, subject to certain exceptions.

Roman-Dutch law did not receive the ius patriae potestatis of Roman law,<sup>106</sup> although it recognised that during the marriage, the father's rights being

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103 See Van Rooyen v Werner 9 SC 425 at 428. See also Green, Long and Murawski Dissolution of Marriage at 223. Children, as potential workers, were of financial value.

104 See van Rooyen v Werner 9 SC 425 at 428.

105 Landman v Mienie 1944 OPD 59 at 62 et seq. The provisions were C.5.24 and N.117.7.

106 Shawzin v Laufer 1968 4 SA 657 (A) 665.

superior to those of the mother, he was entitled to the custody of the children.<sup>107</sup> However, on divorce, while giving the presiding judge a wide discretion, it did follow the rule that custody went to the innocent spouse.<sup>108</sup> Thus the law concentrated on punishing and possibly preventing misconduct on the part of spouses, rather than on the interests of the children.<sup>109</sup>

Common-law systems received from Roman Law the view that children were the property of their fathers, and there was a presumption in favour of paternal custody<sup>110</sup> which continued until about the end of the nineteenth century, although it was also during that century that the "best interests of the child" criterion started to come to the fore. In 1839 for the first time legislation empowered English courts to award custody to the mother.<sup>111</sup>

In more recent times, in South Africa, the courts applied various criteria.<sup>112</sup> They continued to recognise the father's superior rights during the marriage; thus if the spouses were merely separating, not divorcing, the general rule

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107 Tabb 1909 TS 871.

108 Cook 1937 AD 154 162.

109 See Sornarajah 1978 South African Law Journal 133.

110 See Paquin 1987-88 Journal of Family Law 283; Macdonald in Parry Broder and Schmitt Custody Disputes 10.

111 See MacDonald in Parry, Broder and Schmitt Custody Disputes 10.

112 See Schäfer Access 25 et seq.

was that the father was entitled to custody.<sup>113</sup> Even in divorce cases reference was sometimes made to the father's superior claim to custody.<sup>114</sup>

On divorce, custody was usually awarded to the innocent spouse provided that the interests of the children did not indicate otherwise. In 1937 the Appellate Division stated in Cook<sup>115</sup> that the criterion to be applied was that of the innocent spouse, and in 1939 confirmed this viewpoint in Calitz.<sup>116</sup> In Calitz it was stated that in exercising its discretion the Court would not consider the interests of the children exclusively.

### 3.4.2 History of the "best interests" criterion in custody disputes<sup>117</sup>

Although in custody disputes the courts usually adhered to the "innocent spouse" standard, they sometimes stressed the "best interests" criterion. Reference to it may be found in court reports dating back to the last century,<sup>118</sup> but precisely what part it played is uncertain. Studiosus<sup>119</sup>

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113 See eg Calitz 1939 AD 56 at 61; Shawzin v Laufer 1968 4 SA 657(A) 665.

114 Thus in Kallie 1947 2 SA 1207 (SR) 1208 reference was made to the father's prime claim both as natural guardian and as "innocent spouse"; but it was conceded that the paramount consideration was the best interests of the child.

115 Cook 1937 AD 154.

116 Calitz 1939 AD 56.

117 On the best interests criterion generally, see also Chapter 2.

118 See eg Simey 1 SC 171 176; Tabb 1909 TS 1033; Cronje TS 871 872.

contends that it was always the criterion in Roman-Dutch law. He cites many cases where it was applied, but concedes that inexplicably in some cases it was not. Sornarajah,<sup>120</sup> on the other hand, sees it as merely a subsidiary consideration in that legal system. The confusion was clarified in 1948 when in Fletcher the Appellate Division accepted the "best interests of the child" as the sole criterion.<sup>121</sup> According to Sornarajah the judgment of Centlivres JA in this case

"discloses a strenuous effort to rationalize the view in Cook with the view that the welfare of the children is the paramount consideration."<sup>122</sup>

That the courts had by now moved towards a more child-orientated approach is illustrated by Centlivres JA's rejection of the use of the term "rights of the innocent spouse", which, he believed, implied that the child was a mere chattel.<sup>123</sup> Eventually the paramountcy in our law of the "best interests" criterion in all parental disputes over children, whether in the course of divorce proceedings or otherwise, was embodied in legislation. There was, firstly, s 5(1) of the Matrimonial Affairs Act,<sup>124</sup> which originally made

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119      Studiosus 1946 Tydskrif vir Hedendaagse Romeins Hollandse Reg 49,50. Contra see Aquilius 1938 Tydskrif vir Hedendaagse Romeins Hollandse Reg 243.

120      See Sornarajah op cit 133.

121      1 SA 130(A); see also Milstein 1946 NPD 594.

122      Sornarajah op cit 135.

123      1 SA 130(A) 134.

124      Matrimonial Affairs Act 37 of 1953 s 5(1).

provision for orders of sole guardianship or sole custody in divorce matters, and also on the application of either parent of a minor whose parents were divorced or living apart. It is now the Divorce Act<sup>125</sup> which protects the interests of children on divorce; but the Matrimonial Affairs Act still protects the interests of children whose parents are already divorced or merely living apart.<sup>126</sup> Both these enactments refer directly to the interests of the minor. Because the "best interests" criterion is so vague, however, different meanings have been attributed to it over the years.

### 3.5 Incidents of custody

Custodial parents are concerned with the day-to day care of children and also with the children's longer-term interests.<sup>127</sup> Thus as was said in Manning,<sup>128</sup> they care

"not only for the physical well-being of the child, but for its moral, cultural and religious development."

They control and discipline their children, make decisions about their health care and decide with whom they may associate.<sup>129</sup> They also make

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<sup>125</sup> Divorce Act 79 of 1979 s 6. See Chapter 1 par. 8.1.5.

<sup>126</sup> Matrimonial Affairs Act 37 of 1953 s 5(1) as amended. For details of s 5(1) see Chapter 2 par.8.1.5.

<sup>127</sup> See Kastan 1985 3 SA 235 236; W v S 1988 1 SA 475 (N) at 489.

<sup>128</sup> 1975 4 SA 659 (T) 661; see also Van Deijl 1966 4 SA 260 (R).

<sup>129</sup> On the right to determine with whom the child may associate see Du Preez 1969 3 SA 529 (D) 531.

decisions relating to their schooling and religious training.<sup>130</sup> These are decisions which during the marriage are made by both parents together.<sup>131</sup> Unless the divorce order includes specific provisions relating to these matters, the custodian parent may decide which school a child may attend and what form the child's religious instruction is to take.<sup>132</sup> In various cases the courts have acknowledged the pain this may cause the non-custodial parent, but have stressed that after divorce the non-custodial parent's powers, in so far as custody is concerned, are diminished and the court's powers as Upper Guardian of children are increased.<sup>133</sup> It is the court's view of the best interests of the child which prevails.

### 3.6 Father or mother? - the maternal-preference and tender-years doctrines

During this century, in the common-law systems, the paternal presumption made way for the maternal preference doctrine, largely as a result of then

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130 Niemeyer v De Villiers 1951 4 SA 100 (T); on religious matters see Dreyer v Lyte-Mason 1948 2 SA 245 (W); Nugent 1978 2 SA 690 (R); Dunscombe v Willies 1982 3 SA 311 (D) 315; W v S 1988 1 SA 475 (N) 495. On education see Olmesdahl 1980 De Rebus 481, 482.

131 See Nugent 1978 2 SA 690 (R).

132 See Dreyer v Lyte-Mason 1948 2 SA 245 (W) 251; Nugent 1978 2 SA 690 (R) 692; Dunscombe v Willies 1982 3 SA 311 (D); W v S 1988 1 SA (N) 475.

133 See Du Plessis v Van Zyl 1951 2 B24 67; Shawzin v Laufer 1968 4 SA 657(A) 666; Forder and Ward 1987 Cambridge Law Journal 503.

current psychological theories such as those of Bowlby,<sup>134</sup> who in the 1940s stressed the harmful consequences of maternal deprivation. Courts also generally adhered to the so-called "tender-years doctrine" which dictated that very young children should be with their mothers. The maternal preference doctrine reached its culmination<sup>135</sup> with the publication of "Beyond the Best Interests of the Child" by Goldstein, Freud and Solnit in 1973. Those authors stressed the importance of the continuity of the child's relationship with its "psychological" parent and insisted that in the child's interests custody should go to one parent only.<sup>136</sup>

However, recent research has not confirmed the earlier findings. In the United States the tender-years presumption is now considered to have been based on "unwarranted assumptions" and the maternal preference, in so far as it related to "mothering", on "outdated social stereotypes".<sup>137</sup> It has been pointed out that when maternal deprivation was studied no parallel studies of paternal deprivation were done.<sup>138</sup> Bowlby has been criticised for basing his research on children in institutions, thus on children in

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134 On Bowlby's views see Maidment Child Custody 8.

135 according to McCant 1987 Family Law Quarterly 136.

136 Goldstein, Freud and Solnit Beyond the Best Interests. See McCant 1987 Family Law Quarterly 136; see also Maidment Child Custody 205..

137 See Green, Long and Murawski Dissolution of Marriage 255; Houlgate Family and State 125.

138 MacDonald in Parry, Broder and Schmitt Custody Disputes 12.

abnormal circumstances.<sup>139</sup> The psychological theories which underpinned the maternal-preference doctrine have long since been discarded by the mental-health professions. Psychologists now believe that the child can form attachments to more than one person<sup>140</sup> and that parenting is not an inborn maternal ability but comprises skills which can be learned; which means that neither mother nor father is inherently a better parent. It follows that parenting skills can be acquired by a parent of either sex.<sup>141</sup> Recent studies have revealed the crucial role which fathers can play in the raising of children. However, it would be wrong to confuse the ideal of shared parenting with the realities of most families' lives even today. Studies have shown that mothers still carry by far the heavier burden of parenting, which, as Boyd<sup>142</sup> says, remains highly gendered.

South African courts, too, gave preference to maternal custody, and clearly to this day many of the judiciary are convinced that, all things being equal, the child's interests are best served by awarding custody to the mother, especially if the children are very young.<sup>143</sup> Mental-health professionals

139 On Bowlby's views see Maidment Child Custody 8.

140 See Maidment Child Custody 207 et seq.

141 See Uys 1985 Maatskaplike Werk 99; Bainham Children Parents and State 11; Awad and Schmitt in Parry Broder and Schmitt Custody Disputes 131.

142 Boyd 1990 Canadian Family Law Quarterly 3.

143 See Green, Long and Murawski Dissolution of Marriage 243 et seq. The maternal preference doctrine was still advocated in the 1970s and 1980s in textbooks such as Boberg Persons and Family 463 fn 19;

too may still share this belief.<sup>144</sup> New psychological theories pave the way for more custody awards to fathers, and for awards of joint custody; but our courts have been slow to accept the new trends.<sup>145</sup>

The overriding message of today's research is that the optimum is for the children to retain links with both parents.<sup>146</sup> It should be remembered, however, that some parents who seek joint custody, for example, do so not so much out of a desire to retain links with their children as to escape maintenance obligations or to exercise control over their ex-spouses.<sup>147</sup> If no such motive is apparent, the court in deciding whether to award custody or access should try to ascertain what attitude the parent concerned will adopt to the other parent, and whether the child's continuing relationship with the other parent will be encouraged or undermined. If, after custody

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Hahlo Husband and Wife 391; Barnard Cronje and Olivier Persons and Family 267. See also Shawzin v Laufer 1968 4 SA 657 (A) 669; Bashford 1957 1 SA 21 (N) 24; Manning 1975 4 SA 659 (T) 662; Lovell 1980 4 SA 90 (T) 93; Meletakos 21524/85 TPD (unreported); Van Vuuren 1993 1 SA 163 (T); Bainham Children Parents and State 30; Rosen 1978 South African Law Journal 246 et seq.

144 See Mudie 1989 De Rebus 687.

145 See eg Pinion 1994 2 SA 725 (D&C).

146 The South African courts have for long recognised the importance of retaining this bond. See Marais 1960 1 SA 844 (C) 847; Du Preez 1969 3 SA 529 (D) 534. See also McCant 1987 Family Law Quarterly 141; Maidment Child Custody 279.

147 On some of the arguments against joint custody, and on the feminist objections to it, see further Chapter 6 par 6.1.

or access is awarded, one parent for no good reason tries to undermine the child's relationship with the other parent, the court may take the somewhat extreme measure of depriving that parent of custody or access<sup>148</sup> as the case may be. It has been pointed out that to recognise the importance of the child's bonds with parents is to treat the child as a person, rather than as a chattel, as happened in the past.<sup>149</sup>

However, social attitudes to parenting are slow to change, and even today many people believe that parenting means "mothering". As Abella says,

"The cultural assumptions in family law that have resulted in over a century of gender stereotyping were tolerated by the public or they would not have survived."<sup>150</sup>

Throughout the world the mother still normally obtains custody.<sup>151</sup> It is said that many mothers fight for custody because of the social stigma which would attach to them if they did not.<sup>152</sup> Fathers, on the other hand,

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148 See Pommerehne 4042/1986 SELC (unreported); Germani v Herf 1975 4 SA 887 (A) 905; Schäfer Access 64-65; Hoffman and Pincus Custody 40 et seq; Hahlo Husband and Wife 404, 405.

149 by MacDonald in Parry, Broder and Schmitt Custody Disputes 18.

150 Abella 1981 Ottawa Law Review 22; on the cultural discrimination against fathers in custody cases see McCant JW 1987 Family Law Quarterly 135.

151 For information on England see Maidment Child Custody 61 et seq. and see also Richards 1982 Journal of Social Welfare Law 133-135; on the position in the United States see McCant 1987 Family Law Quarterly 127; Green, Long and Murawski Dissolution of Marriage 252.

152 Hoffman and Pincus Custody 35.

complain that the scales are weighted against them because, generally speaking, if they wish to obtain custody they have to prove not only their own suitability for the role but the mother's lack of suitability.<sup>153</sup> In addition, "bargaining in the shadow of the law"<sup>154</sup> plays a part, for fathers, thinking they have very little chance of obtaining custody may think it not worth-while to apply for it.<sup>155</sup> Attorneys, too, who know how difficult it is for fathers to obtain custody may discourage them from trying to do so. It seems that those who still favour the maternal-presumption forget that the mother, whether married or divorced, who stays at home and devotes herself exclusively to the care of her children is no longer the norm.<sup>156</sup> It must be pointed out, however, that when fathers do apply for custody their motives

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153 See In the marriage of Raby 1976-77 Australian Law Reports 667 in which it was stated that "to look for disqualifying factors against the mother is to put the cart before the horse", when the focus should be on the best interests of the child.

154 This famous phrase was first coined by Mnookin and Kornhauser in their article Bargaining in the Shadow of the Law: the Case of Divorce 1979 Yale Law Journal 950. Divorcing parties are said to bargain in the shadow of the law because they are not free to negotiate just any agreement, but one which stays within the confines of the relevant divorce law; and the divorce court will scrutinise it to ensure that it does so.

155 See Richards 1982 Journal of Social Welfare Law 135.

156 See Maidment Child Custody 179.

may not always be altruistic.<sup>157</sup> They may for example hope to trade the custody claim against lower maintenance payments.<sup>158</sup>

In South Africa Rosen did a study of ninety-two persons whose parents had divorced during the preceding five years and found no significant differences between those who had been in maternal custody and those who had been in paternal custody.<sup>159</sup> She said this suggested strongly that custody awards based largely on the sex of the parent were not necessarily serving the best interests of the children; and that in the light of her findings the tender years doctrine and the view that children should be placed with a parent of the same sex were also questionable.<sup>160</sup>

### 3.7 Factors involved in the award of custody

Because the "best interests of the child" is an extremely vague criterion, in any custody dispute the outcome is influenced by the values and beliefs of the judge who presides. Although the courts have a wide discretion in awarding custody, there are certain factors which they generally consider.

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<sup>157</sup> See par 3.8.1 below.

<sup>158</sup> On the subject of trade-offs of maintenance, on the one hand, and custody and/or access, on the other hand, see Burman and Rudolph 1990 South African Law Journal 264 -266; Schäfer Access 93 -95.

<sup>159</sup> See also Richards 1982 Journal of Social Welfare Law 136.

<sup>160</sup> Rosen 1978 South African Law Journal 248; see also Maidment Child Custody 191. In Connell-Thouez and Knoppers Contemporary Trends 213, Knoppers writes of the demise of the tender years doctrine in Canada.

### 3.7.1 The child's age, health and sex

In the light of recent research findings, the tender-years doctrine can no longer be regarded as unassailable. Nor can it any longer be argued that girls should necessarily go to mothers and boys to fathers.<sup>161</sup> In any event, in South Africa the English law rule that older boys should go to fathers has never received recognition.<sup>162</sup>

### 3.7.2 Siblings

It is universally acknowledged that, all other factors being equal, siblings should preferably be kept together; for this would give them some sense of continuity and stability at a time of change and trauma in their lives.<sup>163</sup>

### 3.7.3 The status quo

World-wide, studies reveal that the dominant factor in custody awards is the status quo.<sup>164</sup> Maidment points out that judges' apparent adherence to the maternal-preference rule may in reality reflect their preference for the status quo.

161 Rosen 1978 South African Law Journal 248.

162 See Manning 1975 4 SA 659 (T) 663.

163 See Stock 1981 3 SA 1280 (A) 1290; Van Vuuren 1993 1 SA 163 (T); Hoffman and Pincus Custody 38 et seq; Green, Long and Murawski Dissolution of Marriage 270 et seq; Poulter 1982 Family Law 7.

164 See Poulter 1982 Family Law 6; Eekelaar and Clive Custody after Divorce 8; English Law Commission Working Paper 96 99; Green, Long and Murawski Dissolution of Marriage 304; Maidment Child Custody 62, 67, 203 et seq; Hoffman and Pincus Custody 31.

quo.<sup>165</sup> Judges, being aware of children's need for security and stability,<sup>166</sup> are reluctant to move them and so cause them further distress than the family break-up has already occasioned.<sup>167</sup> However, this is not always a wise policy, for it means that permanent custody is often awarded on the basis of an arrangement made when the parents were in turmoil and least able to make reasoned decisions.<sup>168</sup> Here too, as with the maternal preference rule, the lawyers' knowledge of the strong influence of the status quo may influence the advice they give their clients.<sup>169</sup> Besides, if parents who have temporary custody realise that they are in a superior bargaining position, they may try to delay proceedings, since the longer they have temporary custody the stronger their position becomes. The converse also being true,<sup>170</sup> a further danger is that knowledge of the importance of the status quo may lead the parent who does not have temporary custody to

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165      Maidment Child Custody 180,181.

166      See French 1971 4 SA 298 (W); Green, Long and Murawski Dissolution of Marriage 304.

167      See Fletcher 1948 1 SA 130 (A) 146; Shawzin v Laufer 1968 4 SA 657 (A) 669.

168      See Richards 1982 Journal of Social Welfare Law 135; Maidment Child Custody 213.

169      See Maidment Child Custody 213.

170      See Forder and Ward 1987 Cambridge Law Journal 490.

attempt to kidnap the child.<sup>171</sup> Kidnapping cases do not yet feature in the law reports as frequently as they do in other countries.<sup>172</sup>

#### 3.7.4 Character and conduct of parents

The courts place great emphasis on the character of parents, and on their ability to provide for their children's various needs and to discipline and control them. An American study found that judges valued a sense of responsibility, mental stability and overall maturity in parents.<sup>173</sup> Hoffman and Pincus, however, contend that the courts do not always pay enough attention to the parents' personality style and characteristics. These authors then proceed to discuss the adequate, capable and stable personality.<sup>174</sup>

This discussion highlights the need for the input of mental-health experts in custody cases. At the same time it must be remembered that the character of those parents who stay married to each other is seldom scrutinised by the courts, and that if it were, grave misgivings might arise about the suitability of many of them to raise children. Custody should never be awarded to a parent whose character or conduct is such that there is the risk of harm to the child, but for the rest it should be borne in mind that all children are

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171 See Maidment Child Custody 206.

172 See however Märtens 1991 4 SA 287 (T).

173 See Reidy Silver and Carlson 1989 Family Law Quarterly 75. For examples of South African cases where the parents' character has been emphasised see Cook 1937 154 AD 164; Kallie 1947 2 SA 1207 (SR) 1208; French 1971 4 SA 298 (W).

174 Hoffman and Pincus Custody 43 et seq.

raised by people who are less than perfect.<sup>175</sup> In the past, as we have seen, which parent was the guilty one in the divorce was an important consideration in custody awards.

Today, however, the usual ground for divorce is the irretrievable breakdown of the marriage, and we no longer speak of the innocent or guilty spouse. The conduct of a spouse is relevant only in so far as it may be an indicator of future behaviour towards the child.<sup>176</sup> These days a parent who is cohabiting with but not married to a new partner is not precluded from obtaining custody; but the character and conduct of the new partner may be highly relevant to the children's interests and should be investigated.<sup>177</sup> Poulter refers to parents' participation in "social practices which do not conform with majority values" such as homosexuality. It seems that in England in the 1980s the courts were still reluctant to award custody to such parents.<sup>178</sup> In the United States, in the past, homosexual parents were considered unfit as a matter of law to assume custody of children,<sup>179</sup> but today it is acknowledged that homosexuality is not an indicator of worse or

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175 English Law Commission Working Paper 96 103.

176 See Hahlo Husband and Wife 390; Maidment Child Custody 178. In the award of custody there is no longer an element of punishment of an erring spouse. See Macdonald in Parry, Broder and Schmitt Custody Disputes 15.

177 See Zorbas 1987 3 SA 436 (W) 438. See also Poulter 1982 Family Law 8.

178 See Poulter 1982 Family Law 9.

179 Green, Long and Murawski Dissolution of Marriage 291.

better nurturing skills than those of a heterosexual.<sup>180</sup> In an American case in 1976 mental-health experts denied that the parent's homosexuality was likely to affect the child's sexual orientation;<sup>181</sup> and in some American states the general rule now is that sexual orientation per se should not preclude custody or access.<sup>182</sup> In South Africa, in terms of section 8(2) of the new constitution, it seems that the same rule should apply, for that section provides that no person is to be unfairly discriminated against, directly or indirectly, on the ground of, inter alia, sexual orientation. The word "unfairly" does possibly leave some room for the exercise of a judicial discretion, however. It is submitted that our courts should pay heed to research which has been done elsewhere on the subject.

A parent's past relationship with and behaviour towards the child is relevant, but it must be remembered that these are not always reliable predictors of future behaviour and relationships.<sup>183</sup>

### 3.7.5 Financial position of the parents

The financial position of parents is a factor which is considered, and the courts are reluctant to award custody to a parent who will be unable to

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180 See Macdonald in Parry, Broder and Schmitt Custody Disputes 16.

181 See Macdonald in Parry, Broder and Schmitt Custody Disputes 16.

182 Green, Long and Murawski Dissolution of Marriage 292.

183 See Maidment Child Custody 191; Houlgate Family and State 126.

mature children are concerned.<sup>189</sup> In 1987, in the American states and Canadian provinces which had drawn up "checklists" of matters to be considered in child custody cases, the only factor which featured on every checklist was "the views and feelings of the child, to the extent that these can be ascertained".<sup>190</sup> In England now, as was discussed above,<sup>191</sup> a court is obliged to take into account the ascertainable wishes and feelings of the child concerned.<sup>192</sup>

If children have a strong preference for staying with one parent, or a strong aversion to one, the court should be aware of this. To ascertain children's wishes is, however, fraught with problems and it is difficult to know how it should be done.<sup>193</sup> The view has been expressed by both the bench and mental-health professionals that it is often futile to try to discover the wishes of very young children.<sup>194</sup> At the same time there is no hard and fast rule to determine the age when it will be worthwhile to consult the child, for this will vary from one individual to another. Most experts also agree that if children are consulted they should not be asked directly what their wishes

189 See eg French 1971 4 SA 298 (W); Manning 1975 4 SA 659 (T). McCall 1994 3 SA 201 (C).

190 Forder and Ward 1987 Cambridge Law Journal 504. On the ascertainment of children's wishes generally see that article 504 et seq; Paquin 1987 - 88 Journal of Family Law 288-298.

191 in Chapter 2 par 3.1

192 in terms of s 1(3) of the Children Act 1989.

193 See Chapter 2 par 5.

194 See Germani v Herf 1975 4 SA 887 (A) 899.

are but that these should be ascertained in an indirect fashion. The only persons competent to do so are probably behavioural scientists or social workers. There are various reasons for not questioning children directly on their wishes. One is that what children say may not be a true reflection of what they feel.<sup>195</sup> Sometimes their choices may not be soundly based<sup>196</sup> or may be influenced by one parent. Sometimes children genuinely have no preference. The parent who is not chosen may feel rejected and hurt and this may affect the future relationship between parent and child.<sup>197</sup> King argues that the child's wishes should hardly ever be ascertained and suggests that a counselling service to help children at the time of divorce would be more effective.<sup>198</sup> The courts are sometimes reluctant to consult children for fear of giving them an illusion of power which may endanger their emotional health.<sup>199</sup>

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195 See Green Long and Murawski Dissolution of Marriage 281.

196 See Lyon 1987 California Law Review 683; Eitzen 1985 Family Law Quarterly 56,70-71.

197 See Paquin 1987 -88 Journal of Family Law 288.

198 King 1987 Family Law 190.

199 See Paquin 1987 -88 Journal of Family Law 294.

### 3.8 New trends in custody awards

#### 3.8.1 Joint custody

Once the view gained ground that "parenting" did not necessarily mean "mothering", and that the father, too, was able to nurture children,<sup>200</sup> it followed logically that if the maternal-preference rule was always emphasised, the "best interests" criterion was not being applied impartially. If the psychologists are now to be believed, the bond between child and both parents should, all things being equal, be retained after divorce, and both parents should continue to be responsible for the child.<sup>201</sup> In the United States awards of joint custody are now common and statutory provision is made for them in over thirty states.<sup>202</sup> A strong influence in the trend towards joint custody in that country was the formation of divorced fathers' interest groups<sup>203</sup> who resented being seen as having no other role in their

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200 See Abella 1981 Ottawa Law Review 17.

201 See Macdonald in Parry, Broder and Schmitt Custody Disputes 12. Support for the notion of the continuing link with both parents may be found in our case law as far back as Du Preez 1969 3 SA (D) 534; and see there the reference also to Jooste v Terblanche 1957 1 PH B4. See also Schoeman 1989 Tydskrif vir Hedendaagse Romeins Hollandse Reg 464.

202 See Parkinson 1988 Family Law 27.

203 On these groups in the United States see Fineman and Opie 1987 Wisconsin Law Review 116 -117; Fineman 1989 University of California Davis Law Review 833; Drakich 1989 Canadian Journal of Women and the Law 81; Scott 1992 California Law Review 616.

children's' lives than that of "walking wallets";<sup>204</sup> and demanded equality in family law. Recently, however, some commentators have questioned whether fathers' demands for joint custody are always inspired solely by their desire for greater participation in child rearing. Fineman<sup>205</sup> has described the formation of these interest groups as a response to stricter child support enforcement measures, and says:

"To a great extent these groups represented a backlash to some of the successes of the feminist movement, such as the impetus to take child support awards seriously."

Fineman<sup>206</sup> also contends that

"rules that seek to preserve as much as possible the predivorce power and authority relationships between fathers and their children"

are a manifestation of the strong anti-divorce aspect of much family reform rhetoric.

In England, too, joint custody was frequently awarded until the passing of the Children Act of 1989, in terms of which, as we have seen,<sup>207</sup> the parental responsibility of both parents continues after divorce. If by making joint custody awards the courts are seen to be encouraging continuing parental responsibility after divorce, will this have a positive

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204 Fineman in 1992 University of Miami Law Review 658.

205 Fineman in 1992 University of Miami Law Review 658; see also Fineman and Opie 1987 Wisconsin Law Review 116.

206 Fineman 1989 University of California Davis Law Review 830.

207 See par 3.2 above.

effect on the attitude of parents? Green, Long and Murawski <sup>208</sup> term joint custody "a symbol of postdivorce co-operation". It is often stated that if parents are encouraged to continue their parenting role there will be fewer maintenance defaulters and fewer parents who lose all contact with their children, but this assertion is as yet unproven.<sup>209</sup>

The hurtful effect of sole custody awards, namely that one person who is often a perfectly adequate parent, is the loser and is therefore made to feel rejected and inadequate, is also avoided by awards of joint custody.<sup>210</sup>

The experts generally agree that joint custody should not be awarded unless the parents are mature and responsible, have agreed that they want joint custody, and seem likely to be able to co-operate in parenting in the future.<sup>211</sup>

In recent times there has been much academic writing on the subject of joint custody and also on divided custody, split custody, shared custody etc; and there has been some confusion on the meaning of the various terms.<sup>212</sup> The new developments have naturally been noted and debated in South African

208 Green, Long and Murawski Dissolution of Marriage 222.

209 See Green, Long and Murawski Dissolution of Marriage 315. See, however, also Chapter 6 par 6.1 below.

210 See Richards 1982 Journal of Social Welfare Law 138; Schäfer 1987 South African Law Journal 153; Parkinson 1988 Family Law 27.

211 See Abella 1981 Ottawa Law Review 18; Hoggett and Pearl Family Law and Society 499.

212 See Parkinson 1988 Family Law 27; Schäfer 1987 South African Law Journal 157.

too. A warning should be sounded here however; as has already been pointed out, custody in South African law does not mean precisely what it means in other jurisdictions; and to add to the confusion, in those other jurisdictions the term "joint custody" seems to have more than one meaning.<sup>213</sup> The Americans speak of joint legal custody and joint physical custody. Joint legal custody seems to approximate to joint guardianship in our law;<sup>214</sup> but may also mean that while one parent has care and control and makes day-to-day decisions, more important and longer-term decisions on matters such as education, religion and health care, for example, are made by both parents together. As Shipley says:

"The attractiveness of joint custody is that where both parents are loving and capable each can remain significantly involved in the upbringing of the child, jointly making decisions on such questions as education, religious upbringing, and cultural development."<sup>215</sup>

Where there is joint physical custody, both parents spend a considerable amount of time with their children and indeed share in their upbringing.

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213 See Schäfer 1987 South African Law Journal 155. Thus the term "joint custody" may be used to mean divided custody, where not all the children go to the same parent; split custody, where first one parent and then the other is awarded custody of a child; or shared custody, which may comprise joint physical custody and/or joint legal custody. See Schäfer 1987 South African Law Journal 155.

214 See Joubert 1986 De Jure 356.

215 Shipley in Landau Children's Rights 160.

In South Africa, where for so long the belief was entrenched that custody could go to one parent only,<sup>216</sup> the courts have been slow to award joint custody, but in 1985 in the Kastan<sup>217</sup> case the court made an order for joint custody in accordance with a provision to that effect in the consent paper; and it has subsequently been awarded in other unreported cases. In 1988, in the case of Schlebusch,<sup>218</sup> the parties also included an arrangement for joint custody in the consent paper, but Mullins J refused to award it, and expressed grave reservations about the concept. As Schoeman has pointed out, the cases relied on in Schlebusch were rather outdated.<sup>219</sup> In addition, the learned judge expressed the view that divorce being as common as it is today, modern children would have a common-sense approach to the concomitant change in their living arrangements; a view not borne out by recent research on the effects of divorce.<sup>220</sup> In the case of Schlebusch<sup>221</sup> Didcott J expressed the view that joint custody usually is a practical

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216 See eg Nugent 1978 2 SA 690 (R) 693: "Upon dissolution of the marriage, it is stating the obvious that only one parent can be entrusted with the custody of the children of the marriage". See also Marais 1960 1 SA 844 (C) 847; Spiro 1981 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 163 and cases cited there.

217 Kastan 1985 3 SA 235(C). For unreported cases see Hoffman and Pincus Custody 54,55.

218 Schlebusch 1988 4 SA 548 (E).

219 Schoeman 1989 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 465.

220 See par 2.2 supra.

221 Venton 1993 1 SA 763 (D&C).

impossibility, but that everything depends on the particular circumstances of each case. In that case he granted joint custody to divorced parents whom he saw as "sensible, mature, responsible and temperamentally stable people" whose relationship was remarkably good. In the subsequent Pinion<sup>222</sup> case in the same division, however, Page J refused to grant joint custody although both parties had requested it and it had been recommended by the Family Advocate after an enquiry in terms of the Mediation in Certain Divorce Matters Act.<sup>223</sup> The learned judge, like Mullins J in the Schlebusch case, felt that modern children will adopt a sensible attitude to divorce and the changes it brings to their lives, and also expressed the view that children should know with whom the final say lies (a view with which feminists are likely to agree).<sup>224</sup> He questioned whether the award of joint custody will avoid subsequent disputes about such matters as maintenance, access and control.

In Kastan's case it was not stated whether it was joint legal custody or joint physical custody which was being awarded, but it may be deduced that it was joint legal custody.<sup>225</sup> In the United States joint physical custody is awarded in a minority of cases. Children move between their parents' homes, spending periods which may vary for example between one week and six months at a time in each home. This lifestyle clearly lacks the

222 Pinion 1994 2 SA 725 (D&C).

223 Act 24 of 1987.

224 See Chapter 6 par 6.1 below.

225 See Schoeman 1989 Tydskrif vir Hedendaagse Romeins Hollandse Reg 464.

stability and security which are universally regarded as desirable in a child's life;<sup>226</sup> but results of research thus far seem to indicate that the continued contact with both parents may outweigh the disadvantages. Joint physical custody may never be of much relevance in South Africa, anyway, for it is only practicable where both parents are sufficiently affluent to house the children.<sup>227</sup> Connell-Thouez has suggested that because it is possible that such arrangements may harm children, it is the parents who should move in and out, while the children stay put in the home.<sup>228</sup> Such an arrangement suggests three dwelling-places, would therefore require even more affluent parents, and deserves even less serious consideration.

In the United States many states have now made joint custody mandatory where the parties do not seek another arrangement. Nevertheless, in the United States as elsewhere, in the late 1980s custody continued to be awarded to the mother in the vast majority of cases.

Joint custody, like all other attempts to solve the custody problem, has itself been the subject of critical analysis recently. Feminists have warned that joint custody awards paint a picture of shared parental responsibility which

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226 See Hoggett and Pearl Family Law and Society 503.

227 See also Boyd 1989 Queen's Quarterly 847.

228 See Connell-Thouez 1986 Tulane Law Review 1155.

is not yet the norm, whether during marriage or after divorce. As Boyd<sup>229</sup> says, it "rewards a reality of shared parenting before it actually exists". There is concern that awards of joint custody give men too much scope for interference in the lives of their ex-wives and their children, even when they are in reality not sharing parental responsibility.<sup>230</sup>

### 3.8.2 Primary caretaker<sup>231</sup>

In the United States a factor to which increasing weight has been attached since the 1980s is which parent has been the child's "primary caretaker," who is defined as the parent most intimately involved in the daily life and care of the child.<sup>232</sup> This will usually turn out to be the mother; so that this seeming reversion to the maternal-preference rule<sup>233</sup> criterion is a more accurate reflection of what continue to be the realities of life in most families than the joint custody one with its "wishful thinking" on the subject

229 Boyd 1989 Queen's Quarterly 849. See also Drakich 1989 Canadian Journal of Women and the Law 81 et seq; Boyd 1990 Canadian Family Law Quarterly 6; Scott 1992 California Law Review 615 et seq. See also Clarke and Van Heerden in Burman and Preston-Whyte Questionable Issue 57.

230 See Delorey 1989 Canadian Journal of Women and the Law 41.

231 On the primary caretaker presumption generally see Boyd 1990 Canadian Family Law Quarterly 1 et seq.

232 See Green, Long and Murawski Dissolution of Marriage 268 et seq; Glendon 1986 Tulane Law Review 1181-1182.

233 See Glendon 1986 Tulane Law Review 1182; Boyd 1990 Canadian Family Law Quarterly 13; Scott 1992 California Law Review 618.

of shared parenting.<sup>234</sup> As noted above, there is a growing concern among feminists<sup>235</sup> that they are being disadvantaged by the new gender-neutral criteria in custody awards. Boyd<sup>236</sup> says:

"While women remain primarily responsible for domestic labour, including child care, we confront a legal system which has difficulty in accommodating this gender specific fact. Judges tend to underrate the primary caregiving done by women and to overvalue any caregiving done by fathers."

Further advantages<sup>237</sup> of this criterion are said to be that it, too, is gender-neutral, that it creates certainty<sup>238</sup> and thus gives the child more stability; and that it eliminates the need for the protracted giving of expert evidence. It also operates in a such a way that the law is allowed to play its accustomed role of assessing past events rather than speculating about the future, for which the law is ill equipped. In addition, if generally applied,

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234 See Fineman and Opie 1987 Wisconsin Law Review 119,123; Fineman 1989 University of California Davis Law Review 831 fn6; Boyd in Busby Equality Issues in Family Law 70 et seq; Scott 1992 California Law Review 618. See also para 3.8.1 above.

235 See also par 3.8.1 above.

236 See Boyd in 1989 Queen's Quarterly 833,839, 844. See also Boyd 1990 Canadian Family Law Quarterly 1,3; Boyd in Busby Equality Issues in Family Law 70.

237 On the advantages of the primary caretaker test see Boyd 1989 Queen's Quarterly 851.

238 See Boyd 1990 Canadian Family Law Quarterly 8, 27.

it would serve a useful purpose in limiting the scope of the vague "best interests" criterion.<sup>239</sup>

All in all, the primary caretaker criterion has much to recommend it but may not always be appropriate. Feminists have welcomed it as being closer to the realities of parenting than joint custody is, but it also has the potential to disadvantage them. It does tend to re-introduce discarded stereotypes of the mother's role which not all women would welcome, and which might hinder women's attempts to attain equality outside the home.

### 3.9 Guide-lines

Because the judge's discretion is so wide and the best interests criterion so vague, guide-lines for the award of custody are often seen as desirable.<sup>240</sup> It is argued that these make the judge's task easier, and lend more certainty to this area of the law, thus reducing the number of custody disputes. Even in uncontested cases, guide-lines will certainly influence parents and their lawyers.<sup>241</sup> The question has been posed<sup>242</sup> whether a system is acceptable in which, by definition, as was stated in the English case of S,<sup>243</sup>

"different judges on very similar facts may legitimately take differing views as to where the interests of children lie."

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<sup>239</sup> See Boyd 1990 Canadian Family Law Quarterly 3.

<sup>240</sup> See eg Hoffman and Pincus Custody 8.

<sup>241</sup> See Maidment Child Custody 271.

<sup>242</sup> by Hoggett and Pearl in Family Law and Society 476.

<sup>243</sup> S v S 1978 1 FLR 143, Court of Appeal.

Since each custody case really is different, however, rules should never be rigid.<sup>244</sup>

In 1986 the English Law Commission in its review of custody expressed the opinion that it was necessary to devise some yardsticks against which to judge whether proposed reforms in the law would indeed promote the best interests of the child as the first and paramount consideration. It suggested the following more precise objectives for the law of custody, which would of course be subject to their feasibility in particular cases:

- (i) a separation of child-related issues from others, with priority to be given to the former;
- (ii) the recognition and the maintenance of existing beneficial relationships of the child;
- (iii) a secure environment for the child;
- (iv) protection of the child from the risk of various types of harm;
- (v) recognition of the child's own point of view;
- (vi) where parental responsibility is divided or shared, that parents should understand their responsibilities and powers vis-à-vis the child;
- (vii) ensuring that the arrangements made are workable and sensible in everyday life.<sup>245</sup>

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244 See Forder and Ward 1987 Cambridge Law Journal 502.

245 English Law Commission Working Paper 96 81-83.

In 1989 a similar but not identical set of guide-lines was incorporated in the Children Act. The factors which must be considered whenever, in family proceedings, a court is considering making, varying or discharging an order in respect of a child, have been alluded to above.<sup>246</sup> In America over thirty states have joint custody statutes and half of those incorporate the guide-lines set out in section 402 of the Uniform Marriage and Divorce Act.<sup>247</sup> Other statutes refer to similar factors in different words.<sup>248</sup> Section 402 of the Uniform Marriage and Divorce Act provides as follows:

"The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved."<sup>249</sup>

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<sup>246</sup> in Chapter 1 .

<sup>247</sup> Uniform Marriage and Divorce Act.

<sup>248</sup> Green, Long and Murawski Dissolution of Marriage 261.

<sup>249</sup> See Parkinson 1988 Family Law 27; Green, Long and Murawski Dissolution of Marriage 261.

Several Canadian provinces have statutory guide-lines. An example is to be found in section 24 of the Children's Law Reform Act of Ontario.<sup>250</sup> It refers to the following factors:

- (a) the love, affection and emotional ties between the child and,
  - (i) each person entitled to or claiming custody of or access to the child,
  - (ii) other members of the child's family who reside with the child, and
  - (iii) persons involved in the care and upbringing of the child;
- (b) the views and preferences of the child, where these can reasonably be ascertained;
- (c) the length of time the child has lived in a stable home environment;
- (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;
- (e) any plans proposed for the care and upbringing of the child;
- (f) the permanence and stability of the family unit with which it is proposed that the child will live; and
- (g) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

The only factors which feature in all these lists are the child's wishes and its relationships with family members and other caregivers. As we have seen,<sup>251</sup> our courts have acknowledged the desirability of ascertaining the

<sup>250</sup> Children's Law Reform Act RSO 1980

<sup>251</sup> See Chapter 2 par 9.5 above.

child's wishes; but in practice it proves neither easy nor uncontroversial to do so. Perhaps the emphasis on all the child's relationships, and not just its relationship with its parents, may provide judges with valuable new insights. It is submitted, however, that in custody as in all child-related divorce issues, guide-lines must remain what their name implies, and can never provide the full answer in an area where each dispute is different. Although guide-lines may in effect be found in reported South African cases,<sup>252</sup> as yet South Africa has no statutory ones.

#### 4 ACCESS <sup>253</sup>

##### 4.1 Legislative provision for access

As we have seen, the Divorce Act<sup>254</sup> makes provision for orders granting access to the children of divorcing parties, and the Matrimonial Affairs Act<sup>255</sup> makes provision for such orders in respect of children whose parents are already separated or merely divorced.

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252 See eg Manning 1975 4 SA 659 (T) 661.

253 On access in South Africa generally, see Schäfer Access.

254 Divorce Act 70 of 1979.

255 Matrimonial Affairs Act 37 of 1953.

#### 4.2 Meaning of the term and possibility of guide-lines

Whereas in certain common-law jurisdictions it is uncertain whether the non-custodial parent has a right of access to the child after divorce,<sup>256</sup> in our law there is a clear right of "reasonable access",<sup>257</sup> but what that term means has not been defined. As in custody matters, so too in determining access the court has a wide discretion and no guide-lines to rely on.<sup>258</sup> As in all child-related matters it must be guided by the best interests of the child.

The English Law Commission in 1986 suggested the possibility that guide-lines might be drawn up which could help determine what is meant by "reasonable access", but conceded this would be difficult.<sup>259</sup> In the Children Act of 1989 the term "access" is no longer used. Instead, the term "contact" is used and a contact order is defined as an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other.<sup>260</sup> In Australia in 1987 the

256 See AD 1988 Australian Law Journal 231; English Law Commission Working Paper 96 51. Note, however, that the latter work described the situation in English prior to the passing of the 1989 Children Act.

257 See Marais 1960 1 SA 844 (C) 846; Botes v Daly 1976 2 SA 215 (N) 220; Boberg Persons and Family 462 footnote 18.

258 See Marais 1960 1 SA 844 (C) 846.

259 English Law Commission Working Paper 96 124.

260 Children Act 1989 s 8(1).

Family Law Council proposed that the Family Law Act<sup>261</sup> be amended so as to set out factors which the courts should take into account in determining access cases.<sup>262</sup> American authors, Awad and Schmitt,<sup>263</sup> have suggested four guide-lines which they consider important. These are, firstly, predictable and frequent access by the child to the non-custodial parent; secondly, that the pre-school child needs a more stable environment than an older child; thirdly, that older children should have an increasing say in access arrangements; and lastly that issues relating to care and control should be agreed on and supported by both parents.

In the United States it is commonly ordered that the children spend every second week-end with the non-custodial parent. In our law too such orders are commonly made, as are orders that the child spend one short and one long school holiday a year with the non-custodial parent.

#### 4.3 Importance to the child of access

The importance of access is widely recognised today. In their book "Beyond the best interests of the child"<sup>264</sup> Goldstein, Freud and Solnit propounded the view that the child had difficulty in forming attachments to more than one psychological parent if the parents were not in positive contact with each other. They suggested that access orders not be made,

261 Family Law Act 1975.

262 See AD in 1988 Australian Law Journal 230.

263 Awad and Schmitt in Parry, Broder and Schmitt Custody Disputes.

264 Goldstein, Freud and Solnit Beyond the Best Interests 37-38.

but that it be left to the custodial parent to decide whether the other parent should be permitted access. Since few custodial parents are capable of being detached and unemotional in dealings with their former partner, especially in the early days after the divorce, it is submitted that this decision should never be left to the custodial parent alone. On this point, as on others, the views of Goldstein, Freud and Solnit have been condemned by subsequent researchers.<sup>265</sup> Today it is the child's continuing link with both parents which is considered to be of paramount importance.<sup>266</sup> Eekelaar has also pointed out that if access is viewed as a right of the child, giving the custodian parent the decision interferes with that right.<sup>267</sup>

Even today many parents seem unaware of the importance of access, and of the hurt which may be caused a child by the custodian's attempts to frustrate access or the other parent's failure to see them, or generally by the friction between the parents.<sup>268</sup> Here it is necessary to mention the warnings being sounded by certain writers that the courts should not, in their enthusiasm for the current emphasis on the retention of the bond between child and both

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265 See Mnookin and Weisberg Child, Family and State 774.

266 See also Marais 1960 1 SA 844 (C) 847; Hess and Camara 1979 Journal of Social Issues 91- 92; Richards 1982 Journal of Social Welfare Law 142-143; English Law Commission Working Paper 96 53; Awad and Schmitt in Parry, Broder and Schmitt Custody Disputes 125.

267 Eekelaar Family Law 231.

268 On friction between parents see Marais 1960 1 SA 844 (C) 850; Parry, Broder and Schmitt Custody Disputes 8.

parents, ever grant access where there is a risk of physical or emotional harm to the child.<sup>269</sup>

#### 4.4 Access as a child's prerogative

A world-wide trend which has been advocated in South Africa, is to regard access as a right of the child rather than one of the parent.<sup>270</sup> This would accord with the modern trend towards emphasising parental responsibility rather than parental rights, but the question arises how the child's right to access is to be enforced. The courts as yet have never attempted to force reluctant parents to visit their children, and it is difficult to conceive how they could do so.<sup>271</sup>

#### 4.5 Rights of a parent with access

It was stated in Germani v Herf<sup>272</sup> that during access the non-custodial parent's parental authority revives. This is a somewhat confusing statement. After divorce the non-custodial parent retains those parental rights which are not inconsistent with custody. Obviously during access the non-custodial parent will have to make everyday decisions relating to the care and control of the child. Nevertheless he or she does not have custody

269      Awad and Schmitt in Parry, Broder and Schmitt Custody Disputes 141.

270      See Eekelaar Family Law 226; Hoggett and Pearl Family Law and Society 504; Dunscombe v Willies 1982 3 SA 311 (D); Boberg Persons and Family 462 footnote 18; Schäfer Access 31 -33.

271      English Law Commission Working Paper 96, 123; King 1987 Family Law 188.

272      1975 4 SA 887 (A) 887 902.

or the same rights as the custodial parent.<sup>273</sup> As was explained in Myers v Levitan,<sup>274</sup> an order for access does not entail a division of custody. By way of contrast, in England, in 1986, the Law Commission<sup>275</sup> suggested that a parent who has access

"for whatever period of time, must have all the responsibility of someone with actual custody"

and that the arrangement was

"more one of "time sharing" than an allocation of specific powers and responsibilities to one or other."

#### 4.6 Problems concerning access

##### 4.6.1 Access more problematic than custody

The whole issue of access is fraught with problems which it seems the law can do little to resolve.<sup>276</sup> Although custody disputes have given rise to far more academic writing and far more reported decisions than access, it is generally acknowledged that it is the question of access which is disputed more often; and that access disputes are more bitter and long-lasting.<sup>277</sup>

<sup>273</sup> See Marais 1960 1 SA 844 (C) 847; Boberg Persons and Family 462 footnote 18.

<sup>274</sup> Myers v Levitan 1949 1 SA 203 (T) 211.

<sup>275</sup> English Law Commission Working Paper 96 135, .

<sup>276</sup> See Hoggett and Pearl Family Law and Society 507; English Law Commission Working Paper 96 52; Awad and Schmitt in Parry, Broder and Schmitt Custody Disputes 125.

<sup>277</sup> See Parry, Broder and Schmitt Custody Disputes 8; Hoggett and Pearl Family Law and Society 507; Richards 1982 Journal of Social Welfare Law 141; English Law Commission Working Paper 96 120.

This is, firstly, because, although the custody issue may be fiercely contested at the time of divorce, once the court makes a custody order the parties usually adhere to it, although it is always possible to apply for a variation. Secondly, each visit in terms of an access order may occasion friction between the parents, and sometimes between the child and a parent too. These visits may be the only occasion when parents, many of whom still harbour hostile feelings towards each other, come into contact with each other. Very often their determination to score points off each other overrides their concern for the best interests of the child.

#### 4.6.2 Reasonable or structured access?

When the court has not made a specific order for access, it is said that the custodial parent may decide the conditions of reasonable access.<sup>278</sup> If the parents have a relatively amicable relationship this may present no problems, but certain custodial parents may have so many unresolved feelings about the divorce that they are quite incapable of making that decision, and may find any number of spurious reasons for reducing or refusing access.<sup>279</sup> A court order for "structured access", which sets out exactly when visits are to start and end, may seem preferable, but this kind of order too works best when parents are able to co-operate and do not insist on rigid adherence to the exact times which have been prescribed.<sup>280</sup> Where there is extreme

278 See Lawsa Marriage par 179 and cases cited there.

279 See Hoggett and Pearl Family Law and Society 505.

280 On "structured" and "liberal" access see Awad and Schmitt in Parry, Broder and Schmitt Custody Disputes 126.

friction over access, the courts may even vary the custody order.<sup>281</sup> Our law should be extremely wary, however, of what is termed in North America the "friendly parent" rule.<sup>282</sup> In terms of that rule, the reluctance of the parent applying for custody to allow the other parent access to the child, should be taken into consideration by the court in its decision on custody. It is submitted that the reasons for such reluctance be thoroughly examined, rather than that a "friendly parent" rule-of-thumb be applied.

#### 4.6.3 Diminishing access

Even where an access order has been made, a well-known pattern in many divorced families is for visits to diminish over time and eventually even to cease altogether.<sup>283</sup>

##### (a) The reluctant non-custodial parent

It is submitted that many parents mistakenly believe that if they never see their children they will not be liable to pay maintenance. It is often asserted that some parents simply lose interest in their children, but perhaps the reason for the loss of interest must be sought in the

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281 See Hoggett and Pearl Family Law and Society 506.

282 See Boyd in Busby Equality Issues in Family Law 83.

283 See King 1987 Family Law 187; Eekelaar Family Law 217-218; Mnookin and Weisberg Child Family and State 777; Hoggett and Pearl Family Law and Society 508; English Law Commission 1986 121. On the various reasons why non-custodial parents disappear, see Richards 1982 Journal of Social Welfare Law 146 et seq; English Law Commission Working Paper 96 123-124.

totality of problems surrounding the divorce. Eekelaar<sup>284</sup> speaks of the formidable problems of role-adjustment faced by an absent parent when visiting the children.

Nevertheless there are always some persons who are reluctant to shoulder their parental responsibilities, whether before or after divorce. Such parents, when divorced, are loath to let access interfere with their own weekend or holiday plans. Children often complain of insufficient access when a supposed week-end visit lasts only for an hour or two. The heavy burden of the custodial parent can be considerably lightened if the other parent does use the available access, however.<sup>285</sup>

(b) The reluctant custodial parent<sup>286</sup>

The custodial parent may not be reconciled to access and may even try to prevent it completely.

(c) The reluctant child

Sometimes it is the child who is unwilling to see the non-custodial parent, because of the influence of the custodial parent or for other

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284 Eekelaar Family Law 217-218.

285 See Richards 1982 Journal of Social Welfare Law 144-145; Awad and Schmitt in Parry, Broder and Schmitt Custody Disputes 131.

286 See Schäfer Access 14-15.

reasons.<sup>287</sup> Older children may resent access if it reduces the time they have for their own friends, pastimes and extra-mural activities.<sup>288</sup> Parents often complain that children are upset before and after access, not realising that the children's behaviour, too, may relate to the divorce generally, rather than to the specific visit.<sup>289</sup> It is sometimes contended that the child should not be allowed or expected to decide whether there should be access or not, and that a child should not be allowed to frustrate an access order, because the child is unlikely to have a grasp of the long-term benefits of access.<sup>290</sup> In South Africa the custodial parent is permitted the use of moderate force to compel a child to submit to access. A situation where force was so used is described in Germani v Herf.<sup>291</sup> The use of even moderate force ill accords with the notion that access is a right of the child. Besides, it may be questioned whether extremely stressful incidents such as the one described in that case can ever be in the best interests of the child. Where the relationship between parent and child has deteriorated to this extent, and counselling and conciliation have failed, it is submitted that a "cooling off" period is

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287 English Law Commission Working Paper 96 122.

288 See Awad and Schmitt in Parry, Broder and Schmitt Custody Disputes 126.

289 See Richards 1982 Journal of Social Welfare Law 146-147.

290 See Germani v Herf 1975 4 SA 887 (A) 887 899; Awad and Schmitt in Parry, Broder and Schmitt Custody Disputes 129; Burrett Child Access 60.

291 Germani v Herf 1975 4 SA 887 (A) 887 902.

preferable to the use of force. However, forced access seems incompatible with the best interests of the child.

#### 4.6.4 Other problems of access

Access may be unsuccessful for practical reasons, such as the distance between the parents' homes. Access works better when the child can slot into the parent's normal living pattern than when the parent tries to turn each visit into a special treat.<sup>292</sup> Writers warn against the "Father Christmas" or "Disneyland" syndrome,<sup>293</sup> which can create problems for the custodial parent who perhaps has a markedly lower standard of living than the non-custodial parent. Thus there appears to be merit in the argument that sometimes difficulties surrounding access may be resolved by granting more, not less, access.<sup>294</sup>

It might be thought that the granting of joint custody would do away with access problems, but this is only so where there is joint physical custody. Where there is merely joint legal custody, access may still be in contention.

#### 4.6.5 The resolution of the problems

While many of the issues surrounding access are not ones which the law can be expected to resolve, it is clear from what has been said thus far that

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292 See Lund 1984 Family Law 199.

293 See English Law Commission Working Paper 96 124.

294 Richards 1982 Journal of Social Welfare Law 512-513; See English Law Commission Working Paper 96 124.

parents, too, flounder when they have to address them. It seems that there is a great need here for input from behavioural scientists or social workers.<sup>295</sup>

#### 4.7 Variation of access orders

Access arrangements may need occasional variation.<sup>296</sup> This would solve the problem of those parents who, through respect for the court, feel obliged to obey access orders rigidly even if changed circumstances make this inappropriate.<sup>297</sup> It has been suggested that on-going mediation is needed when access has to be varied, and that usually family members, with the help of mental-health professionals can resolve the problems.<sup>298</sup> The older child, in particular, should participate in any discussion of variation.

### 5 FINANCE

Since the subject of maintenance has been extensively canvassed in a dissertation by the author,<sup>299</sup> there will only be brief reference here to some of its important aspects.

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295 See Mnookin and Weisberg Child Family and State 778.

296 See Burrett Child Access 63.

297 See Johnson 1990 Family Law 484-485.

298 See Awad and Schmitt in Parry, Broder and Schmitt Custody Disputes 129.

299 Van Zyl Maintenance.

### 5.1 Common-law and statutory law duty to support children

In terms of our common law both parents of a child have a duty to support it, which they share proportionately, according to their means. Divorce does not terminate this duty.

There is also statutory provision for child support after divorce. In terms of section 6 of the Divorce Act <sup>300</sup> a divorce decree may not be granted until the court is satisfied that satisfactory provisions or the best that can be effected in the circumstances have been made for any minor or dependent child of the marriage. Section 6 also provides that a court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage, make any order which it deems fit.<sup>301</sup>

### 5.2 Links between the issue of child support and other divorce issues

Child support after divorce is not an issue which can be considered in isolation.<sup>302</sup> In the first place, although the law does not recognise any trade-offs between maintenance on the one hand and custody and/or access on the other, in practice parents, sometimes with the backing of their

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300 Act 70 of 1979 s 6(1).

301 Act 70 of 1979 s 6(1).

302 See Richards 1982 Journal of Social Welfare Law 149.

lawyers, habitually negotiate with each other on this basis prior to the divorce.<sup>303</sup>

Secondly, since the child will be living in a family unit with the custodial parent, what that parent's financial position will be after divorce will have to be taken into account; so it will be relevant whether spousal maintenance is to be paid and whether there is to be a distribution of property.

### 5.3 Economic consequences of divorce

The importance of the issue of child support in divorce negotiations is borne out by recent research findings that children of divorce are at an economic disadvantage which sometimes lasts well into their adult lives.<sup>304</sup>

Throughout the world there is a low rate of compliance with maintenance orders. In South Africa, according to Maclean, 85 % of Blacks and 30 % of Whites default on maintenance payments.<sup>305</sup>

Academic writers today are taking a new look at the economic consequences of divorce. They contend that whilst society tolerates easy divorce and the resultant high divorce rate, it cannot expect a segment of the population, namely women and children, to bear a disproportionate share of the

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303 See Mnookin and Kornhauser 1979 Yale Law Journal 9663 et seq; Weitzman and MacLean in Economic Consequences of Divorce 396. On such bargaining in South Africa see Burman and Rudolph 1990 South African Law Journal 265.

304 See par 2 above; see also Woodhouse 1990 Texas Law Review 269.

305 Weitzman and Maclean Economic Consequences of Divorce 355.

hardships consequent upon divorce; and they plead for State support.<sup>306</sup> In South Africa, however, government funds have never been available for such purposes to any significant extent. The Maintenance Act has recently been amended in an effort to ensure enforcement.<sup>307</sup> In other countries, too, where the liable parent is at all able to pay, there is a strong feeling that he or she should do so, and there is a move towards stricter enforcement.

As Woodhouse says, the family is still

"undoubtedly the most critical group in the development, and indeed survival, of humanity, especially for infants and children."<sup>308</sup>

Maclean speaks of a move in England towards parents' "sharing the full costs of child rearing".<sup>309</sup> Garfunkel<sup>310</sup> states that in the United States

"Private child support is moving from individual determinations in the court room to the routinization associated with taxation and social insurance"

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306 See Van Zyl 1992 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 297 and sources cited there.

See also, on the State's role in support in England see Bainham Children - the Modern Law 299 et seq.

See also, on the English Child Support Act of 1991, Bainham op cit 304; Wightwick in 1994 Family Law 384 and Burrows 1994 Family Law 425.

307 Maintenance Act 23 of 1963 as amended by Maintenance Amendment Act 2 of 1991. For a discussion of the amendments, see Van Zyl 1992 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 297.

308 Woodhouse 1990 Texas Law Review 266.

309 Maclean 1991 Family Law 3.

310 Garfunkel in Weitzman and Maclean Economic Consequences of Divorce 205.

and that government benefits are no longer viewed as a substitute for, but as a supplement to the earnings of both parents. The best method of enforcement of private support obligations yet devised seems to be the one which Australia has adopted. Since 1989 child support payments have been debited directly from the debtor's pay packet and the level of support is an administrative decision based on a fixed proportion of the liable parent's income.<sup>311</sup> Putting the scheme into practice has proved difficult, however.<sup>312</sup> Even if such a scheme were to be introduced in South Africa, this would not ensure payment by the large number of maintenance debtors who, because they work in the informal sector, would escape its net.

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311 Maclean Surviving Divorce 27.

312 See Harrison 1992 Australian Journal of Family Law 23 et seq.

## CHAPTER 4

### DOES THE ADVERSARY SYSTEM AFFORD ADEQUATE PROTECTION OF THE INTERESTS OF CHILDREN ON DIVORCE?

#### 1 INTRODUCTION

In this chapter the defects of the adversary divorce procedure will be discussed. The role played in that procedure by attorneys, and assertions that they foster hostility between divorcing parties, will be analysed. The inadequacies of the adversary procedure in protecting the children of divorce will be highlighted, and a brief summary of the recommendations of the Hoexter Commission given. Reference will be made to two recent attempts in South Africa to improve on the adversary procedure, namely the establishment of Offices of Family Advocates, and the introduction of private mediation. The operation of the Offices of the Family Advocate will be explained and critically assessed. Discussion of the question whether the Family Advocate is practising mediation will be deferred until the next chapter when the concept of mediation will be explored.

#### 2 CRITICISM OF THE ADVERSARY PROCEDURE IN FAMILY MATTERS

It has long been questioned whether the adversary approach is appropriate in divorce matters. The Commission of Enquiry into the Structure and Functioning

of the Courts in South Africa,<sup>1</sup> whose report was published in 1983, stated that a critical appraisal of the adversary system in family matters was necessary.<sup>2</sup> It noted the inquisitorial elements already present in the Divorce Act<sup>3</sup> and declared itself to be in favour of a further move in that direction, although it did not recommend the total abolition of the adversary procedure. The adversary style of divorce has been the target of much criticism. Before the passing of the Mediation in Certain Divorce Matters Act<sup>4</sup> it was alleged that not much attention was given in practice to the interests of children.<sup>5</sup> The Hoexter Commission brought to light other difficulties which have not yet been resolved, for example that the adversary procedure seems to foster hostility between the parties instead of attempting to reduce it<sup>6</sup> and that it is tardy and prohibitively expensive.<sup>7</sup> It was also pointed out

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1 Hereafter referred to as the Hoexter Report.

2 Hoexter Report 505.

3 Divorce Act 70 of 1979.

4 Mediation in Certain Divorce Matters Act 24 of 1987.

5 See Hoexter Report 471.

6 See Hoexter Report 471,490,505.

7 See Hoexter Report 490-492; Levy and Mowatt 19 De Jure 64. The same complaints are made in other jurisdictions. See for example the "Guide to Practice and Procedure in the Family Law Division of the Supreme Court of Ontario (Toronto), the Supreme Court of Ontario" as cited in McLeod Family Dispute Resolution 3.

that the court hears only the plaintiff's evidence,<sup>8</sup> and that the court processes divorce matters so quickly that it cannot really establish whether a marriage has broken down irretrievably, but continues to act as a mere "rubber stamp" as it did before divorce law reform.<sup>9</sup>

## 2.1 The role of attorneys in adversary divorce proceedings

Attorneys in South Africa, like their counterparts in other countries where the divorce procedure is adversary, are often criticised for their handling of divorce cases. It is alleged that they are too combative and aggressive in their handling of divorce matters, and that instead of attempting to diffuse tensions between divorcing couples they adopt a "win at all costs" attitude on behalf of their clients.<sup>10</sup> Whilst this accusation is undoubtedly true of a minority of attorneys, many do try to persuade their clients to adopt a fair approach,<sup>11</sup> and few are really anxious to pursue a matter to trial.<sup>12</sup> Clients in the emotional turmoil of divorce tend to blame

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8 See Hoexter Report 489.

9 See Hoexter Report 465, 477, 484, 490; see also Mnookin and Kornhauser 1979 Yale Law Journal 956.

10 See Schäfer Family Courts 119; Schäfer 1984 De Rebus 19; Grobler 1991 De Rebus 370; Cohen in Hoffmann Family Mediation in South Africa 36.

11 Parkinson 1982 Family Law 14; Dingwall Transatlantic Conference Papers 75; Dingwall and Eekelaar Divorce Mediation and the Legal Process 8,9.

12 Galanter 1985 Journal of Law and Society 13; see also Neilson 1990 International Journal of Law and the Family 239.

lawyers for aspects of the process which are beyond the lawyers' control.<sup>13</sup> A complicating factor here is that legal firms sometimes entrust divorce matters to inexperienced staff.<sup>14</sup> It must be borne in mind that not only are attorneys schooled in the adversary procedure, but in their handling of cases they have to operate within its parameters.<sup>15</sup> Most of them take seriously their duty, as officers of the court, to further their clients' interests to the best of their ability.<sup>16</sup> In addition, most divorcing clients are not at all in the mood to be reasonable, and often an adversary approach is precisely what they want from their attorneys.<sup>17</sup>

Attorneys also have a duty to try to ascertain whether the marriage has indeed broken down; and to explain the relevant law to the parties and tell them what decision the court is likely to make.<sup>18</sup> As far as the first duty is concerned, the consensus seems to be that by the time an attorney is consulted reconciliation is

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13 See Cohen in Hoffman Family Mediation in South Africa 37; Williams 1987 Civil Justice Quarterly 143.

14 See Grobler 1991 De Rebus 370; see also Erickson 1991 Hamline Journal of Public Law and Policy 5.

15 See Schäfer 1984 De Rebus 18; Hoexter Report 471; Le Roux in Steyn, Strydom, Viljoen and Bosman Marriage in Family Life 622; Robinson report 19; Davis 1982 New Law Journal 355.

16 Fricker, Fisher and Davis 1989 Family Law 258.

17 See Crouch 1982 Family Advocate 219; Davis, Mcleod and Murch 1982 Law Society's Gazette 40; Robinson report 19; Westcott 1977 Family Law 25; Schäfer 1984 De Rebus 20.

18 Westcott 1977 Family Law 25; Robinson report 20.

probably impossible.<sup>19</sup> Nevertheless attorneys should acquaint themselves with local counselling services and make referrals when this is appropriate.<sup>20</sup>

Unfortunately not all attorneys know about local counselling services<sup>21</sup> or give adequate legal advice to their clients.<sup>22</sup> In England rules of court were introduced requiring solicitors to certify that they have discussed reconciliation with divorce petitioners and given them names; but it seems that signing this certificate is little more than an empty ritual.

## 2.2 Children in Divorce Proceedings before and after the institution of the Office of Family Advocate

Any discussion of the attention given to the interests of children under the adversary system must distinguish two periods, namely those prior to and after the introduction of the Office of Family Advocate on 1 October 1990, for that date marked a profound change in the state's approach to the children of divorce.

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19 Schäfer Family Courts 317; Le Roux Role of the Attorney 6-7.

20 See Le Roux in Steyn, Strydom Viljoen and Bosman Marriage and Family Life 624. la Cock in 1983 De Rebus 292.

21 Baxter 1979 University of Toronto Law Journal 209.

22 Davis, Mcleod and Murch 1982 Law Society's Gazette 40. It should be noted that New Zealand and Canada have imposed a statutory duty on lawyers to inform parties of facilities which promote reconciliation and conciliation. See New Zealand Family Proceedings Act 1980 s 8; Canadian Federal Divorce Act 1986 s 9 1(b).

By today's standards, before the Office of the Family Advocate was instituted, the needs of children received insufficient attention in the course of divorce proceedings. However, it must be reiterated that although those interests are now considered the most crucial divorce issue, this was not always so. For a long time, whilst spouse fault was the cornerstone of divorce, it was fault which also largely determined ancillary issues such as custody and maintenance and even property distribution. Gradually this approach was undermined by the emergence of the "best interests of the child" principle;<sup>23</sup> and when South Africa followed the overseas trend towards no-fault divorce with the introduction of the Divorce Act,<sup>24</sup> children came under the spotlight more than they ever had before.

When a client, having decided to institute divorce proceedings, approaches an attorney, the arrangements to be made for the children of the marriage are naturally amongst the issues which are discussed. However, attorneys hardly ever see the children of the divorcing couple,<sup>25</sup> and are therefore reliant on their clients for the relevant information, which is often presented in a far from objective fashion. It would be most unusual for a South African attorney to ask to see the children in order to ascertain their wishes.<sup>26</sup> As we have seen, attorneys, with their adversary background, largely believe that their role in divorce is to represent their clients to

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23 On the best interests criterion generally, see Chapter 2.

24 70 of 1979.

25 See Schäfer 1984 De Rebus 19,20.

26 The situation appears to be no different in England: see Robinson 1989 Family Law 466.

the best of their ability.<sup>27</sup> If a client wishes to obtain custody or access, that is generally what the attorney will try to obtain, rather than persuade the parent that the child might be better off with the other parent. In undefended matters the advocate likewise usually sees the client only on the day of the hearing, and does not see the children at all.

Before the passing of the Mediation in Certain Divorce Matters Act <sup>28</sup>, when a divorce action was heard it was the duty of the court, as has been mentioned, to satisfy itself that the provisions for the children were satisfactory or the best that could be made in the circumstances.<sup>29</sup> In undefended divorces, despite the judges' genuine concern to carry out this mandate, the over-crowded divorce roll and the four or five minutes which the court spent on each case, made it impossible to give more than perfunctory attention to the provisions being made for the children. Judges had largely to rely on the attorneys to have delved into this aspect. It was only on rare occasions that the judge would ask to see the children.<sup>30</sup>

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27 See 2.1 above.

28 Act 24 of 1987.

29 Divorce Act 70 of 1979 s 6(1).

30 See, however, Horsford v De Jager 1959 2 SA 152(N); Byliefeld v Redpath 1982 1 SA 702 (A) SA713; and Märtens 1991 4 SA 287 (T) 294.

### 3 RECOMMENDATIONS OF THE HOEXTER COMMISSION

In the final report of the Hoexter Commission of Inquiry into the Structure and Functioning of the Courts in South Africa, the defects of an adversary system of divorce were highlighted and concern was expressed inter alia that the interests of children were not being adequately safeguarded under that system.<sup>31</sup> The Commission recommended<sup>32</sup> that a family court be created, which would unify the existing children's court, juvenile court and maintenance court; and that it have concurrent jurisdiction with the Supreme Court to hear divorce actions and ancillary applications. The proposed family court would have:

- (a) a social component to be known as the family court counselling service. This service would provide
  - (i) a reception process, where problems would be sifted and classified, where legal advice and social counselling would be available, and where marriages which might be saved could be identified and the parties referred for marriage counselling;
  - (ii) a conciliation process for couples who had no hope of saving their marriages, and

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31 Hoexter Report 489.

32 Hoexter Report 521 et seq.

- (iii) a supporting service to the court in the shape of social welfare investigations either by the counselling service's staff or by an approved outside agency.

- (b) a court component.<sup>33</sup>

The Commission also recommended the appointment of a Children's Friend who would ensure the protection of the rights of children.<sup>34</sup> It based this suggestion on an extant model of a Family Advocate in British Columbia and a similar one proposed by the Royal Commission for New Zealand for that country.<sup>35</sup>

#### 4 RECENT ATTEMPTS TO IMPROVE ON THE ADVERSARY PROCEDURE

Although the defects of the adversary divorce procedure and in particular its failure to pay sufficient attention to the needs of the children of divorcing parents, have for long been known and debated, it was the publication, in 1983, of the Report of the Hoexter Commission of Inquiry into the Structure and Functioning of the Courts in South Africa which really brought these issues into the public spotlight. Since the

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33 Following on the Commission's recommendations, the Family Court Bill 62 of 1985 was introduced, but it has not yet become law, apparently for financial reasons. The Magistrates' Courts Amendment Act 120 of 1993, which is not yet in operation, makes provision for the establishment of family courts in a very restricted sense. See par 3 below.

34 Hoexter Report 510.

35 Hoexter Report 511.

publication of the Hoexter Report two important initiatives have been taken to try to improve on the traditional adversary procedure. The first is the appointment, in terms of the Mediation in Certain Divorce Matters Act,<sup>36</sup> of Family Advocates whose brief is to safeguard the interests of the children of divorcing or divorced parents. The second is the introduction of private divorce mediation to South Africa, modelled largely on North American and English examples. The operation of the Act will be described below. In the next chapter the meaning of the term mediation will be discussed, and the history of the mediation movement traced. In addition, since the Act which created Family Advocates refers to Mediation in its title and short title, it will be necessary to determine whether the Family Advocate is indeed practising mediation in the generally accepted sense of the term.

#### 4.1 THE MEDIATION IN CERTAIN DIVORCE MATTERS ACT<sup>37</sup>

A step in the direction of the establishment of a Family Court was made when the Mediation in Certain Divorce Matters Act,<sup>38</sup> which was passed in 1987, came into operation on 1 October 1990. This Act embodied in the Office of the Family Advocate the Hoexter Commission's suggestion of a Children's Friend.<sup>39</sup> In

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<sup>36</sup> Act 24 of 1987.

<sup>37</sup> For descriptions of the office of the Family Advocate see Schäfer in Bainham and Pearl Frontiers of Family Law 32 - 45; Family Law Service par F 57A.

<sup>38</sup> Act 24 of 1987.

<sup>39</sup> Hoexter Report 510.

addition, according to Bosman,<sup>40</sup> the Office of the Family Advocate represents the Commission's model of a family court, to some extent, in embryonic form. While it is true that the Office does provide some elements of the Commission's proposed family court counselling service in that it offers legal advice and counselling and does obtain reports from social workers, it does so only in the context of the best interests of the child. It does not set out to identify marriages which may be saved or to offer conciliation to couples who have no hope of saving their marriages. If during an investigation into the welfare of the child it appears that reconciliation is a possibility, outside counselling will be recommended to the couple.<sup>41</sup>

The Act came into force on 1 October 1990. It makes provision for the appointment of one or more Family Advocates at each division of the Supreme Court, and also for the appointment of one or more persons who are not necessarily civil servants, to act as Family Advocates in a specific matter or specific matters.<sup>42</sup> Family Advocates must be qualified to be admitted to practise as advocates, and must also have been involved or experienced in the adjudication or settlement of family matters.<sup>43</sup> The Act also makes provision for the appointment of Family Counsellors to assist the Family Advocates in enquiries.<sup>44</sup> The Act stipulates that

40 Bosman in Hoffmann Family Mediation in South Africa 54. See also O'Gorman Family Advocate 35.

41 See Bosman in Hoffmann Family Mediation in South Africa 58.

42 s2(1).

43 s2(2).

44 s3.

Family Counsellors must be suitably qualified and experienced, but does not define the requisite qualifications.

#### 4.1.2 Enquiries by the Family Advocate

The Act confers on the Family Advocate the power and duty to institute an enquiry in order to furnish the court at a trial or hearing with a report and recommendations on any matter concerning the welfare of children of the marriage or on other matters referred to him by the court.<sup>45</sup> The enquiry is instituted only after a divorce action has been instituted, or an application has been lodged for the variation, rescission or suspension of an order made in terms of the Divorce Act<sup>46</sup> concerning the custody, guardianship of, or access to a child.<sup>47</sup> An enquiry may be instituted in one of three ways:

- (a) at the request of one of the parties;
- (b) at the request of the court;
- (c) if the Family Advocate decides that it would be in the interests of the child to institute an enquiry and applies to the court for authorisation to do so.

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45 s4.

46 Divorce Act 70 of 1979.

47 Act 24 of 1987 Reg 4(1).

Apart from these instances the supreme court as the Upper Guardian of children sometimes requests the Family Advocate, as amicus curiae, to assist in a matter.<sup>48</sup> A regrettable lacuna is that no provision is made for intervention by the Family Advocate in applications made for variation if divorce took place prior to the passing of the Divorce Act.<sup>49</sup> There are still minor children of such marriages, and there will still be dependent children of such marriages for a long time to come.

No specific reference is made in the Act to what role the Family Advocate is to play in Rule 43 applications for the interim custody of or access to a child pendente lite.<sup>50</sup> Clearly, however, the Office of the Family Advocate has all the resources necessary to investigate such applications.<sup>51</sup> Two conflicting judgements have been given on whether the Family Advocate may be involved in Rule 43 applications. At the hearing in the case of Davids,<sup>52</sup> advocates for both parties asked for a postponement so that a dispute about interim custody might be referred to the Family Advocate for an enquiry. This was refused because the learned judge found that the scope of Section 4 of the Mediation in Certain Divorce Matters Act did not extend to an application in terms of Rule 43 of the Uniform Rules of

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48 See eg Van Erk v Holmer 1992 2 SA 636 (W).

49 See Act 24 of 1987 s 4(1)b and 4(2)b.

50 Rule 43 of the Supreme Court Act 59 of 1959.

51 See Terblanche 1992 1 SA 501 (W) 503.

52 1991 4 SA 191 (W).

Court. He suggested that

"If it was the intention of the Legislature that the reports so frequently requested by the Courts in applications made in terms of Rule 43 should be compiled by the Family Advocate"

section 4 of the Act needed amendment.

However, in the same division, in the case of Terblanche,<sup>53</sup> Van Zyl J found the decision in the Dauids case to be clearly wrong and held the court not bound by it. The learned judge found that the Family Advocate undoubtedly does have a role to play in such applications. He drew attention to section 1 of the Act, in terms of which any word or expression in the Act has the meaning attached to it in the Divorce Act. In section 1(1) of that Act the term "divorce action" is defined to include an application pendente lite for an interdict or for the interim custody of, or access to, a minor child of the marriage or for the payment of maintenance. In addition, the learned judge pointed out that a referral to the Family Advocate would be an "an eminently suitable and proper order to make in terms of Rule 43(5)".

That rule reads:

"The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision."

If a court may request the Family Advocate to conduct an enquiry and furnish a report on interim custody and access, it follows that the court may postpone the hearing of an application pending the report.<sup>54</sup>

<sup>53</sup> 1992 1 SA 501 (W).

<sup>54</sup> See also Whitehead 1993 3 SA 72 (SEC).

For the foreseeable future the Office of the Family Advocate will have to operate subject to constraints of time and personnel, so that it will not be anxious to launch enquiries where these are not essential. Here, attorneys who may have feared a diminution of their role in divorce after the introduction of the Act will find that on the contrary the Family Advocate relies heavily on their co-operation. Thus where the Family Advocate finds discrepancies between the particulars of claim and the prescribed form or forms, the matter may be referred back to the attorney for possible amendment of the particulars of claim.<sup>55</sup> In instances where the plaintiff has not sought to define or restrict the defendant's rights, and there are serious allegations in the particulars of claim relating for example, to violence or alcohol abuse on the part of the defendant, the Family Advocate sends a standard letter<sup>56</sup> to the plaintiff's attorney, suggesting an appropriate amendment to the particulars of claim.<sup>57</sup> In the Van Vuuren<sup>58</sup> case De Villiers J expressed approval of this practice, and surprise that it had not been followed in that matter.

In the second category of cases, the parties themselves may request an enquiry. In Van Vuuren<sup>59</sup> De Villiers J expressed the view that parties and their representatives availed themselves of this opportunity far too seldom. Sometimes the parties

55 See Grobler 1991 De Rebus 367.

56 Form pro- v19.

57 See Grobler 1991 De Rebus 367.

58 1993 1 SA 163 (T).

59 *supra*.

request an enquiry at the suggestion of the attorney who feels the parties' demands are unreasonable.<sup>60</sup>

If Family Advocates deem it in the interest of a child to do so, or if they are requested to do so by a court, they may appear at a divorce trial, or at the hearing of an application of the kind referred to above and adduce relevant evidence and cross-examine witnesses.

The Act also expanded section 6 (1) of the Divorce Act<sup>61</sup> so that before granting a divorce the court must now not only be satisfied with the provisions for the children but also, if the Family Advocate has conducted an enquiry, have considered her report and recommendations. A similar amendment has been made to section 8 of the Divorce Act which relates to the rescission, suspension or variation of orders for maintenance, custody, guardianship and access. It is now provided that if there has been an enquiry into the matter by the Family Advocate, an order for the custody or guardianship of or access to a minor child may not be rescinded or varied, or, in the case of access, suspended, until the court has considered the Family Advocate's report and recommendations.

#### 4.1.3 The Regulations and the procedure in the Offices of the Family Advocates

The Act empowers the minister to make regulations regarding the procedure to be followed by the Family Advocate in conducting an enquiry and in reporting and

60 The Chief Family Advocate has expressed the view that attorneys themselves could adopt a more mediatory stance. See Grobler 1991 De Rebus 369.

61 See Chap 2 par 9.3 above.

making recommendations to the court. However, the regulations which were made under the Act<sup>62</sup> do not lay down the procedure which is to be followed. They merely stipulate<sup>63</sup> that after being requested to institute an enquiry, the Family Advocate must do so as soon as practicable, in a manner which he deems expedient or desirable.<sup>64</sup>

In terms of Regulation 2, the plaintiff in every divorce action in which relief is claimed in relation to the custody or guardianship of or access to children, or the applicant in any application for the variation, rescission or suspension of an order made in terms of the Divorce Act<sup>65</sup> in relation to any minor or dependent child of the marriage concerned, must complete a form<sup>66</sup> in which full particulars of the

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62 published under GN R2385 in GG 12781 of 3 October 1990.

63 Act 24 of 1987 Reg 5(1).

64 By now, however, a very detailed uniform procedure has been devised in the Offices of the Family Advocate, which is followed in all Offices. In addition, at the time of writing, the Chief Family Advocate was drawing up procedural guidelines for the instruction of all persons working in Family Advocates' Offices. Standard forms have been devised for use at various stages of the proceedings, including forms to be filled in by persons such as social workers who have been employed in a fact-finding capacity. New appointees in Family Advocates' Offices are brought to the Pretoria Office for a week's training. Initially the period was two weeks but now that other Family Advocate's Offices are well established this is no longer necessary.

65 70 of 1979.

66 known as Annexure A.

arrangements to be made for the children concerned are set out.<sup>67</sup> Inter alia it must be stated whether any member of the family is known to a welfare organisation or agency.<sup>68</sup> The Family Advocate will establish contact with such bodies and gain valuable insights into the family from them. It has also been found that schools are very useful sources of information about the children and a standard form is utilised to obtain information from this source.<sup>69</sup> Once completed, the form must be duly sworn or affirmed. After scrutinising the form, the Family Advocate may in some cases decide that it is necessary to extend the scope of the enquiry beyond what is contained in the form.<sup>70</sup>

The Family Advocate's report and recommendations must be submitted to the Registrar of the Supreme Court within fifteen days after completion of the enquiry or a shorter period which the court determines.<sup>71</sup> According to the regulations,<sup>72</sup>

67 Act 24 of 1987 Reg 2(1). Information which must be supplied includes details concerning: the children's proposed place of residence; the educational institutions they are attending or their places of employment as the case may be; any learning problems they may have or physical or mental disabilities from which they may suffer; arrangements for support; access; whether they have been convicted of a criminal offence or have been subject to an order in terms of the Child Care Act 74 of 1983.

68 in terms of reg 5(2).

69 Act 24 of 1987 Reg 5(2).

70 The Chief Family Advocate, in an interview with author, 18 December 1992, expressed the view that such action is not in conflict with the Act.

71 Act 24 of 1987 Reg 5(3).

copies of the Family Advocate's report and recommendations must be delivered "to the plaintiff or defendant, or the applicant or respondent, as the case may be". In practice, copies are served on all parties but not in any particular order. There may be some merit in Mowatt's assertion<sup>73</sup> that people whom the family counsellor consults, such as teachers, may be less open if they know that both parties are to see these documents. Nevertheless, as O'Gorman<sup>74</sup> points out, it seems essential in the interests of equity that both should see the report and recommendations, for they must surely be given an opportunity to dispute any allegations in those documents. Mowatt also argues that that disclosure may destroy the remnants of the relationship between the parties. This argument carries less weight, for disclosure is only one step amongst many in the process of converting private disputes into public ones during the divorce procedure.

#### 4.2 A Critical Assessment of the Role of Family Advocate

##### 4.2.1 The Family Advocate's role in the protection of children

It is apparent that, from the point of view of the children of divorce, the institution of the Office of Family Advocate is a significant milestone. For the first time, the judicial system is taking the time and the trouble to focus on the needs of every child of divorcing parents. As we have seen, each plaintiff in a divorce action must complete a form giving full details of

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72 Act 24 of 1987 Reg 5(3).

73 See Mowatt 1988 Tydskrif vir die Suid-Afrikaanse Reg 54.

74 O'Gorman Family Advocate 30.

arrangements for the children and also of any problems the children may have.<sup>75</sup> The form is scrutinised in the Family Advocate's Office, so that even where parents have reached agreement on all issues relating to children, if any unsatisfactory arrangement is noticed it will be investigated.<sup>76</sup> Then again, the Family Advocate may be requested to institute an enquiry by either party to an action or by the court. Although perfect protection for children can never be guaranteed, it is hoped that highly unsatisfactory arrangements concerning the children of any divorce will seldom slip through the net. However, this does seem to have happened in the case of Van Vuuren.<sup>77</sup> This case underlines the desirability, in the interests of time-saving, of the Office of the Family Advocate detecting problem cases when scrutinising the requisite form, rather than that the judge should at the hearing refer them back to the Family Advocate for a report. In Van Vuuren, despite allegations of daily alcohol abuse by the defendant and of his having severely assaulted the plaintiff on various occasions, the parties had reached an agreement that defendant was to have access to the children during certain weekends and school holidays. It was also agreed that if defendant broke his undertaking never to be under the

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75 See fn 22.

76 This is in line with the suggestion made by Solender in 1976 Texas Tech Law Review 640, who after researching the appointment of guardians ad litem, concluded that such appointments should not be mandatory in custody or termination matters, but that a law clerk should rather be assigned to read all papers filed with the court.

77 1993 1 SA 163 (T).

influence of alcohol whilst the children were with him, it would be in the plaintiff's discretion to stop access or limit it. A representative of the Family Advocate wrote on the agreement that it was noted, but the matter was not pursued further by the Family Advocate. When the case was heard, De Villiers J found that prima facie it would not be in the children's best interest for them to go to the defendant.<sup>78</sup> In response to the objections which the learned judge raised to the agreement, the plaintiff's advocate asked that the matter be referred to the Family Advocate for a report, and an order to this effect was made. The learned judge pointed out that if, when the divorce action was instituted, the parties had requested the Family Advocate to investigate the matter, the report would long since have been ready and have been available to the parties and their representatives during settlement negotiations. He expressed the opinion that in this case, where the parties themselves had not approached the Family Advocate, she herself should have requested authorisation to launch an enquiry, and that in matters concerning the welfare of children, it was in their interests that an investigation be done as quickly as possible. He then, for guidance of the Family Advocate, listed four other sets of circumstances where he felt that the court should be approached for permission to launch an enquiry. These were:

- (a) where custody of a young child was not being given to the mother;

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He also queried whether giving the plaintiff the discretion to restrict access was lawful.

- (b) where siblings were to be separated;
- (c) where custody was to be given to someone other than a parent; and
- (d) where arrangements for custody or access were prima facie not in the interests of the child.

With regard to (a), it should be noted that, whenever divorcing parties have agreed that the father was to have custody, the Family Advocate has always routinely asked the mother whether she is satisfied with this arrangement. This is in keeping with our society's cautious and conservative approach to paternal custody. In other jurisdictions such an arrangement might perhaps not be considered sufficient reason for particular scrutiny.<sup>79</sup>

It might be argued that the state's scrutiny of the arrangements for children even in undefended divorces, constitutes an unwarranted intrusion into the privacy of the family,<sup>80</sup> but, as Mowatt<sup>81</sup> points out, the State which has a duty to protect children must retain some control over the welfare of these children. Besides, divorcing parents must be made aware of the importance

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79 Of course the attitudes of a particular Family Advocate or Family Counsellor towards the family, divorce, custody and access must have some influence on the determination of which arrangements are satisfactory and which are not.

80 On State intervention in the family see also Chapter 2.

81 Mowatt 1987 De Rebus 613.

which the judicial system now attaches to the children's interests. In addition, as has been discussed, recent revelations of the extent of domestic violence and of child abuse in South Africa, highlight the need to protect the child even if this is at the expense of family privacy.<sup>82</sup> In any event, in most cases, once the requisite form has been completed, the Family Advocate will not find it necessary to probe any further.

#### 4.2.2 Interviews with children

A definite improvement on the adversary procedure as described above is that in the cases in which she does intervene, the Family Advocate arranges interviews not only with the parents but also with the children. The Family Counsellor will interview smaller children while the Family Advocate will see older ones. Today more emphasis is being laid on the wishes of children in divorce matters than ever before. As noted above,<sup>83</sup> at the head of the checklist of factors which the court must consider in deciding the best interests of the child in terms of the English Children Act of 1989<sup>84</sup> is "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)." Obviously small children will not be asked direct questions such as for example whether they wish to stay with their mother or father, and should preferably be told that the decisions are

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82 See Chapter 2 par 8.1.3 above.

83 See Chapter 2 par 9.5 above.

84 S 1(4)(a) Children Act 1989.

for the adults to make. More subtle means will be used to ascertain their feelings. Members of the helping professions may use projective pictures, doll play and drawings in interviewing children although the use of such instruments may result in varying interpretations and is therefore questionable, according to Gardner.<sup>85</sup> That author suggests that encouraging children to describe the family's daily routine is of more value.

#### 4.2.3 Housing of the Family Advocates' Offices

Conforming at least partially to the recommendations on the family court by the Hoexter Commission,<sup>86</sup> Family Advocates' Offices are housed separately from courts. They are furnished informally and toys form part of the furnishing.<sup>87</sup>

#### 4.2.4 The role of mental-health professionals

If in the course of the enquiry serious problems, such as domestic violence or alcohol abuse, are detected, the Family Advocate refers the parties to a mental-health professional. It is a major improvement on the old

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85 Gardner Child Custody Litigation 254-256.

86 See Hoexter Report 529.

87 Unfortunately at the time of writing the Family Advocate's Offices in Pretoria were housed in a building where strict security measures were in force, so that one's first impression on entering was certainly not one of informality.

dispensation<sup>88</sup> that the mental-health professionals' services are now enlisted by the Family Advocate so that they are free to adopt a neutral approach. According to O'Gorman,<sup>89</sup> delays in obtaining the services of State psychiatrists and psychologists usually induce parties to pay for the services of an expert in private practice. This, however, is not a satisfactory solution for the poorer segment of the population.

#### 4.2.5 The role of family counsellors and volunteer workers

Because of inadequate funding it has not been possible to appoint sufficient paid Family Counsellors at the Offices of the Family Advocate, so considerable use is made of volunteer workers. This would appear to be a less than ideal solution, but the Chief Family Advocate believes that it will be necessary to continue to rely on voluntary workers for the foreseeable future.<sup>90</sup> They may be drawn for example from the ranks of people with a social work, legal or teaching background. particularly guidance teachers. Teachers with long experience, and particularly those who have been guidance teachers, have been found to be very useful voluntary workers. The Chief Family Advocate states that considerable effort was required to establish a network of such workers, but the system is now functioning well

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88 See Chapter 2 par 9.2 above.

89 O'Gorman Family Advocate 28.

90 Hall is in favour of using supervised voluntary workers in court-linked conciliation bureaux in England. See 1976 Family Law 234.

and the volunteers are proving very reliable. They work on a certain day or certain days only. Obviously, when the Black Divorce Court is abolished in the near future,<sup>91</sup> staffing problems will be insuperable without a volunteer input. The Black community will have to be served by its own people if communication difficulties, which the Office of the Family Advocate has already experienced,<sup>92</sup> are to be overcome. The possibility of using auxiliary workers who are not fully trained social workers and whose salaries are lower than those of social workers, may have to be explored as a compromise solution.

The forms which must be filled in by social workers whom the Family Advocate often uses in a fact-finding capacity were referred to above.<sup>93</sup> The use of these forms represents an improvement on the instructions which were formerly given to social workers in divorce cases, from the point of view of both the Family Advocate and the social worker. The social worker now has a much better idea of precisely what is required of her, while the Family Advocate does not have to sift through lengthy and detailed reports containing much information which is irrelevant from her

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91 See Magistrates' Courts Amendment Act 120 of 1993 s 74.

92 See Grobler 1991 De Rebus 369.

93 See Chapter 2 par 9.3 above.

point of view.<sup>94</sup> However, when professionals other than lawyers are involved in the divorce process, the question must be asked what influence they have on the final outcome of the case and whether their input does not impede the parties' access to the due process of the law.<sup>95</sup> This should never happen, because although reports are written by members of the helping professions, these are scrutinised by the Family Advocate and it is she who makes the recommendations to court.

#### 4.2.6 The judge's discretion

Of relevance to Family Advocate's Offices is the observation made by the Hoexter Commission that, for the sake of protecting the rights of all parties, family courts must retain the character of courts of law and decisions must be made exclusively by a legally qualified judicial officer.<sup>96</sup> The Family Advocate and the Family Counsellor render an invaluable service in that they delve far deeper into problems than the judge has the time to do,<sup>97</sup> and the experience up until now has been that judges usually do value the Family

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94 On the possibility of an improvement in the relationship between the legal and social work professions which is implicit in the Mediation in Certain Divorce Matters Act, see Grobler 1990 Consultus 133.

95 See Mowatt 1988 Tydskrif vir die Suid-Afrikaanse Reg 47-56.

96 Hoexter Report 502; see also Mowatt 1988 Tydskrif vir die Suid-Afrikaanse Reg 55.

97 See Terblanche 1992 1 SA 501 (W).

Advocate's assistance and follow her recommendations.<sup>98</sup> However, the final decision is still the judge's. In Venton<sup>99</sup> Discount J expressed his gratitude to the Family Advocate and her collaborators for the assistance they had given him, and described the reports he received from them as thorough, incisive and illuminating. In the case of Märtens<sup>100</sup> the judge similarly had the benefit of what he termed "a comprehensive and a most helpful report" by the Family Advocate as well as the reports of a clinical psychologist appointed by the Family Advocate, and of a Family Counsellor who was an experienced social worker. Nevertheless, in view of the difficulty of the case, he found it necessary to interview the children concerned himself, and reached his own conclusions. In Van Vuuren<sup>101</sup> it was said that the Family Advocate's reports are generally very helpful because they are thorough and are prepared by independent and well-qualified persons. Nevertheless it was pointed out that the judge still has to cast a critical eye over the report and the enquiries on which it is based.<sup>102</sup>

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98 See eg Van Erk v Holmer 1992 2 SA 636 (W) which, however, was not followed in S v S 1993 2 SA 200 (W) and B v S 1993 2 SA 211 (W) on the legal issue re access.

99 1993 1 SA 763 (D&C)766.

100 1991 4 SA 287 (T).

101 1993 1 SA 163 (T)

The case of Whitehead<sup>103</sup> sounded a dissenting note amidst the above-mentioned tributes to the work of the Family Advocate, for in that case the court accused the Family Advocate and her Counsellor of bias and of wishing to dictate to the court.<sup>104</sup>

#### 4.2.7 Conclusions and comments

The establishment of the Office of the Family Advocate is welcome proof that at last our judicial system is doing more than pay lip service to the best interests of the child. The welfare of every child of divorce is now weighed up. Nevertheless some areas of concern remain. Neither the Mediation in Certain Divorce Matters Act nor the regulations made under it<sup>105</sup> prescribed in any detail the procedure to be followed in the Family Advocates' Offices; so procedure has had to be gradually devised by the Chief Family Advocate. A flexible procedure which can be devised and adapted according to need has its advantages, especially in a new and untried

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102 The Chief Family Advocate reports that after her intervention the parties usually accept the Family Advocate's recommendations, and that after the pilot project was launched in the Transvaal, proportionately fewer cases went to trial there than in the other regions.

103 Whitehead 1993 3 SA 72 (SEC) 75.

104 For a criticism of this case, however, see Van Zyl 1994 De Rebus 469.

105 Regulations in terms of Section 5 of the Mediation in Certain Divorce Matters Act 24 of 1987, published under Government Notice R2385 in Government Gazette 12781 of 3 October 1990, and amended by Government Notice R2513 in Government Gazette 14263 of 11 September 1992.reg

service. However, for those wishing to analyse and comment on the work of the Family Advocate the disadvantage is that it is impossible to assess and analyse an unspecified procedure.

When the Act was passed various articles were written in which it was analysed and criticised<sup>106</sup> and a dissertation on "The Role of the Family Advocate" was completed in 1991.<sup>107</sup>

Mowatt expressed misgivings about help being offered in the adversary environment of the court; and thought that earlier intervention would be preferable. He also noted that the Act did not define mediation. He queried whether the Family Advocate would be mediating in the accepted sense of the term, especially since that officer would also be able to adduce evidence and cross-examine witnesses. He stressed the neutral role of mediators.<sup>108</sup> He also criticised the Act's lack of specificity on how the Family Advocate was to help parents reflect on the provisions for their children. He referred to difficulties concerning confidentiality, and questioned the expertise of social workers who would be Family

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106 See eg Mowatt 1987 De Rebus 612; Mowatt 1988 Tydskrif vir die Suid-Afrikaanse Reg 47; Grobler 1990 Consultus 133; Grobler 1991 De Rebus 367.

107 O'Gorman Family Advocate.

108 See Mowatt 1987 De Rebus 611 and 1988 Tydskrif vir die Suid-Afrikaanse Reg 47.

Counsellors. Grobler<sup>109</sup> also wondered what form mediation by the Family Advocate would take, but failed to distinguish counselling from mediation.

Clearly some time has to elapse before an accurate assessment can be made of the success of the process which has now evolved and is still evolving in the Family Advocate's Offices. It has been necessary to highlight certain aspects of this process, in the hope that these will be carefully considered before family courts come into operation.

The Family Advocate seems the ideal person to address the full spectrum of divorce issues, including finance, and this possibility should be considered.<sup>110</sup> Divorce issues such as custody and access cannot be satisfactorily canvassed in isolation, without reference to the financial implications of the divorce.<sup>111</sup> Since the Family Advocate routinely launches thorough investigations into the family background of parties, to include financial issues in the investigation should not be too much of an added burden.

The Family Advocate should guard against the dangers, which are always present in court-linked mediation, of coercion of parties into settlement, and of the gradual transformation of informal processes into rigid ones. In addition, in the context of mediation, if that is indeed what is envisaged, it

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109 1990 Consultus 133.

110 For a discussion of financial issues in mediation, see Chapter 3 par 4.

111 See also Chapter 7 4.

would be unacceptable for one and the same official to question, give legal advice, write reports and make recommendations, and appear in court to cross-examine and adduce evidence.

It will be difficult for the Family Advocate's Offices to continue to function efficiently in times of economic hardship, but it seems that voluntary workers are alleviating the burden to a considerable extent, and that it will be impossible to dispense with their services in the foreseeable future. In the light of these difficulties, it hardly seems appropriate to suggest an expansion of the Family Advocate's services, yet there is clearly a need for earlier intervention and for follow-up services.<sup>112</sup>

The Act has been in operation for too short a period for worthwhile assessments of its functioning to be made yet, but it is necessary to discuss what form these assessments should take. Most divorce matters are settled before they come to trial, so settlement alone cannot be the criterion. Client satisfaction<sup>113</sup> would therefore seem to be a better measure of the success of the Family Advocate's work. To assess the satisfaction of adult clients by way of interview is not too difficult, but of course the Family Advocate's main concern is with the welfare of the children. Regrettably, virtually no empirical research on these issues, which could form the basis of comparison, has been done in South Africa. An easier criterion, but also

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112 See par 4.2.8 (c) below.

113 Dingwall Research in the UK 76; Erlanger, Chambliss and Melli 1987 Law and Society Review 599; Rosenberg 1991 Arizona Law Review.

a necessary one will be to establish how durable agreements, made after intervention by the Family Advocate, turn out to be.

Finally, it will also be necessary for experts to watch the Family Advocate at work.<sup>114</sup> Dingwall,<sup>115</sup> writing of mediation in England, said that to understand the process you have to be able to "observe it, tape it or video it and publish the results in sufficient detail to make sense to a reader", but what he says applies to both private and public mediation here too.

#### 4.2.8 Continued need for a Family Court

It will be regrettable if, after the establishment of the Office of the Family Advocate, which provides only some of the Family Court services which the Hoexter Commission envisaged, the rest of the Commission's suggestions on the establishment of a Family Court are forgotten.<sup>116</sup> Even taking into account that the Family Advocate is concerned only with the best interests of the children, certain lacunae in the services it offers are apparent, namely:

- (a) the parties who do come into contact with the Family Advocate, do so only after a divorce action has been instituted or an application has been made for variation, rescission or suspension of an order made in terms of the Divorce Act,

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<sup>114</sup> See also Chapter 7 par 2.

<sup>115</sup> Dingwall in Transatlantic Conference Papers 79. See also Roberts in 1992 Family Mediation 14.

<sup>116</sup> On family courts generally see Schäfer Family Courts.

relating to custody, guardianship or access to a child. It is unfortunate that parties have no access to his Offices prior to that;

- (b) there is a real need for legal advice and counselling at an early stage;<sup>117</sup>
- (c) there is similarly a need for a follow-up service after settlement has been reached, for parties' circumstances often change which may mean that agreements are no longer as satisfactory as they were initially;<sup>118</sup> yet cost often prevents parties from seeking variations.<sup>119</sup>
- (d) both parents and children need education about the divorce process. Francis<sup>120</sup> describes courses run by divorce court welfare officers in Leicester in England, for divorcing and separating couples and their children. These courses comprise both factual presentations and group discussions and

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117 See above. See also Hoexter Report 474; Mowatt 1987 De Rebus 612; Cohen in Transatlantic Conference Papers 67; Brown in Transatlantic Conference Papers 40.

118 See Robinson Report 58.

119 According to the Women's Legal Status Committee's recommendations to the Hoexter Commission. See Hoexter Report 485.

120 Francis 1981 Family Law 72.

proved very successful. Children, in particular, seemed to find it helpful to encounter other children who shared their predicament.

The Magistrates' Courts Amendment Act 120 of 1993<sup>121</sup>, which is not yet in operation, makes provision for the establishment of family courts to hear divorce actions and for the appointment of family magistrates, but makes no provision for the creation of family courts in the broader sense envisaged by the Hoexter Commission.

As mentioned above, in view of the title of the Act, it is necessary to enquire whether Family Advocates are indeed practising mediation. This will be done in the next chapter, once mediation has been defined and explained.

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121 Magistrates' Courts Amendment Act 120 of 1993 Preamble and s 21 (b).

## CHAPTER 5

### ALTERNATIVE DISPUTE RESOLUTION IN DIVORCE

#### 1 INTRODUCTION

In this chapter, before so-called alternative dispute procedures are discussed in the context of divorce, their general history will be briefly sketched. Next, those procedures which have potential for use in the divorce context, namely arbitration, arbitration-mediation and divorce mediation will be examined. Of these procedures mediation is by far the most popular in the divorce context so it is this one which will be discussed in the most detail. An attempt will be made to define mediation in general and family mediation in particular. Divorce mediation as practised in this country derives largely from American and British models, so its history in those countries will be traced. Canada, Australia and New Zealand have also been at the forefront of family law reform and are ahead of us in the field of divorce mediation. As it is therefore likely that we may learn from their examples, developments in those countries will be described. Next, the brief history of divorce mediation in South Africa and its present standing here will be discussed. Finally, the question whether the Family Advocate is practising mediation will be addressed.

#### 2 ALTERNATIVE DISPUTE RESOLUTION

Divorce mediation is but one form of so-called "alternative dispute resolution". That term is really a misnomer, because the various forms of "alternative dispute resolution" may supplement judicial procedures but cannot replace them. As Levy

and Mowatt put it, mediation occurs in a legal environment.<sup>1</sup> Faris<sup>2</sup> has pointed out that judicial dispute resolution cannot be replaced by any private system of dispute resolution, since the judiciary, like the other components of government, the legislative and the executive, has the function of ensuring the ordering of society; and the judiciary more particularly has a deliberative and adjudicative function. He continues:

"Collectively these three components of government represent the sovereignty of the state and hence exercise the power of the state. It is therefore intolerable that any other private institution or body should be entitled to subvert the sovereignty of any one of these components of government."

The term "alternative dispute resolution" is, however, firmly entrenched by now, although "informal dispute resolution" would be a more accurate term.

## 2.1 Alternative dispute resolution in older societies compared with alternative dispute resolution today

Whatever name we give the procedure, it is not a twentieth-century concept, but has formed part of conflict resolution in most societies throughout the ages.<sup>3</sup> The on-going history of mediation in the Chinese and Japanese civilisations goes back many centuries. A mediator approach to dispute resolution is a feature of African society,<sup>4</sup> and forms part of the indigenous tradition of this country. Nevertheless,

1 Levy and Mowatt 1991 De Jure 64, 76.

2 Faris 1992 Codicillus 9.

3 See Paquin 1987-88 Journal of Family Law 303; Cohen SS Transatlantic Conference Papers 66; Gardner Child Custody Litigation 162-163.

4 See Mkhize in Hoffmann Family Mediation in South Africa 86 et seq.

it is inaccurate to equate mediation as practised in small, homogeneous communities with the mediation which is being propagated today, primarily in an urban, heterogeneous context.<sup>5</sup> For example, it is now considered desirable that mediation be voluntary, that the mediator be neutral, that the parties not be coerced into an agreement, and that power imbalances between the parties be redressed. None of these ideas formed part of earlier types of mediation.<sup>6</sup> Another characteristic of mediation in older societies is that members of the community are free to attend and to make an input. Western-style mediation is held in private. In older societies the purpose of mediation was the restoration of harmony<sup>7</sup> in the community or, in the African context, "social integration"<sup>8</sup> "the social equilibrium of the ward or tribe",<sup>9</sup> not the upholding of individual rights as in the West today. Nor can divorce mediation in Japan be equated with Western-style divorce mediation. In that country, where the egalitarian provisions on family life in the Civil Code of 1947 are in conflict with the traditionally hierarchical and

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5 See Abel The Politics of Informal Justice Vol 2 4 et seq; Merry in Abel The Politics of Informal Justice Vol 2 17 et seq; Griffiths in Dingwall and Eekelaar Divorce Mediation 130.

6 See Merry in Abel The Politics of Informal Justice 17 et seq.

7 On this aspect of mediation in China see Merry in Abel The Politics of Informal Justice Vol 2 32; in Japan Davis 1983 Journal of Social Welfare Law 134-135.

8 See Griffiths in Dingwall and Eekelaar Divorce Mediation 129.

9 See Mkhize in Hoffman Family Mediation in South Africa.

authoritarian view of the family,<sup>10</sup> divorce by consent is the norm. Divorcing couples who cannot reach an agreement may resort to private mediation, but if the matter goes to court the first stage in the proceedings is mandatory mediation (Rikon Chotei). In private mediation the mediators sometimes do pressurise the parties; at other times the parties leave it to the mediator to make all decisions.<sup>11</sup> Discussing mandatory mediation in the court,<sup>12</sup> Minamikata refers to the pervasive lack of attention to parties' rights, and to the mediators' power to extract information from the parties which may even be used against them at a later stage. He also points out that the mediation committee's ability to impose its own values about family life seems to conflict with the ideal of party control in mediation.

### 3 APPROPRIATE TYPES OF ALTERNATIVE DISPUTE RESOLUTION IN DIVORCE

In the context of divorce three forms of so-called alternative dispute resolution may be utilised. They are arbitration, a combination of arbitration and mediation, and mediation. The only one that is extensively used in this context is mediation, but the potential of the others should also be examined.

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10 See Minamikata in Dingwall and Eekelaar Divorce Mediation 116 et seq; Haley in Abel Politics of Informal Justice Vol 2 129. A shift towards a greater emphasis on the individual has been discerned lately, however. See Davis 1983 Journal of Social Welfare Law 134.

11 See Minamikata in Dingwall and Eekelaar Divorce Mediation 117-118.

12 See Minamikata in Dingwall and Eekelaar Divorce Mediation 123 et seq.

### 3.1 Arbitration and Mediation-Arbitration

#### 3.1.1 Arbitration

Arbitration is a familiar method of dispute resolution in labour, commercial and international disputes, but has played little part in the resolution of divorce disputes.<sup>13</sup> In arbitration, as in mediation, disputing parties refer their dispute to a neutral third party, but in arbitration unlike mediation, the third party, after listening to the disputants, is empowered to reach a decision independently. Arbitration may be binding or non-binding (advisory); in other words, the parties may agree to be bound by the arbitrator's decision or merely to give it serious consideration.<sup>14</sup> In binding arbitration the arbitrator's role to some extent resembles that of a judge, and in that way arbitration retains adversary characteristics.<sup>15</sup>

In South Africa, in terms of the Arbitration Act<sup>16</sup>, arbitration may not be utilised in the sphere of divorce. Section 2 provides:

"a reference to arbitration shall not be permissible in respect of....  
any matrimonial cause or any matter incidental to such cause."

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13 But see Stulberg 1980 Family Advocate 4.

14 See Gardner Child Custody Litigation 167.

15 See Green, Long and Murawski Dissolution of Marriage 187.

16 42 of 1965.

In the case of Ressell<sup>17</sup> Davidson J held that in terms of this provision, child-related issues arising out of a divorce could not be arbitrated, whether they arose before or after the divorce.

In the United States, in 1964, the New York Appellate Division approved the use of arbitration in custody and visitation disputes.<sup>18</sup> Generally, however, United States jurisdictions insist on the court's parens patriae powers, and refuse to recognise the validity of agreements to refer custody and visitation disputes to arbitration, although they do regard the arbitration of support issues as acceptable.<sup>19</sup> The American Arbitration Association has recommended that couples include in their separation agreements a provision that in the event of conflict about or arising out of the agreement the matter will be referred to arbitration.<sup>20</sup> Couples may also agree to resort to arbitration if mediation fails.<sup>21</sup>

### 3.1.2 Mediation-Arbitration

In 1976 Spencer and Zammit<sup>22</sup> proposed a three-stage "mediation-arbitration" procedure, comprising:

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17 Ressell 1976 1 SA 289(W).

18 in Sheets 254 NYS 320(1964).

19 Green, Long and Murawski Dissolution of Marriage 190,191; see also Coulson 1969 Family Law Quarterly 28.

20 See Green, Long and Murawski Dissolution of Marriage 186,187, 190.

21 Folberg and Milne Divorce Mediation 244.

22 Spencer and Zammit 1976 Duke Law Journal 930-939.

- (i) the drafting of an agreement;
- (ii) mediation in the event of a dispute arising out of the agreement ,
- (iii) arbitration if the mediation fails.<sup>23</sup>

Street, too, in 1991<sup>24</sup> referred to the developing procedure dubbed "Arb-Med" or "Med-Arb", which is a combination of arbitration and mediation in a single structured process. He cited this as an example of the complementary rather than alternative roles which different dispute resolution mechanisms may play. He warned, however, that whilst one person may arbitrate and then mediate, the converse is not desirable, for it may "distort and inhibit the mediation process".

### 3.1.3 Conclusions on Arbitration

Arbitration is less formal and more private than litigation and is also said to be faster and cheaper.<sup>25</sup> It has the further advantage that the parties do have a say in the choice of arbitrator and in the amount of time that is devoted to their dispute,<sup>26</sup> whilst catering for those couples who really would prefer somebody else to tell them what to do. As a method of dispute resolution it may be said to stand

23 For a full discussion of this suggestion see Scott-Macnab and Mowatt in 1986 De Jure 313 et seq. On arbitration and mediation-arbitration see also Stulberg 1980 Family Advocate 4-5.

24 Street 1992 Australian Law Journal 197.

25 See Spencer and Zammit 1976 Duke Law Journal 936. Whether binding arbitration is cheaper is debatable; see Williams 1987 Civil Justice Quarterly 142.

26 On the advantages of arbitration see Green, Long and Murawski Dissolution of Marriage 189; Gardner Child Custody Litigation 167,168; Folberg and Milne Divorce Mediation 8,245.

somewhere between mediation and litigation. In the divorce field it remains an unusual procedure, even in the United States.<sup>27</sup> Whilst both private mediation and court-based "mediation"<sup>28</sup> by the Family Advocate are still in their teething stages in this country, it seems unlikely that any strong campaign will be mounted in the near future for the introduction of yet another method of dispute resolution in divorce.

### 3.2 Mediation

#### 3.2.1 Definition of mediation

To define mediation is not an easy task, for the various definitions which are to be found in the literature differ markedly.<sup>29</sup> Nevertheless certain key concepts recur in virtually all the definitions. It is not intended to enter into the debate about the difference in meaning between the terms "conciliation" and "mediation", chiefly because this has been thoroughly canvassed by other authors.<sup>30</sup> The main disadvantage of the term "conciliation" seems to be that it may easily be, and often has been, confused with "reconciliation". Secondly, although "mediation" seems to be the preferred North American term and "conciliation" was until recently the

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27 Folberg and Milne Divorce Mediation 244.

28 For a discussion on whether the Family Advocate is practising mediation, see par 4 below.

29 See Parkinson 1982 Law Society's Gazette 1307; Mowatt 1988 Tydskrif vir die Suid-Afrikaanse Reg 49; Levy and Mowatt 1991 De Jure 64.

30 See eg Scott-Macnab 1987 De Jure 49; Scott-Macnab 1988 South African Law Journal 715-716; Parkinson 1990 Family Law 477.

preferred British one, the former has now gained acceptance in Britain too.<sup>31</sup> It is submitted that Street<sup>32</sup> is correct in asserting that there are no relevant, practicable or useful distinctions between the two terms, and that they are synonymous. For the purpose of ascertaining which concepts do recur in descriptions of mediation, some of those descriptions, firstly of mediation in the broader sense, and then more specifically of family mediation, will be reproduced below.

In Australia mediation has been defined as:

"a process in which a third party helps people to negotiate between themselves a clear cut and specific agreement about how they will resolve a specific problem or series of problems."<sup>33</sup>

In the 1987 Texas Alternative Dispute Resolution Procedures Act<sup>34</sup> mediation is defined as:

"a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them;"

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31 According to a notice issued on May 21 1992 by the National Family Conciliation Council in England, that body in April 1992 voted by a large majority to change its name to "The National Association of Family Mediation and Conciliation Services", to be known as "Family Mediation", and has changed the name of its journal to Family Mediation.

32 Street 1992 Australian Law Journal 196.

33 Pears as cited in Clarke and Davies 1992 Australian Dispute Resolution Journal 71.

34 s 154.024 as cited by Dougherty in 1988 Texas Bar Journal 28.

and Lefcourt<sup>35</sup> says it is

"a method whereby disputing parties try to resolve their differences through discussion and compromise. A third-party mediator acts as a facilitator or leader in negotiations. The mediator is supposed to define and narrow issues and guide the parties to resolving their conflicts in a neutral, nonjudgmental manner. The main goal of the process is agreement..."

Davis<sup>36</sup> uses the following definition:

"The terms 'conciliation' and 'mediation' refer to a form of negotiation in which the disputants attempt to settle their differences with the aid of a third party. The essential characteristic of this process is that any settlement is entirely voluntary. The mediator may clarify issues and identify alternatives but he cannot impose an outcome on parties."

In England, the "most widely quoted definition"<sup>37</sup> of family mediation is that of the Finer Committee<sup>38</sup>:

"assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or a separation, by reaching agreements or giving consents or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers' fees, and every other matter arising from the breakdown which calls for a decision on future arrangements."

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35 Lefcourt 1984 Clearinghouse Review 267.

36 Davis in 1983 Family Law 6, citing Bahr.

37 see Piper For the Sake of the Children 7.

38 Finer Report par 4.288.

Roberts<sup>39</sup> has said:

There seems to be widespread agreement that the objective of family mediation should be to initiate, nourish and sustain those fundamental bilateral processes through which parties to domestic conflict may themselves reach joint decisions about the issues which divide them.

In the definitions and descriptions of mediation given above, certain recurring concepts occur, which make it possible to describe mediation as follows :

Mediation is a co-operative process whereby the disputing parties attempt to reach a mutually acceptable agreement or settlement on specific issues, or, 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 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.<sup>40</sup> Thus the outcome of the mediation is determined by the parties, not by the mediator.

In only one of the above definitions is it stated that it is of the essence of mediation that it should be voluntary. It is submitted that this is the correct point of view but it is the subject of much debate.<sup>41</sup>

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39 Roberts in Dingwall and Eekelaar Divorce Mediation 144.

40 See also Davis 1983 Journal of Social Welfare Law 132.

41 See Chapter 6 par 6.4 below.

### 3.2.2 History of Divorce mediation

Since the recent development of divorce mediation in South Africa is based largely on the American and British models,<sup>42</sup> a brief survey of its history in those countries is of interest. Divorce mediation in Canada, Australia, and New Zealand is also further advanced than in South Africa, so we should pay attention to trends in those countries. After that the history and present standing of divorce mediation in South African will be described.

#### 3.2.2.1 Divorce Mediation in the United States.

Long before mediation came to be used in the divorce context in North America, it was known in the spheres of labour, community, religious and international disputes.<sup>43</sup> In family matters, although the concept of conciliation courts was introduced in California as long ago as 1939<sup>44</sup>, the Americans, like the English, initially emphasised reconciliation rather than conciliation<sup>45</sup> but today the two are clearly differentiated.<sup>46</sup> Divorce mediation as we understand the term today

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42 See Pretorius 1990 Consultus 38.

43 Spencer and Zammit 1976 Duke Law Journal 932; Landau Bartoletti and Mesbur Family Mediation Handbook 1; see also Pretorius 1990 Consultus 38.

44 The Family Conciliation Court of Los Angeles County was established in 1939. See McIsaac in McLeod Family Dispute Resolution 53 et seq.

45 McIsaac in McLeod Family Dispute Resolution 54 lists among the objectives of the Family Conciliation Court of Los Angeles both reconciliation and mediation.

46 See Dougherty 1988 Texas Bar Journal 28.

emerged in the United States only in the 1960s<sup>47</sup> to 1970s<sup>48</sup>, partially as a result of concern about the upsurge in divorce which the United States experienced from the mid-sixties onwards, which concern focused more particularly on the children of divorce;<sup>49</sup> and partially as a result of the trend towards no-fault divorce. As Scott-Macnab and Mowatt<sup>50</sup> have stated:

"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."

As in England, both court-based and private mediation schemes developed. The Association of Family and Conciliation Courts, which originally concerned itself with court-based services, was launched in 1963.<sup>51</sup> It was an Atlanta lawyer, OJ Coogler, who introduced the concept of mediation into attorneys' divorce practice in the United States.<sup>52</sup> Disillusioned with divorce procedures, he started helping couples reach their own divorce agreements on issues such as custody, maintenance and property division. He acknowledged the need for the input of mental health

47 See Landau Bartoletti and Mesbur Family Mediation Handbook 1.

48 See Newcastle Report 20.

49 See Cohen in Transatlantic Conference Papers 65; Green, Long and Murawski Dissolution of Marriage 196.

50 1986 De Jure 199.

51 For a history in tabular form of family mediation in North America see Landau Bartoletti and Mesbur Family Mediation Handbook 11- 14.

52 See Erickson in 1991 Hamline Journal of Public Law and Policy 6; Green, Long and Murawski Dissolution of Marriage 196.

experts, and drew them into the procedure. In 1978 he devised a model of what he termed "structured mediation" which has been widely followed; but another, more flexible model, known as comprehensive mediation, also emerged subsequently.<sup>53</sup> Eventually a wide variety of mediation models were to be found, all owing something to one or other of the original two models.<sup>54</sup> Coogler founded the Family Mediation Association, which focused on private mediation, in 1975. Other pioneers in the field were Haynes and Folberg and Taylor.<sup>55</sup> By 1989 approximately 4,500 jurisdictions in the United States required mediation in family custody and visitation disputes, and by 1991 the Academy of Family Mediators, founded in 1978 by John Haynes, had 1400 practising members in the States and Canada.<sup>56</sup>

No one profession seems to dominate the practice of divorce mediation in the United States but a co-operative approach is common.<sup>57</sup> In private practice, according to Fisher,<sup>58</sup> the following may be found:

"the lawyer-mediators who specialise in property mediation and who deal occasionally with child custody issues, counsellor-mediators who specialise in custodial mediation and who deal occasionally with

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53 See on structured and comprehensive mediation Scott-Macnab and Mowatt 1986 De Jure 318-320.

54 See Green, Long and Murawski Dissolution of Marriage 196.

55 See Folb Attorneys' Attitudes 14.

56 See Erickson in 1991 Hamline Journal of Public Law and Policy 8.

57 See Fisher 1991 Australian Dispute Resolution Journal 193; Scott-Macnab Mediation in the Family Context 12.

58 See Fisher 1991 Australian Dispute Resolution Journal 193.

property issues, and mediator-mediators who deal with both."

In-court mediation services are staffed by mental-health professionals, but property and financial aspects are usually referred either to lawyer-mediators who do voluntary work at the courts, to private lawyer-mediators or to community mediation programmes.

### 3.2.2.2 Divorce Mediation in England

In England, family and divorce conciliation is a fairly recent phenomenon, which was preceded, as it was in the United States, by other forms of conciliation, more particularly industrial conciliation.<sup>59</sup> The history of "conciliation", which until recently, was the term which was used there in preference to "mediation"<sup>60</sup> goes back to the 1930s. For many years, however, the aim of those (including spokespersons of the church and the social work profession) who advocated conciliation in the context of divorce was really to reconcile the parties.<sup>61</sup> Subsequently, in the 1960s and 1970s, the sharp rise in the divorce rate paralleled that in the United States and prompted concern about over-crowded courts and the consequent additional financial burden being imposed on the state.<sup>62</sup> Eventually it had to be acknowledged that efforts to reconcile divorcing couples were seldom

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59 See Newcastle Report 10.

60 See par 3.2.1 above.

61 See Newcastle Report 10-12; Dingwall and Eekelaar Divorce Mediation 3 et seq.

62 Dingwall and Eekelaar Divorce Mediation 12.

successful.<sup>63</sup> In 1974 in the Report of the Finer Committee on One-Parent Families<sup>64</sup> a clear distinction was drawn between reconciliation and conciliation, and the Committee declared itself in favour of conciliation in the context of proposed family courts.<sup>65</sup> Consequently the trend towards conciliation gathered momentum, the American influence playing a major role according to Scott-Macnab<sup>66</sup>; and various types of conciliation schemes were introduced, which may be broadly divided into:

- (i) "out-of-court" or "independent" schemes, and
- (ii) "in-court" or "court-based" schemes (the equivalent of the American court based and private schemes).

The following types of out-of-court schemes may be distinguished:<sup>67</sup>

- (a) independent voluntary schemes;
- (b) probation service-based voluntary schemes, and
- (c) probation service-based schemes where probation officers conciliate as part of their welfare reporting duties.

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63 See Hoggett and Pearl Family Law and Society 636-638; see however Parkinson 1983 Family Law 23.

64 Finer Report par 4.288.

65 Finer Report par 4.283.

66 Scott-Macnab 1988 South African Law Journal 712. This influence has not received much recognition in the English literature on the subject, however.

67 Robinson Report 22 et seq; Appendix 5; see also Gerard in Freeman State, Law and Family 282-283.

Independent voluntary schemes were introduced in many communities in England from the 1970s onwards,<sup>68</sup> the first one being the Bristol Courts Family Conciliation Service, established in 1978. Conciliators in such schemes are usually social workers, as are the divorce court welfare officers in probation service-based schemes.<sup>69</sup> Thus in England, unlike the United States, it is the social work profession which from the start has dominated divorce mediation. Independent schemes are largely regarded as a community service and their funding is precarious. The conciliators receive little or no pay.<sup>70</sup> In 1982 the National Family Conciliation Council, now renamed the National Association of Family Mediation and Conciliation Services, was established as an umbrella body for the independent schemes. By 1992 fifty-six schemes were affiliated to it.<sup>71</sup>

At approximately the same time that independent mediation schemes were introduced, in-court conciliation in the shape of "preliminary appointments" became available. The first such service was established in Bristol, in the County Court, in 1977, to be followed soon afterwards by others in almost all divorce county courts.<sup>72</sup> In these schemes also, divorce court welfare officers are involved, so

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68 See Newcastle Report 15.

69 See Murch Justice and Welfare in Divorce 190.

70 According to the Robinson Report 23, "the costs of out-of-court schemes are met by contributions from the parties, payments from solicitors which are later claimed as disbursements under the 'Green Form' Scheme, charitable donations and assistance from other publicly-funded sources".

71 See National Family Conciliation Council Annual Report 1992.

72 See Davis 1991 Family Law 130.

that in England it is the social work profession which predominates in in-court mediation as it does in independent mediation.

### 3.2.2.3 Divorce mediation in Canada

In Canada<sup>73</sup> the development of court-based mediation services has been haphazard and impeded by lack of funds. Shaffer,<sup>74</sup> writing in 1988, reported that divorce mediation in Canada was a recent but fast growing phenomenon; that at least half the provinces by then made use of court-connected mediation services.

Independent mediation started slowly but subsequently grew rapidly, with increasing numbers of private mediators drawn from the ranks of lawyers and of mental-health practitioners.<sup>75</sup>

### 3.2.2.4 Divorce mediation in Australia<sup>76</sup>

The Family Court of Australia was established in 1976.<sup>77</sup> The philosophy underlying its creation was that disputes should be resolved by conciliation and

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73 See Newcastle Report 19.

74 Shaffer 1988 University of Toronto Faculty of Law Review 169.

75 See Newcastle Report 19; Shaffer 1988 University of Toronto Faculty of Law Review 169.

76 On counselling in the Australian Family Court see generally Dickey Family Law 71 et seq. See also Newcastle Report 24-26.

77 In terms of the Family Law Act 1975 (Cth).

counselling and that parties should turn to the court only as a last resort.<sup>78</sup> Among the reasons cited by Dickey<sup>79</sup> for its creation were

"to provide for the administration of such an emotionally charged area of law in a less severe, or at least a less formal, setting than was common in most State courts,"

and also

"to provide for ancillary services such as counselling and welfare facilities for people with marital and family problems."

Only persons suitable "by reason of training, experience and personality" may be appointed as judges in the Family Court.<sup>80</sup>

Statutory provision was made for the creation of a Family Court Counselling Service, with a principal director and with court counsellors who are officers of the court. The role played by the counsellors at counselling sessions may be equated to what would be termed "mediation" in other countries. Although no compulsory qualification is laid down, most counsellors have some mental-health professional qualification. Parties to a marriage, parents and children may seek the help of counsellors at any time, even before proceedings are instituted. After proceedings have been instituted, the court may also advise or direct parties to seek counselling, and may also order them to attend a conference with a counsellor. Except where the parties have agreed, the court cannot ordinarily make an order relating to guardianship, custody or access unless the parties have attended a conference with a

78 See Goodman 1986 Australian Journal of Family Law 29.

79 Dickey Family Law 65.

80 Family Law Act 1975 (Cth) s22(2)b.

court counsellor or welfare officer.<sup>81</sup> At these conferences issues are apparently not investigated in as much depth as they normally are in private mediation; and it seems that both counsellors and clients are uncertain of the role the counsellor is expected to play.<sup>82</sup> The help given by counsellors envisages either reconciliation or conciliation. In proceedings where the welfare of a child is at issue, counsellors are also charged with writing family reports, but the counsellor who is to write the report may not participate in a conference in the matter.<sup>83</sup> Prospective litigants are provided with a document which enlightens them about the effects of the steps which they are contemplating and also of the counselling and welfare services which are available to them.

In Australia, as in other countries, the terms "mediation" and "mediator" have now gained acceptance. In terms of a 1991 amendment<sup>84</sup> to the Family Law Act, a Family Court is empowered, subject to the Rules of Court, and with the consent of the parties, to make an order referring matters in dispute in the proceedings to mediation by an approved mediator.

Independent mediation is known in Australia but according to Fisher,<sup>85</sup> writing in 1991,

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81 Family Law Act 1975 (Cth) s64(1b).

82 See Newcastle Report 25 and 26.

83 See Newcastle Report 25.

84 in terms of the Courts (Mediation and Arbitration) Act 1991 (Cth).

85 Fisher 1991 Australian Dispute Resolution Journal 195.

"the bad news is that the private practitioner still has a lean time in the marketplace."

### 3.2.2.5 Divorce Mediation in New Zealand

In New Zealand the Family Court was established in 1981.<sup>86</sup> As in Australia, specialist judges are appointed to the Family Court, and as in Australia, the philosophy underlying the creation of the court was that a conciliatory approach to family disputes should be encouraged<sup>87</sup>, and that litigation should be seen as a last resort. A further similarity is that the court is enjoined to consider from time to time the possibility of reconciliation.<sup>88</sup> A three-tier method<sup>89</sup> of dealing with disputes obtains, namely:

- (a) Counselling and Conciliation;
- (b) The Mediation Conference, and
- (c) Litigation.

According to Hipgrave<sup>90</sup>

"the terms tend to be used more as descriptions of stages in a process than discrete skill areas."

Counselling sessions may be equated with what in other countries would be termed mediation sessions. As will be discussed below, the "mediation conference", on

86 in terms of the Family Courts Act 1980.

87 See Hipgrave 1988 Family Law 109.

88 Family Proceedings Act of 1980 s19.

89 See Newcastle Report 23.

90 Hipgrave 1988 Family Law 109-110.

the other hand, does not appear to be mediation in the generally accepted sense of the word. It should be noted that counselling, conciliation and mediation are used mostly where there are child-related disputes rather than in property disputes.<sup>91</sup>

### Counselling

At any time, and even before proceedings are instituted, the parties themselves or their lawyers may request counselling for the parties; or they may be referred for counselling by a Judge, Registrar or Counselling Co-ordinator. In addition, counselling is mandatory before the parties may go to trial. The court may also at any stage of proceedings refer parties back to "conciliation".

The Counselling Co-ordinator refers parties to an appropriate counsellor. Counsellors are not attached to the court, but extensive use is made of the voluntary services of the New Zealand Marriage Guidance Council.<sup>92</sup> Where more specialised counselling is required the services of mental-health and other professionals are utilised. The court usually appoints a lawyer as separate counsel for the child in custody, access and guardianship disputes.

### The Mediation Conference

A mediation conference may be held at the request of the parties or their lawyers, and must be held before the matter may proceed to litigation. A judge presides at the conference, but not in his judicial capacity, and the emphasis is on informality. Nevertheless, he may at the end of the conference make a consent order. There is no guarantee that the judge who presides at the mediation conference will not

91 See Cartwright 1987 Conciliation Courts Review 29; Hipgrave 1988 Family Law 112.

92 See Cartwright 1987 Conciliation Courts Review 29.

subsequently preside at the hearing, although every attempt is made to avoid this.<sup>93</sup> Because of the part played by the judge <sup>94</sup> the mediation conference, in spite of its name, does not conform to generally accepted ideas of mediation. The judge is unlikely to have had any training in mediation. His very presence and the fact that he may make a consent order must introduce an element of coercion, even if only in the minds of the parties.

The introduction of the counselling service and of the mediation conference has succeeded in reducing the number of contested custody cases which proceed to trial to approximately 10%, with 67% being resolved in counselling or conciliation.

#### 3.2.2.6 Divorce Mediation in South Africa

It is only during the last decade that the alternative dispute resolution movement has come to the fore in South Africa.<sup>95</sup> In South Africa, as in the United States and Britain, family mediation was preceded by the application of alternative dispute resolution in other spheres such as labour, politics and community matters.<sup>96</sup> Thus the Independent Mediation Service of South Africa (IMSSA) was founded in 1984 to promote alternative dispute resolution in the labour field.<sup>97</sup> Amongst the bodies involved in alternative dispute resolution are the Centre for Inter-group

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93 See Newcastle Report 24.

94 *ibid.*

95 See Hoffmann and Wentzel in Hoffmann Family Mediation in South Africa 7.

96 See Pretorius 1990 Consultus 40.

97 *Ibid.*

Studies (CIS), the South African Association for Conflict Intervention (SAACI), and the Community Dispute Resolution Trust (CDRT).

The divorce mediation movement in this country is of very recent origin, but such is the enthusiasm for it that new initiatives are constantly being taken in this field.

The first organisation to concern itself with family and divorce mediation exclusively was the South African Association of Mediators in Family Matters (SAAM) which was founded in 1988. According to its mission statement, it

"is a multi-disciplinary professional body in the field of family and divorce dispute resolution which aims to:

promote constructive resolution of family disputes through mediation;

develop and maintain standards of practice;

foster working relationships with other Alternative Dispute Resolution organizations, and

encourage research and publications in this field."

SAAM's membership is drawn from both practising and academic members of the legal and helping professions. In 1993 it had eighty members, including forty-five practising mediators. It runs workshops and presents seminars and national conferences. It publishes a newsletter, offers training courses and gives accreditation to other training courses and to mediators. It has drawn up an ethical code for mediators.<sup>98</sup> Problems have arisen when persons with no training in mediation have done mediation and/ or offered training courses themselves. Since

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98 In the code the most important issues addressed are the following: the mediator's role in the process; impartiality and neutrality; confidentiality; training and education; advertising; the mediator's relationships with other mediators, and the advancement of mediation.

SAAM has no statutory standing, all it has been able to do thus far is address letters expressing dissatisfaction or concern to the persons concerned.<sup>99</sup>

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99 Information on SAAM gained from SAAM's newsletters and other published material, and from the response,

dated 30 August 1993, by the then Chairperson of SAAM to questionnaire submitted by the author. In this questionnaire the author asked various organisations:

what their membership was;

how many of their members were practising mediation;

how many divorces their members were mediating per annum;

how many mediators the organisation had trained;

the organisation's view of the adequacy of training courses generally;

whether the organisation was aware of problems of untrained people practising mediation and/or training mediators;

what the organisation's policy was on accreditation;

what the impact of the establishment of the Family Advocates' offices had been on private mediation;

the organisation's comments on the functioning of the Family Advocate's offices;

whether the organisation believed that the mediation movement had established itself in South Africa and if not,

why not;

what part the attorneys' profession was playing in mediation.

A mediation group called the Cape Association of Mediators (CAAM) was founded in 1989, which in 1993 had sixteen members.<sup>100</sup>

The Family Life Centre, a private welfare organisation based in Johannesburg, established a Divorce Centre in 1992 to provide divorce counselling, divorce mediation and basic legal information. It has offered training in mediation.<sup>101</sup>

The Family and Marriage Society of South Africa (FAMSA) has for long done marriage guidance counselling but has broadened the scope of its services to include divorce mediation, and itself runs training courses in mediation. In 1993, among FAMSA's employees there were twenty-four social workers who had been trained to do mediation. In that year, of the fifteen Family and Marriage Societies of South Africa at least seven were offering a divorce mediation service. If mediation is successful FAMSA draws up an agreement which is submitted to the parties to hand to their attorneys.<sup>102</sup>

The Alternative Dispute Resolution Association of South Africa (ADRASA) is a lawyer-driven organisation devoted to the promotion of alternative dispute procedure, primarily in the commercial field but also in divorce. In February 1994 it had 212 members, including attorneys' firms (which made up 75 % of

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100 Information gained from response dated 11 August 1993 by the Manager of Professional Services, Cape Town office of FAMSA, to questionnaire submitted by author.

101 Information gained from response dated 9 August 1993, by the Director of the Family Life Centre, to questionnaire submitted by author; and from SAAM newsletters.

102 Information gained from response dated 25 October 1993, by the Provincial Manager, Eastern Cape, of FAMSA, to questionnaire submitted by author.

membership), advocates, academics and companies. It administered only four divorce mediations in 1993, but of course this number excludes mediation done by individual members. ADRASA has a course accreditation committee comprising a lawyer and a professor of social work, and it has given accreditation to courses offered inter alia by the Association of Law Societies and by SAAM. Once a mediation is complete, ADRASA sends a follow-up questionnaire to mediator and clients.<sup>103</sup>

### 3.2.3 Mediation Procedure <sup>104</sup>

Although there are many variations within the practice of divorce mediation, a basic pattern common to all may be discerned. Parties may be referred to mediation by their lawyers or other professionals, or may themselves request it. A mediator who is approached by only one of the divorcing parties will contact the other spouse and ascertain whether the decision to go to mediation is indeed a joint one, thus emphasising the co-operative nature of the process.

In North America interviews with the parties may be preceded by a meeting between the mediator and the lawyers of both parties, at which the proposed

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<sup>103</sup> Information gained from response by its Executive Director, dated 2 February 1994, to questionnaire submitted to ADRASA by author.

<sup>104</sup> On mediation procedure see inter alia Green, Long and Murawski Dissolution of Marriage; Landau Bartoletti and Mesbur Family Mediation Handbook 47-62; Goodman 1986 Australian Journal of Family Law 34 et seq; Winks 1980-81 Journal of Family Law 635-640; Gee 1992 Family Law 91-92; Folberg and Milne Divorce Mediation Part 3.

mediation procedure will be explained to the lawyers.<sup>105</sup> Some mediators prefer to have meetings with each party separately before meeting both together. In the United States this is known as caucusing. At such meetings the parties will have the opportunity to voice their particular concerns, which the mediator will then summarise at the first meeting with both parties together. Other mediators refuse ever to meet the parties separately, contending that this fosters hostility and suspicion; and in structured mediation separate meetings are prohibited.<sup>106</sup>

### 3.2.3.1 Explanation of mediation to the parties

Before mediation commences it is essential for the mediator to explain to the parties what the purpose of mediation is, what the mediator's role is, and what procedure is followed. This is usually done at the first meeting between the mediator and both parties together. FAMSA in Cape Town find it helpful, before mediation, to offer a half hour free "education" interview which a couple considering mediation must attend together. They then have to sign a contract and fill in financial forms.<sup>107</sup> The most important points which should be discussed with the parties are the purpose of mediation and the mediator's role.

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105 Landau Bartoletti and Mesbur Family Mediation Handbook 48.

106 See Winks 1980-81 Journal of Family Law 637; Salus and Maruzo in Folberg and Milne Divorce Mediation 169; Grebe in Folberg and Milne Divorce Mediation 229. On structured mediation see par 3.2.3.2. below.

107 Information gained from response dated 11 August 1993 by the Manager of Professional Services, Cape Town office of FAMSA, to questionnaire submitted by author.

(a) Purpose of mediation

The purpose of mediation is to help the parties identify the issues in dispute and try to find their own fair solutions to the problems.

(b) The mediator's role<sup>108</sup>

The object of mediation is for the parties to reach their own agreement.

The mediator is not there to control the outcome, which is in the hands of the parties themselves, but to control the process.<sup>109</sup> It is the mediator's function, in the first place, to provide a neutral and safe locale in which the parties may meet and communicate.<sup>110</sup> The mediator will be impartial, and will not judge the issues nor give legal advice. Even a lawyer-mediator will not act as the legal representative of one party or of both together because of the very different roles played by a mediator, on the one hand, and by a lawyer representing one of the parties, on the other. A legal representative who has acted as a mediator and to whom disclosures have been made would in any event be precluded from acting for one of those parties for professional ethical reasons.<sup>111</sup> For this reason it is advisable

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108 For a comprehensive definition of the mediator's role see Deutsch as cited by Salus and Maruzo in Folberg and Milne Divorce Mediation 171.

109 See Salus and Maruzo in Folberg and Milne Divorce Mediation 174.

110 See Gee 1992 Family Law 91.

111 See Winks 1980-81 Journal of Family Law 635; Milne and Folberg in Folberg and Milne Divorce Mediation 20; Crouch 1982 Family Advocate 33.

for unrepresented parties each to have their own lawyer.<sup>112</sup> Mediation will not give parties the same protection as the "advocacy model", nor is it appropriate for all parties.<sup>113</sup>

The mediator does not counsel the parties nor act as a therapist,<sup>114</sup> and it may therefore be necessary to call in the help of outside experts from the helping professions.<sup>115</sup>

The mediator will lay down ground rules with which the parties must comply and will, after listening to the options suggested by the parties, mention possible alternatives. He/she will throughout the mediation sessions try to facilitate communication and "the flow of information".<sup>116</sup>

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112 In England unrepresented parties may be given the names of some lawyers who are members of the Solicitors' Family Law Association, which favours a conciliatory approach. See Parkinson 1983 Family Law 184.

113 See Elson in Folberg and Milne Divorce Mediation 149.

114 Stulberg 1980 Family Advocate 5.

115 See Gardner Child Custody Litigation 206.

116 See Grebe in Folberg and Milne Divorce Mediation 228; Green, Long and Murawski Dissolution of Marriage 198; Landau, Bartoletti and Mesbur Family Mediation Handbook 51-52.

### 3.2.3.2 The procedure

#### (a) Preliminary meetings

There is a widely differing degree of structure and formality in mediation procedures<sup>117</sup>. Coogler<sup>118</sup> devised a system of "structured mediation" which was quite rigid and even prescribed strict time constraints.<sup>119</sup> Coogler's model has been popular with other mediators but many variations have subsequently been devised. Where procedure is rigidly structured the mediator may at the outset be able to tell the parties how many mediation sessions there will be, and possibly also the duration of the sessions and at what intervals they will be held.<sup>120</sup> Where the mediation procedure is more flexible, the parties may be told that on average four to six sessions will be necessary.<sup>121</sup>

At the preliminary meeting the issue of confidentiality of the proceedings is addressed. The question of fees is also discussed, and the parties are told to collect certain information to present at the next mediation session. It is more particularly in respect of financial issues that much information

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117 Roberts 1983 Modern Law Review 541,546.

118 On Coogler see Grebe in Folberg and Milne Divorce Mediation 225 et seq.

119 See Davis and Roberts Access to Agreement 44.

120 For an example of fairly rigidly structured mediation see the description of the procedure at the Bromley Family Conciliation Bureau in Davis and Roberts Access to Agreement 43.

121 See Winks 1980-81 Journal of Family Law 636; Scott-Macnab and Mowatt 1986 De Jure 318.

gathering is necessary, but detailed information will also be necessary on such topics as:

- (i) the children's routines, their schooling, their extra-mural activities, any health problems they may have, and their relationships with extended family members;
- (ii) any history of violence in the family;
- (iii) how the parties picture their post-divorce lives.

Sometimes parties are given forms to fill in which cover financial issues.

During the preliminary session it may sometimes be possible for the mediator to determine whether the matter is indeed suitable for mediation,<sup>122</sup> though this is a more complicated matter than may at first appear.<sup>123</sup> Immediately after separation couples may still be going through the "emotional divorce", in which case the mediator may tell them to return at a later stage.<sup>124</sup>

In North America it is customary for the parties, at the end of the preliminary session, to sign a "submission sheet", "letter of agreement" or "consent form" which incorporates the most important points which the mediator has explained.<sup>125</sup>

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122 See Winks 1980-81 Journal of Family Law 643.

123 See Chap 6 par 6.3 below.

124 See Elson in Folberg and Milne Divorce Mediation 147.

125 Stulberg in 1980 Family Advocate 5; Elson in Folberg and Milne Divorce Mediation 147; Winks 1980-81 Journal of Family Law 635.

(b) Subsequent meetings

Subsequent meetings reveal more clearly than preliminary ones which issues are, and which are not really in dispute, although this usually happens only once information gathering is complete.<sup>126</sup> It may now be decided in which order issues will be discussed, although this decision may change as mediation progresses, and it is open to question whether it is advisable to separate the issues at all. One advantage of separating them is that the resolution of some issues can persuade the parties that the resolution of other, more difficult ones is possible. In structured mediation, the order in which issues are to be discussed is laid down, with custody sometimes but not always<sup>127</sup> being the first on the agenda.

According to Stulberg, at the second meeting the mediator assumes the roles of educator, information gatherer, translator and clarifies, and facilitate.<sup>128</sup> The educational role may come to the fore if for example, it becomes apparent that, although the parties are debating such issues as custody and access, they are not sure of the precise meaning of those terms. Wolff characterises the roles of the mediator as those of catalyst, communicator, go-between and helper.<sup>129</sup>

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126 Green and Long Dissolution of Marriage 199.

127 Coombs 1984 Family Law Quarterly 471.

128 Stulberg 1980 Family Advocate 5.

129 Wolff 1982-3 Journal of Family Law 223.

Early on in the mediation process couples may be very emotional and the mediator may have great difficulty in confining the discussion to the issues in dispute. Nor will the mediator insist on doing so, for as Salius and Maruzo say, the parties do need some opportunity to "ventilate", that is to air their grievances; besides which the "ventilation" may help the mediator decide whether the parties are capable of mediating.<sup>130</sup> Nevertheless it is the mediator's task to keep the parties on track by reminding them that in mediation they must look to the future, not the past, and must concentrate especially on the children's rights and interests. The effects of divorce on children will be explained and the necessity for both parents to continue in the parenting role will be stressed.<sup>131</sup>

If the parties are able to resolve the issues, a tentative agreement, often termed a Memorandum of Agreement,<sup>132</sup> will be drawn up and its practical implications discussed. The mediator may draw it up and submit it to a lawyer or lawyers for scrutiny; or the mediator may simply inform the lawyer that agreement has been reached on certain points and leave it to the lawyer to draw up the agreement which will of course then be discussed with the parties. Sometimes it is suggested that the parties put the tentative

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130 See Salius and Maruzo in Folberg and Milne Divorce Mediation 174.

131 See Salius and Maruzo in Folberg and Milne Divorce Mediation 173; Landau Bartoletti and Mesbur Family Mediation Handbook 52.

132 See Gardner Child Custody Litigation 208. Other terms which are used for the tentative agreement in the United States are Marital Settlement Agreement, Mediation Plan, and Memorandum of Understanding.

agreement into operation for a trial period and then report back to the mediator, after which suitable amendments may be made.<sup>133</sup>

If at any stage it becomes clear that the parties are unable to resolve their differences and will not be able to reach an agreement, the mediator should terminate the mediation.

#### 4 IS THE FAMILY ADVOCATE PRACTISING MEDIATION?

Bosman<sup>134</sup> states that

"...mediation by the family advocate differs from mediation as commonly viewed by mediators and as described in the literature."

However, the question really is whether the Family Advocate is practising mediation in the recognised sense at all.

##### 4.1 Voluntary Attendance at the Family Advocate's Offices?

Where the Family Advocate institutes an enquiry on her own initiative or at the request of the court, any mediation which takes place is mandatory, since the Family Advocate has the power, in theory at any rate, to compel the parties to attend.<sup>135</sup> Although in Australia one session with a court counsellor is mandatory where an order on custody or access is sought,<sup>136</sup> and mediation on child-related issues is mandatory in some states in the United States and some parts of Canada,

133 See Gee 1992 Family Law 92.

134 in Hoffmann Family Mediation in South Africa 58.

135 See also Bosman in Hoffman Family Mediation in South Africa 58.

136 Australia Family Law Act 1975 s 64 (1B).

there are those who believe that its voluntary aspect is an essential element of mediation and that mandatory mediation is therefore a contradiction in terms.<sup>137</sup> In the United Kingdom, in particular, this view is prevalent.<sup>138</sup>

#### 4.2 Examination of the functions of the Family Advocate

In order to establish whether Family Advocates are practising mediation as described in the previous paragraph one has to examine the functions they perform. It should be mentioned at the outset that if they are practising mediation they, like private mediators, should be required to attend accredited training courses in mediation before doing so, so that they have a thorough grasp of the philosophy, purpose and practice of mediation.

##### 4.2.1 Family Advocate as child's representative

Despite the title of Family Advocate, it is clear that that official, whose primary function is to safeguard the interests of the child, is the child's, not the family's, advocate.<sup>139</sup> Grobler<sup>140</sup> asserts that intervention on behalf of minors by neutral third parties, namely Family Advocates and counsellors, does constitute mediation; and Bosman too speaks of the neutral stance of the Family Advocate and the experts.<sup>141</sup> It must be queried, however, whether the person intervening on behalf

<sup>137</sup> See Scott-Macnab and Mowatt 1987 De Jure 47; Mowatt 1988 Tydskrif vir die Suid-Afrikaanse Reg 52.

<sup>138</sup> Fricker, Fisher and Davis 1989 Family Law 256; see also Parkinson 1982 Family Law 15.

<sup>139</sup> See Mowatt 1987 De Rebus 612.

<sup>140</sup> Grobler 1990 Consultus 133.

<sup>141</sup> Bosman in Hoffmann Family Mediation in South Africa 59.

of someone can maintain that neutrality vis-à-vis all parties which is required of a mediator.<sup>142</sup> Davis has warned that<sup>143</sup>:

"to view mediation primarily in terms of protecting children's interests could lead to a very authoritarian and judgmental form of 'conciliation' and one that was likely, in the end, to be rejected by most parents."

#### 4.2.2 The giving of legal advice

At the commencement of the first interview, the Family Advocate explains the relevant law to the parties and tells them what the court is likely to decide in the particular circumstances. The giving of legal advice is essential, as was stressed in the context of the family court by the Hoexter Commission.<sup>144</sup> However, as Davis has emphasised,<sup>145</sup> this service is different from mediation and should be clearly separated from it. If a Family Court were instituted along the lines suggested by the Hoexter Commission, the giving of legal advice would be part of the reception process and would be quite separate from the mediation process.<sup>146</sup>

#### 4.2.3 The Family Advocate's functions of monitoring, mediating and evaluating

If Family Advocates are mediating, the question arises whether it is appropriate for them to be simultaneously fulfilling other roles as well. The Chief Family

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142 On neutrality see Chapter 6 par 5.2.2 below.

143 See Davis 1983 Journal of Social Welfare Law 140; Mowatt 1987 De Rebus 612.

144 Hoexter Report 496.

145 Davis 1983 Family Law 7,8.

146 See Chapter 4 par 3 above.

Advocate sees the roles of Family Advocates as threefold, namely to monitor, to mediate and to evaluate and concedes that these functions are generally integrated when an enquiry is held.<sup>147</sup> These roles are irreconcilable with the idea of a mediator as someone who merely assists the parties to reach their own decision. Family Advocates are<sup>148</sup>

"duty-bound to assure the court that, whatever the agreement between the parties, that which is agreed upon would be in the best interest of the children."

#### 4.2.4 The Family Advocate's inquisitorial role

During interviews, the Family Advocate is clearly adopting an inquisitorial<sup>149</sup> approach, which seems hard to reconcile with the possibility that she may also appear in court in an adversary role to adduce evidence and to cross-examine witnesses.<sup>150</sup>

#### 4.2.5 The Family Advocate's role in decision-making

Because the Family Advocate's Office is operating very much in the shadow of the law, the divorcing parties do not have complete autonomy to arrive at their own

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147 Bosman in Hoffmann Family Mediation in South Africa 55, 56, 58.

148 op cit 58.

149 op cit 54, 58.

150 According to Mowatt 1988 Tydsrif vir die Suid-Afrikaanse Reg 53, cross-examining witnesses and adducing evidence are not processes one associates with the concept of a mediator.

decisions. This has been conceded by the Chief Family Advocate who states<sup>151</sup> that

"the family advocate and the experts assisting him or her actively participate in the decision-making procedure."

#### 4.3 Financial issues

Financial aspects of the divorce are not discussed during the enquiry, although the Act and Regulations do not prohibit such discussion.<sup>152</sup> Where the amount of maintenance for a child appears to be low, the Family Advocate is likely to query it, but generally it seems she will rely on the parties' attorneys to ensure that satisfactory financial arrangements are made. The exclusion of financial issues from discussion is in conflict with the widely held belief that all relevant issues should be addressed in mediation;<sup>153</sup> and besides, financial considerations are often so intertwined with custody and access issues that their rigid exclusion from discussion seems neither feasible nor desirable.<sup>154</sup> If the Family Advocate is indeed mediating, attention should be paid to those writers who assert that in mediation child-related and financial issues cannot be totally separated.<sup>155</sup> In the sphere of out-of-court mediation this is evidenced by the move in England, for

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151 See Bosman in Hoffmann Family Mediation in South Africa 58.

152 O'Gorman Family Advocate 27.

153 See definition in Finer Report par 4.288.

154 See Mowatt 1987 De Rebus 613.

155 See Richards 1990 Family Law 436; Parkinson 1982 Family Law 14; Butlin 1992 Family Mediation Vol 2 no 3  
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example, towards co-mediation with the participation of both a lawyer (who would have the expertise to handle the financial issues) and, usually, a social worker. It is to be hoped that before a family court is instituted there will be a fresh look at the whole question of the financial aspects of divorce and of the functioning of the maintenance court, which as was pointed out by the Hoexter Commission, is unsatisfactory.<sup>156</sup>

#### 4.4 Access to justice<sup>157</sup>

A crucial question which must be addressed in any divorce-related proceedings is whether the parties have full access to justice. The Hoexter Commission emphasised that a family court must do justice according to legal principles,<sup>158</sup> and clearly the Family Advocate must do so too. There is always a danger of coercion in court-linked mediation,<sup>159</sup> and of procedures eventually becoming as rigid and

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156 Hoexter Report 495. Among the shortcomings of the Maintenance Court mentioned in evidence given to the Hoexter Commission and by the Commission itself (See pars 6.18, 6.19, and 7.3.4) were the following: the shortage of maintenance officers; the inexperience of maintenance officers; insufficient advisory services; the court's failure to elicit full financial disclosure, and problems of enforcement of maintenance orders. Delays in the procedure constitute possibly the most serious problem of all: see Burman and Rudolph 1990 South African Law Journal 257 - 259.

157 See also Chapter 6 par 6.4.

158 Hoexter Report 513.

159 See Davis 1983 Family Law 7,9,11; Davis 1983 Journal of Social Welfare Law 135; Roberts 1983 Modern Law Review 556; Davis and Westcott 1984 Modern Law Review 218,221,222; Erlanger, Chambliss and Melli 1987 Law and Society Review 586; Hoggett 1986 Legal Studies 16; Davis 1989 Family Law 262.

inflexible as those they were designed to replace.<sup>160</sup> With reference to mediation on court premises, Davis and Westcott<sup>161</sup> point out that

"there is certainly a risk that the basic tenet underlying the mediation concept, namely that the parties control the outcome (as well as, it could be argued, the form) of the negotiations, will be sacrificed to the court's need to secure a settlement of some kind."

Since the Family Advocate's Office is an arm of the divorce court which is severely overburdened, it must always guard against pressurising parties into settlements. It seems that the Chief Family Advocate is aware of the risks involved, for she states that no time limit is set to mediation sessions nor are parties rushed into settlements. Once a tentative settlement has been reached, parties are often advised to go away and discuss it with, for example, a relative, before committing themselves to it.

#### 4.4.1 The problem of confidentiality<sup>162</sup>

Another aspect of mediation which raises questions about access to justice is its confidentiality.

Sometimes the problem of confidentiality may arise during an interview with a child. If the child makes it clear that he does not wish to stay with a certain parent

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160 Davis 1982 New Law Journal 356 has warned that if conciliation were to become the usual method of resolving family disputes, it "might then take on many of the characteristics of court adjudication, with greater formality, firmer adherence to social norms, and in all probability, a stronger element of coercion. The risks inherent in this approach concern the possible denial of justice to individuals." See also Brown Transatlantic Conference Papers 45; Bottomley in Freeman State, Law and Family 278.

161 Davis and Westcott in 1984 Modern Law Review 221.

162 See McCrory 1988 Modern Law Review 442. On confidentiality see also the discussion in Chapter 6 par 6.5.

because of a problem such as alcoholism, the Family Advocate will be reluctant to harm the relationship between parent and child by disclosing this information, and will therefore ask the child if it may be repeated to the parent. If the child refuses, the Family Advocate will in her report recommend that the judge too interview the child. In the Family Court of New Zealand, where "counselling", which is said to be the equivalent of what is called mediation in England, is compulsory if a custody or access order is sought, "information shared during counselling is confidential from the rest of the court process".<sup>163</sup>

As Faris points out, formality and technicality of procedure are necessary in order to guarantee the rights of litigating parties; and any court proceedings must be public, on record and subject to appeal.<sup>164</sup> The Hoexter Commission emphasised that divorce proceedings should not be in camera, for justice must be seen to be done.<sup>165</sup> Divorce mediation, whether public or private, takes place behind closed doors, and what is said during mediation sessions is generally treated as confidential. Naturally the object of mediation is simply to produce an agreement which will be scrutinised by the court; nevertheless mediators must not forget that their work is done "in the shadow of the court" and subject to the principle of justice for all. Roberts<sup>166</sup> has pointed out that the private, confidential and informal nature of mediation is one of its strengths but also one of its dangers. She

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163 See Pashley 1992 Family Law 303.

164 Faris 1992 Codicillus 9.

165 Hoexter Report 513; see also Faris *ibid*.

166 1992 Family Mediation 14.

stresses the need for research which reveals what really happens in mediation sessions.

#### 4.5 Is the Family Advocate practising mediation?- conclusions

The multiple roles performed by the Family Advocate, namely as children's friend, legal adviser, questioner, evaluator, and reporter to the court, when taken together, do not amount to mediation as described above; nor do parties always come to the Family Advocates' offices voluntarily. It is only in cases where there is no inherent reason why either parent should not have custody, but where external factors such as the necessity of children changing schools, or the possibility of siblings being separated, play a role, that Family Advocates come close to mediation in the more accustomed meaning of the term.<sup>167</sup> Here they play a "less active role" and attempt to guide the parties towards their own decisions.

Clearly, when the Act was drawn up, insufficient thought was given to the title.

##### 4.5.1 Mediation/evaluation by the Family Advocate?

It seems that the work of the Family Advocate approximates more closely to what Rosenberg has termed mediation/evaluation <sup>168</sup> than to true mediation. That author refers to local rules in California courts in terms of which mediators may be required to make custody recommendations to the court if mediation is unsuccessful. He sees mediators as functioning, not just as mediators but also as evaluators and quasi-decisionmakers. He asserts that because of this quasi-coercive power mediation/evaluation differs substantially from mediation, although he

<sup>167</sup> Bosman in Hoffmann Family Mediation in South Africa 59.

<sup>168</sup> See Rosenberg 1991 Arizona Law Review 473.

believes it does have its place. Nevertheless it is important to note his warning that, if the recommendation sways the judge, the parties may view mediation/evaluation as part of the court procedure and may consequently not be as open with the mediator as they otherwise might.

This "mediation/evaluation" may also be likened to what is termed "open" mediation in Ontario.<sup>169</sup> In "open" mediation the mediator reports to court and may be cross-examined, whereas everything said in "closed" mediation is privileged. The difficulties involved in mediation/evaluation are avoided in Winnipeg, Manitoba<sup>170</sup> where mediation is mandatory in disputed cases. If the mediation fails, another worker does an evaluation and makes recommendations so that the confidentiality of mediation is preserved, which it is not in California.<sup>171</sup> The view in England seems to be that it is inadvisable for one official, who in that country will usually be the divorce court welfare officer, to perform the functions of both mediator and adviser to the court.<sup>172</sup>

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169 See Newcastle Report 19.

170 See Brown Transatlantic Conference Papers 43.

171 See Brown *op cit* 38.

172 See Hoggett 1986 Legal Studies 16; Fricker, Fisher and Davis 1989 Family Law 256; Fricker and Coates 1989 Family Law 57.

## CHAPTER 6

### ADVANTAGES AND DISADVANTAGES OF DIVORCE MEDIATION

#### 1 INTRODUCTION

In this chapter the advantages which are claimed for mediation will be examined, but before this is done attention will be drawn to the common but unrealistic practice of comparing mediation with fully litigated divorce cases. The current popularity of divorce mediation will be noted. Since the bulk of the analysis of mediation emanates from feminist jurists, the feminist attitude to it will be explained. Next, the more common claims for mediation will be analysed, as will certain of its disadvantages. An attempt will then be made to decide whether divorce mediation does represent a viable solution to the problems of divorce procedure, from the point of view of the parties and of their children. In any discussion of the advantages for children it must be remembered that divorce mediation does not purport to focus on the children only, but to bring about an agreement which is acceptable to both parties.<sup>1</sup>

#### 2 INCORRECT BASIS OF COMPARISON BETWEEN DIVORCE MEDIATION AND THE ADVERSARY PROCEDURE

At the outset, it should be noted that the literature proclaiming the advantages of divorce mediation displays a serious flaw. In the discussion of almost every claimed advantage, a distorted picture is painted because mediation is compared

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1 For definitions of mediation see Chapter 5 par 3.2.1.

with the litigation of divorce matters on an opposed basis, something which is extremely rare.<sup>2</sup>

### 3 POPULARITY OF DIVORCE MEDIATION

Divorce mediation has shared the popularity of all forms of alternative dispute resolution in recent years.<sup>3</sup> As Crouch, writing in 1982, said<sup>4</sup>:

"It is as difficult today to be against mediation as it once was to be against motherhood. This dispute- resolution process is riding the crest of an immense wave of fad appeal, within both the professions and the media."

Until recently, in countries where divorce mediation had been introduced, it was widely seen as the solution to all the problems associated with the traditional divorce.<sup>5</sup> Most writing about mediation adopted a noticeably uncritical stance.<sup>6</sup> In South Africa too, the praises of divorce mediation have been sung,<sup>7</sup> with hardly

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2 See Hoexter Report 463; see also Davis 1983 Family Law 7; Erlanger, Chambliss and Melli 1987 Law and Society Review 585, 599.

3 See Kirby 1992 Australian Dispute Resolution Journal 145.

4 Crouch 1982 Family Advocate 27; see also Crouch 1982 Family Law Quarterly 219; Lefcourt 1984 Clearinghouse Review 267.

5 See Bottomley in Freeman State, Law, and Family 293; Shaffer 1988 University of Toronto Faculty of Law Review 165; Fineman 1988 Harvard Law Review 754 et seq.

6 See Piper For the Sake of the Children 9.

7 See eg Mowatt 1988 Tydskrif vir die Suid-Afrikaanse Reg 56; Scott-Macnab 1988 South African Law Journal 726; Scott-Macnab and Mowatt 1987 De Jure 52.

a dissenting voice to be heard.<sup>8</sup> However, in the United States, Canada, England and Australia mediation has of late been the subject of close and critical scrutiny. The critics of mediation point out that there is little research to back up its claims, claims which some have dubbed the myths of mediation.<sup>9</sup> Thus Shaffer<sup>10</sup> says:

"...the dominant portrayal of mediation as an overwhelmingly positive process fosters the creation of wildly unrealistic claims and expectations. A more realistic picture of the strengths and weaknesses of mediation is needed to dispel the myths surrounding the process".

Scutt<sup>11</sup> with particular reference to the problem of unequal power between parties, also says

"The claims made for mediation are boundlessly optimistic, and can be dangerous."

#### 4 THE FEMINIST CRITIQUE OF MEDIATION

In the analysis of the claims of mediation which follows, it will be noted that the bulk of the criticism of those claims has been made by feminist jurists.<sup>12</sup> These

8 See however Burman and Rudolph 1990 South African Law Journal 251; Clark 1993 Tydskrif vir Romeins-Hollandse Reg 454.

9 See eg Kirby 1992 Australian Dispute Resolution Journal 146; Piper For the Sake of the Children 9.

10 Shaffer 1988 University of Toronto Faculty of Law Review 200. See also Bottomley in Freeman State, Law and Family 293; Girdner 1987 Mediation Quarterly 3; see also Kirby 1992 Australian Dispute Resolution Journal 146.

11 Scutt Women and the Law 552.

12 See Shaffer 1988 University of Toronto Faculty of Law Review 166. On divorce mediation and ethics, however, see also Crouch 1982 Family Law Quarterly 219; Crouch 1982 Family Advocate 26-35.

writers regard divorce mediation as prejudicial to women, and as threatening the substantial gains which women have made in family law and other branches of the law in recent years.<sup>13</sup> They suggest that the interests of women are better served within the traditional legal process.<sup>14</sup> This may seem anomalous<sup>15</sup>, because another strand of feminist scholarship, emphasising the by now well-documented view<sup>16</sup> of the law and the courts as male-orientated and male-dominated, initially hailed mediation as at last giving recognition to woman's unique voice with its emphasis of relationships rather than of rights<sup>17</sup>; and continues to have its adherents.<sup>18</sup> Thus Hill<sup>19</sup> states:

"Feminists believe.....that the objective stance is really the male stance. This is so for a number of practical and societal reasons. First the members of our courts are, and always have been, predominantly male. This not only causes a potential problem of bias in favour of male parties, but it also injects a male perspective into the proceedings, which sets a male standard for the parties to meet and which decides questions in a male way. Second, the lawmaker's in our legislatures are predominantly male.....It is

13 See eg Woods 1985 Clearinghouse Review 431 et seq; Lefcourt 1984 Clearinghouse Review 267.

14 See Shaffer 1988 University of Toronto Faculty of Law Review 199; Merry in Abel Politics of Informal Justice 38; Lefcourt 1984 Clearinghouse Review 269.

15 See Bottomley in Brophy and Smart Women in Law 164; Pickett 1991 Journal of Human Justice 27.

16 See eg MacKinnon 1991 Yale Law Journal 1281; Naffine Law and the Sexes 7; Gagnon 1992 Harvard Women's Law Journal 277.

17 See Grillo 1991 Yale Law Journal 1601.

18 See eg Rifkin 1984 Law and Inequality 23; Hill 1990 Journal of Dispute Resolution 337 et seq; Grillo 1991 Yale Law Journal 1548 fn 6.

19 Hill 1990 Ohio State Journal of Dispute Resolution 341.

reasonable to expect that this male-centred law, when combined with our male-centred courts will produce male-centered decisions through male-centred processes."

In similar vein Naffine says <sup>20</sup>:

"Law treats people as unfeeling automatons, as selfish individuals who care only for their own rights and who feel constantly under threat from other equally self-absorbed holders of rights. This is a male view of society, they say, which ignores and devalues the priorities of women - those of human interdependence, human compassion and human need."

When it comes to traditional divorce proceedings, women share the general and justified concern over inordinate delays and excessive costs. In addition, they complain that they feel intimidated by, and ill at ease in the male-dominated court system and legal profession. They also complain that matters are decided by the lawyers and/or the judge, often in a manner which reveals male bias, and that they themselves are not given much opportunity to express their own concerns and feelings.

Winks sees the lack of direct involvement of the divorcing parties as perhaps the most serious defect of the adversary procedure.<sup>21</sup> Attorneys are often criticised, and not just by women, for failing to address emotional aspects of the divorce. This is a valid criticism, for attorneys seldom have the time<sup>22</sup> or the skills to offer what amounts to a divorce counselling service. As was suggested above,<sup>23</sup>

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<sup>20</sup> Naffine Law and the Sexes 7.

<sup>21</sup> Winks 1980-81 Journal of Family Law 623.

<sup>22</sup> See Davis and Roberts Access to Agreement 11.

<sup>23</sup> See Chapter 4 par 2.1.

however, they should at least take the trouble to refer clients to organisations or individuals who do offer such services.

In spite of all these well-known disadvantages for women of the adversary system, those feminist writers who oppose divorce mediation are at present clearly in the majority.<sup>24</sup> This is a surprising trend, and it is worthwhile to enquire more closely into the reasons for dissatisfaction with a procedure which many thought would eliminate the problems surrounding the adversary procedure. Shaffer<sup>25</sup> recommends that women adopt a cautious approach to mediation, whose results, she says, will not generally be in the interests of women for as long as gender hierarchy remains a reality. As long as it does, the traditional procedure may indeed serve women better, for as Davis and Westcott remind us, the legal system is designed to protect the weak from the strong.<sup>26</sup>

As far as children are concerned, it is hard to see how a procedure from which their mothers might emerge feeling dissatisfied and resentful could be of benefit to them.

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24 On scepticism about mediation on the part of feminists see Pearson and Thoennes in Folberg and Milne Divorce Mediation 440. Among the authors cited below who have warned on the dangers of mediation for women are, in South Africa, Burman and Rudolph, and Clark, and abroad Bailey, Bottomley, Bryan, Grillo, Lefcourt, Leitch, Shaffer, Scutt and Woods.

25 Shaffer 1988 University of Toronto Faculty of Law Review 167.

26 Davis and Westcott 1984 Modern Law Review 220.

## 5 THE ADVANTAGES CLAIMED FOR MEDIATION

### 5.1 Approach to the claims of mediation

In what follows, each of the important claims of the mediation proponents will be discussed, together with criticisms of that particular claim.

### 5.2 The most common claims of mediation

The advantages claimed for mediation include the following:

- (a) mediation empowers parties by allowing them to control its outcome;
- (b) the parties are helped to reach agreement by neutral, unbiased mediators;
- (c) mediation fosters better communication and reduces conflict;
- (d) through mediation the parties usually reach agreement and
- (e) agreements reached are longer lasting than those arrived at in the traditional adversary way;
- (f) parties who mediate are more satisfied with the process and the outcome than those who litigate;
- (g) mediation is a fair process which produces fair outcomes;
- (h) mediation saves time and money;
- (i) mediation is especially appropriate in family disputes;
- (j) a mediated divorce is better for children than a litigated divorce.

### 5.2.1 The parties are in control of mediation

What is said to distinguish mediation from all other forms of dispute resolution and is considered its most important characteristic is that it is a form of private ordering<sup>27</sup> in which the parties themselves have control over the outcome<sup>28</sup> and, according to some writers, also over the process<sup>29</sup> of mediation. It is asserted that a decision is not imposed on them as it would be by adjudication or arbitration or even, to some extent, by a negotiated agreement reached by the lawyers of each party; but that the parties remain responsible<sup>30</sup> for reaching their own agreement, one which will be tailored to their particular circumstances and needs. It is only in voluntary mediation, however, that the parties may be said to exercise this control.<sup>31</sup>

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27 Davis and Westcott 1984 Modern Law Review 221; Cobb and Rifkin 1986 Law and Social Inquiry 47-49; Folberg in Eekelaar and Katz Resolution of Family Conflict 194; Irving Family Law 28; Landau, Bartoletti and Mesbur Family Mediation Handbook 20.

28 See Davis and Roberts Access to Agreement 7; Davis and Westcott 1984 Modern Law Review 215; Erlanger, Chambliss and Melli 1987 Law and Society Review 589; Knuppel 1991 Journal of Dispute Resolution 128.

29 See Knuppel 1991 Journal of Dispute Resolution 129; Gee 1992 Family Law 91; Piper For the Sake of the Children 21. Wolff 1982-83 Journal of Family Law 230 sees party control of the entire process as essential.

30 Parkinson 1983 Family Law 23.

31 Erlanger, Chambliss and Melli 1987 Law and Society Review 589; Davis and Roberts Access to Agreement 7; Roberts 1983 Modern Law Review 556.

It must be remembered that there will always be some parties who do not welcome the opportunity to make their own decisions and who prefer that someone else should do so. Expecting decisions to be made for them, they may be rather taken aback to find how much latitude they have to make their own input.<sup>32</sup> Mediation is probably not an appropriate method of resolving their problems.

The claim of party control is debatable and cannot be separated from the issue of the mediator's neutrality, which will be discussed in more detail below. Each mediator naturally brings to mediation his or her own values and may consciously or unconsciously seek an outcome which accords with those values.<sup>33</sup> The more a mediator intervenes and tries to steer the parties in a certain direction, the less the parties themselves may be said to be in control.<sup>34</sup> Voegeli<sup>35</sup> maintains that a mediator does suggest outcomes, that the parties then lose control of the issues and that the outcomes are directly influenced by the third party. Roberts<sup>36</sup> speaks of mediators who, through their transformation of the parties' views, come to share control with them, while Erlanger, Chambliss and Melli speak of the "coercive and distortion possibilities inherent in informal processes."<sup>37</sup> It has been well

32 See Roberts 1983 Modern Law Review 553.

33 See Goodman 1986 Australian Journal of Family Law 44; Bottomley in Freeman State, Law and Family 298, 299; Davis and Roberts Access to Agreement 12.

34 See Dingwall and Eekelaar Divorce Mediation 1988 150 et seq.

35 Voegeli 1992 Civil Justice Quarterly 292.

36 Roberts 1983 Modern Law Review 549

37 Erlanger, Chambliss and Melli 1987 Law and Society Review 586.

documented that divorce mediators generally are strongly in favour of co-parenting and joint custody,<sup>38</sup> and in attempting to persuade parents that co-parenting arrangements are best for children, they may be infringing on the parents' control of mediation.<sup>39</sup> Their subjective views on what is best for the children should not be allowed to defeat the primary purpose of mediation, which is that of reaching an agreement acceptable to the parties. It must be borne in mind that most parents will see the mediator as a knowledgeable person to whose views on child-rearing<sup>40</sup> or the law<sup>41</sup> they will be inclined to defer.

Bottomley<sup>42</sup> claims that

What is actually a blend of informal adjudication with an element of party control is legitimated by the appearance of greater party control than is evident in practice.

She believes that because of their economic, social and psychological vulnerability women can only be harmed by private ordering. Research done by Pearson and Thoennes revealed that many women do indeed feel disadvantaged in mediation.<sup>43</sup>

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38 See Girdner 1989 Canadian Journal of Women and Law 142 et seq; Bryan 1992 Buffalo Law Review 491. On joint custody see further Chapter 3 par 3.8.1 below.

39 Girdner 1989 Canadian Journal of Women and Law 145.

40 See Bryan 1992 Buffalo Law Review 490.

41 See Roberts 1983 Modern Law Review 553,554.

42 Bottomley in Brophy and Smart Women in Law 175, 179.

43 See Girdner 1989 Canadian Journal of Women and Law 145. Pearson and Thoennes reported that in custody mediation women were more likely than men to report the following: that they felt they were being pressurised

Griffiths'<sup>44</sup> study of informal family dispute settlement amongst the Bakwena in Botswana reveals a process in which it is the third party handling the dispute, rather than the parties to the dispute, who is in control. Since this third party's goal is to restore harmony against the background of the existing social order, the female party to such a dispute is usually disadvantaged both during the process and by its outcome. Griffiths is aware of the dangers of comparing third-world and first-world practices<sup>45</sup> but nevertheless believes that her study should sound a warning to

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into agreement by their ex-spouse; that they felt uncomfortable expressing their feelings and often felt angry during sessions; that mediators were very directive and dictated the terms of the agreement.

44 See Griffiths in Dingwall and Eekelaar Divorce Mediation 129 et seq. Griffiths researched family dispute processing in Molepole, the central village of the Bakwena tribe in Botswana. One case which she observed was that between a divorced couple, Mr and Mrs Busang. The couple had been divorced in the High Court, but the question of the distribution of property was referred back to the Chief's kgotla at the wife's request. According to the prevailing customary system, the property should have been divided according to its source and according to the parties' conduct. At the hearing, the questions which the husband asked his wife were intended to discredit her assertion that certain property had been acquired by the couple jointly. Next, the kgotla members questioned the wife and concentrated exclusively on her conduct, which they found to have been the cause of the divorce. The kgotla found that the wife was not entitled to any property. At no stage did the third party hearing the dispute try to steer the discussion towards the question of the property which had been said to be owned jointly; nor did he question the husband about his allegations of his wife's misconduct. See also Rwezaura in Eekelaar & Katz Resolution of Family Conflict 65; Bottomley in Brophy & Smart Women in Law 180. See also Rwezaura in Eekelaar and Katz Resolution of Family Conflict 65; Bottomley in Brophy and Smart Women in Law 180.

45 See Chapter 5 par 2.1 above.

those practising informal dispute settlement elsewhere, to treat the concepts of party control and the role of third parties with caution.

### 5.2.2 The mediator is neutral<sup>46</sup>

As we have seen, it is the mediator's task to assist the parties to reach their own agreement, not to impose an agreement on them; to guide the parties through the process and offer them guidance and even advice, but not to control the outcome. Thus it is envisaged that the process will be guided by a neutral, unbiased mediator.

But can a mediator truly be neutral? Many writers have queried this. In the first place, they point out what is surely self-evident, namely that all persons, whether

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46 Sometimes reference is made to mediation or mediators as being impartial: see for example Landau, Bartoletti and Mesbur Family Mediation Handbook 20, who speak of mediation as a process whereby an impartial third party is retained to effect a resolution of issues between two or more disputants; and sometimes to their being neutral: see Davis 1983 Journal of Social Welfare Law 136; Paquin 1987-88 Journal of Family Law 302; Wolff 1982-3 Journal of Family Law 214; Mnookin and Weisberg Child, Family and State 789; Erickson 1991 Hamline Journal of Public Law Policy 11, and Roberts in 1983 Modern Law Review 545 who speaks of a third party in mediation intervening from a position of at least apparent neutrality. It is submitted that these terms may be used interchangeably. Voegeli refers to mediation as a "non-directive" method of counselling: see 1992 Civil Justice Quarterly 292. On neutrality in mediation generally, see Cobb and Rifkin 1986 Law and Social Inquiry 35; Bryan 1992 Buffalo Law Review 502 et seq.

consciously or unconsciously,<sup>47</sup> have their own values and beliefs, and can never be completely unbiased and objective.<sup>48</sup> As Scutt<sup>49</sup> states:

"Informal justice does not dispense with norms.....The content of justice and what is a reasonable claim is also likely to be dependent upon assumptions about women and men, women's rights and men's rights, racial characteristics, ethnic features, in accordance with norms which do not need to be stated to exist, nor to be adhered to.."

and

'Neutral' in Anglo-Australian culture means almost inevitably that the dominant ethic rules"<sup>50</sup>.

It is submitted that this is true of most cultures, not just of the Anglo-Australian one. Tillett listed the assertion that mediation is culturally neutral as one of the myths of mediation.<sup>51</sup>

In the second place, a mediator's profession may instil certain values. The tendency amongst mediators to prefer joint custody was discussed above.<sup>52</sup> Davis speaks of welfare officers in England operating "in the rather murky waters of child

47 See Cobb and Rifkin 1986 Law and Social Inquiry 43.

48 See Parkinson 1983 Family Law 184-185; Teitelbaum and DuPaix 1988 Rutgers Law Review 1093-1132; Bottomley in Freeman State, Law and Family 295,297; Shaffer 1988 University of Toronto Faculty of Law Review 178, 184; Leitch 1986/87 Mediation Quarterly 168; Grillo 1991 Yale Law Journal 1587, 1592; Goodman 1986 Australian Journal of Family Law 41.

49 Scutt Women and the Law 553.

50 *ibid* 551.

51 Tillett as cited by Kirby 1992 Australian Dispute Resolution Journal 146.

52 Par 5.2.1.

care theory".<sup>53</sup> Feminist writers contend that members of the helping professions, who constitute the majority of mediators, have through their training and practice absorbed a somewhat outmoded<sup>54</sup> outlook on the family and its place in society; one which supports the retention of the status quo<sup>55</sup> and the traditional roles of husband and wife in the family, and which emphasises the wife's traditional role as carnivore to the children at the expense of her rights as an individual.<sup>56</sup> It is also argued that these mediators see themselves primarily as advocates for the children,<sup>57</sup> and pay scant regard to the parents' interests. For these reasons, it is alleged, women's recently won rights may be disregarded and devalued by a mediator,<sup>58</sup> who will, albeit unconsciously, try to steer the parties towards an agreement which accords with the mediator's own ideas of what is appropriate.<sup>59</sup>

53 Davis Partisans and Mediators 150; see also Davis 1983 Family Law 10.

54 Teitelbaum and Du Paix 1988 Rutgers Law Review 1098.

55 See Davis and Roberts 1989 Family Law 305; Bottomley in Freeman State, Law and Family 297; Bottomley in Brophy and Smart Women in Law 180; Pickett 1991 Journal of Human Justice 30, 31. On the conflict between traditional views of the family on the one hand, and the independence of women on the other, see Delorey 1989 Canadian Journal of Women and Law 35.

56 See Bottomley in Freeman State, Law and Family 298; Bottomley in Brophy and Smart Women in Law 176; Pickett 1991 Journal of Human Justice 31.

57 See Bryan 1992 Buffalo Law Review 441 et seq.

58 See Bottomley in Brophy and Smart Women in Law 171; Bryan 1992 Buffalo Law Review 441 et seq.; Grillo 1991 Yale Law Journal 1570.

59 See Bottomley in Freeman State, Law and Family 298; Girdner 1987 Mediation Quarterly 4.

The mediator's bias may not always work against women, however. Davis and Roberts, after interviewing fifty-one parents who had attended the Bromley Family Conciliation Bureau, found that on the whole it was the husbands who disliked the mediator's stance and felt it had favoured their wives.<sup>60</sup> In the United States the problem of bias during mediation is starting to be addressed. In North Carolina, legislation provides that<sup>61</sup>

"either party may move to have the mediation proceedings dismissed and the action heard in court due to the mediator's bias."

Clearly, too, neutrality may be affected by professional concerns.<sup>62</sup> Certain social psychological studies have shown that "the mere presence of a third-party conduces to settlement."<sup>63</sup> Besides, for mediation and the mediator to be considered successful the parties must surely come to an agreement, and not take too long to do so? <sup>64</sup> According to Davis,<sup>65</sup> mediation of various kinds has a "remarkably uniform success rate" which, according to that author, suggests that underlying the

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60 See Davis and Roberts 1989 Family Law 305.

61 See Gagnon 1992 Harvard Women's Law Journal 288.

62 See Fineman 1988 Harvard Law Review 730; Crouch 1982 Family Advocate 33.

63 Goodman 1986 Australian Journal of Family Law 41.

64 See Crouch 1982 Family Advocate 33; 7; Woods 1985 Clearinghouse Review 435; Goodman 1986 Australian Journal of Family Law 44; Anon 1987 Family Law 120; Paquin 1987-88 Journal of Family Law 303; Girdner 1989 Canadian Journal of Women and Law 146 Bryan 1992 Buffalo Law Review 511-512; ; Gagnon 1992 Harvard Women's Law Journal 281; Voegeli 1992 Civil Justice Quarterly 292.

65 Davis 1983 Family Law 7; see also Davis and Westcott 1984 Modern Law Review 218.

apparent success of most of these schemes are considerable pressures directing the parties towards settlement.

In addition, in the wider context, it is said that the helping professions, with their emphasis on the emotional aspects of divorce,<sup>66</sup> would like to see divorce become their own preserve to the exclusion of the lawyers.<sup>67</sup>

The literature also reveals other reasons why it is impossible for a mediator to be neutral. One of them is the often voiced complaint, which will be discussed below, that the parties to mediation are seldom equally powerful and that for mediation to be fair the power balance must be redressed.<sup>68</sup> Mediators today are aware of this need, and do intervene to redress the power imbalance. However, the minute they do so they are departing from a neutral stance.<sup>69</sup> Davis and Roberts<sup>70</sup> found some evidence showing that the mediators

"were active; they did challenge; they controlled the ebb and flow of the negotiation; in some cases, the 'weaker party' did, indeed, feel empowered."

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66 See Folberg and Milne Divorce Mediation 6; Goodman 1986 Australian Journal of Family Law 33; Leitch 1986/87 Mediation Quarterly 170; Fineman 1988 Harvard Law Review 744-746.

67 See Bottomley in Freeman State Law and Family 296; Fineman 1988 Harvard Law Review 746; Bailey 1989 Canadian Journal of Family Law 70.

68 See Teitelbaum and DuPaix 1988 Rutgers Law Review 1124.

69 See Grillo 1991 Yale Law Journal 1592; Bryan 1992 Buffalo Law Review 510.

70 1989 Family Law 306.

This hardly seems a description of neutrality.<sup>71</sup> Similarly, if a lawyer-mediator realises early on that mediation will be beneficial for only one of the spouses,<sup>72</sup> or if the parties reach an agreement which the mediator perceives to be unfair to one of them,<sup>73</sup> or if the mediator knows that the parties are failing to take account of some relevant aspect of the law in reaching their agreement, whether or not the mediator intervenes s/he cannot be said to be neutral.<sup>74</sup> In an American study it was found that only about ten percent of divorce mediators adopted a non-interventionist stance.<sup>75</sup> Cobb and Rifkin, in a study of neutrality in mediation published in 1986, found that up to that time no empirical studies had documented the practice of neutrality.<sup>76</sup>

All in all, it is clear that neutrality is an ideal towards which mediators must strive but which they can never fully attain.<sup>77</sup>

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71 Davis and Roberts 1989 Family Law 306; see also Shaffer 1988 University of Toronto Faculty of Law Review 185; Fisher 1989 Family Law 259.

72 Crouch 1982 Family Law Quarterly 242.

73 See Bryan 1992 Buffalo Law Review 510; Mnookin and Weisberg Child, Family and State 793.

74 See Shaffer 1988 University of Toronto Faculty of Law Review 185; Crouch 1982 Family Advocate 33.

75 Mnookin and Weisberg Child, Family and State 793.

76 Cobb and Rifkin 1986 Law and Social Inquiry 36.

77 See Voegeli 1992 Civil Justice Quarterly 292.

### 5.2.3 Mediation improves communication and reduces conflict

One of mediation's claims is that it promotes better communication between parties;<sup>78</sup> and it seems that successful mediation may achieve this and indeed may help the parties to improve their communication skills generally.<sup>79</sup> This is bound to be to the advantage of the children, for, as was stated above, the degree of conflict between parents does influence children's' adjustment to divorce.<sup>80</sup> Grillo<sup>81</sup> indeed sees the possibility of improved communication and co-operation as the only reason to prefer mediation to other procedures.

Linked with claims of improved communication skills are those of conflict reduction. Mediation proponents deplore the anger and hostility which they see as concomitants of the adversary divorce, and suggest that mediation can drastically reduce levels of conflict, and can render divorce more civilised and humane.<sup>82</sup> Assertions that adjudication increases hostility in custody disputes while mediation reduces it are unsupported by research, however.<sup>83</sup>

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78 See Forster Divorce Conciliation 53; Voegeli 1992 Civil Justice Quarterly.

79 See Parkinson 1983 Family Law 25.

80 See Chapter 3 par 2.3 above.

81 Grillo 1991 Yale Law Journal 1609.

82 Girdner 1989 Canadian Journal of Women and Law 135; Davis 1982 New Law Journal 355.

83 Bailey 1989 Canadian Journal of Family Law 61, 66 -67; and for an analysis of some of the relevant research see 73-76.

Mediation, its proponents believe, ensures that in divorce there are only winners and no losers. In the era of the no-fault divorce the helping professions see divorce conflicts as largely emotional ones which they can help the parties resolve.<sup>84</sup> Thus they see litigation as undesirable,<sup>85</sup> and themselves rather than lawyers as playing the major role in the divorce process. Kirby correctly distinguishes between dispute settlement and conflict reduction, and points out that in adjudicated cases the dispute is often settled but the underlying conflict remains and may cause further problems and even further disputes in the future. For this and other reasons parties may often need assistance in coping with the emotional aspects of divorce,<sup>86</sup> but these aspects must be distinguished from the legal aspects which, for as long as the law continues to concern itself with divorce and its consequences, cannot be ignored. As Bottomley says<sup>87</sup>

"...too often there is ...a conflation of dispute resolution with therapy."

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84 See Leitch 1986/87 Mediation Quarterly 170; Goodman 1986 Australian Journal of Family Law 33.

85 Fineman 1988 Harvard Law Review 750.

86 Before they can put the divorce behind them, many parties feel the need to give expression to grievances arising out of the marriage, which have sometimes accumulated over a long period. Lawyers have very limited time to listen to grievances, and in any event lack the skills to help parties cope with emotional problems. Mediators, similarly, are supposed to help clients look forward rather than back.

87 Bottomley in Freeman State Law and Family 296; see also Shaffer 1988 University of Toronto Faculty of Law Review 172.

But is conflict reduction always desirable? <sup>88</sup> People are entitled to fight for what they consider to be their rights, even if this creates an impression of anger and hostility. As Kirby<sup>89</sup> says:

"Sometimes, in a free society, conflict is healthy and even desirable..... Negotiation and temporisation to achieve agreement may put undue pressure on parties with legitimate grievances."

Mediators, by over-emphasising conflict reduction, run the risk of labelling as unco-operative or resistant, parties who are merely asserting rights or who wish to go to court as they are entitled to do.<sup>90</sup> Davis,<sup>91</sup> citing a theory that "it is generally the weaker party to a dispute who will wish to widen the conflict" concedes that if family conflict is to be settled by mediation both parties must have an interest in limiting the conflict, and argues that in conflicts between former spouses this is likely to be the case. Feminists, on the other hand, who have of late seen the potential for women's individual and political growth in their assertion of rights and also in their expression of anger, have been particularly sceptical of

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88 See Crouch 1982 Family Law Quarterly 243; Voegeli 1992 Civil Justice Quarterly 285; Davis 1983 Family Law 9.

89 See Kirby 1992 Australian Dispute Resolution Journal 146; see also Bottomley in Freeman State Law and Family 297; Piper For the Sake of the Children 72.

90 See Goodman 1986 Australian Journal of Family Law 33; Pickett 1991 Journal of Human Justice 39; Girdner 1989 Canadian Journal of Women and Law 145; Griffiths in Dingwall and Eekelaar Divorce Mediation 143.

91 Davis 1983 Journal of Social Welfare Law 137.

the benefits of conflict reduction through mediation.<sup>92</sup> As Grillo says, the assertion of rights may clarify and elucidate the roots of anger.<sup>93</sup> Schulman<sup>94</sup> states:

"What we know is that mediation is based on a therapeutic theory....What we know is that women do not need more therapy or more therapists. What we need is access to a legal system that is responsive to our issues- that is, equal justice."

In circumstances where women emerge from mediation feeling they have been deprived of equal justice, the process is unlikely to benefit their children who are bound to be affected by their mothers' feelings of resentment.

One of the benefits of family mediation, Parkinson<sup>95</sup> believes, is that by speedily providing a forum for "safe" communication between the spouses it may contain crisis such as threatened further violence, assault and suicide. There is merit in this argument, but it should be remembered that there are other organisations which specialise in handling such crises and may do so even more speedily and effectively than the mediator can.

#### 5.2.4 Mediation produces agreements

The reaching of an agreement is indisputably one of the goals of mediation,<sup>96</sup> which makes it rather surprising that welfare officers in England are, according to

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92 Grillo 1991 Yale Law Journal 1566 and sources cited there and 1572.

93 Grillo 1991 Yale Law Journal 1558.

94 Schulman as cited in Chesler Mothers on Trial 445.

95 Parkinson 1983 Family Law 23.

96 See definitions of mediation in Chapter 5 par 3.2.1; Forster Divorce Conciliation 50.

Davis,<sup>97</sup> more concerned about shifting the parties' attitudes than they are about reaching a formal agreement. That litigation is avoided and agreement often reached is not, however, in itself sufficient reason to prefer divorce mediation to the traditional procedure, for as stated above, over 90% of divorces are in any event settled before reaching the court room.<sup>98</sup> Statistics on agreements reached after divorce mediation show that the percentage may vary from 35% to 70%, depending on the area of dispute and the locale.<sup>99</sup> In the opinion of Davis and Westcott it is the quality of an agreement rather than the agreement itself which should be considered.

#### 5.2.5 Agreements reached in mediation are longer-lasting than those reached through the adversary procedure

The proponents of mediation contend further that the parties are more likely to comply with an agreement which they have reached themselves, and that such an agreement is likely to prove more satisfactory in practice than one which has been imposed on the parties.<sup>100</sup> This claim is an important one, particularly in view of the low compliance world-wide with court-ordered maintenance.<sup>101</sup> There seems to be some evidence that decisions reached through mediation are longer lasting and

97 Davis 1983 Journal of Social Welfare Law 138.

98 See Erlanger, Chambliss and Melli 1987 Law and Society Review 603.

99 Forster Divorce Conciliation 50.

100 Parkinson 1983 Family Law 23; Knuppel 1991 Journal of Dispute Resolution 128,129; Erlanger, Chambliss and Melli 1987 Law and Society Review 589; Folberg and Milne Divorce Mediation 189.

101 See Pearson in Fisher Divorce 5.

less likely to be re-litigated;<sup>102</sup> which from the children's' point of view is an argument in favour of mediation. Longer-lasting agreements are likely to introduce some measure of stability into their lives. In any comparison of mediation with adversary divorce proceedings, however, it must be remembered that to compare successful mediation with adversary proceedings gives a false picture. Not all mediation is successful and produces an agreement. Goodman warns that the assertion that parties have a greater degree of commitment to an agreement they have reached themselves has not been proved or disproved.<sup>103</sup> In a study by Pearson and Thoennes,<sup>104</sup> in follow-ups two to three months and six months after the court order, there was evidence of a higher rate of compliance with support orders where there had been successful mediation as compared with cases which had not been mediated, but the lowest compliance rates were where mediation had been unsuccessful. On the other hand, the Canadian Department of Justice study<sup>105</sup> did not find that mediation had a significant effect on compliance with support orders.

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102 Forster Divorce Conciliation 50; Knuppel 1991 Journal of Dispute Resolution 133.

103 Goodman 1986 Australian Journal of Family Law 44.

104 Pearson and Thoennes in Eekelaar and Katz Resolution of Family Conflict 258.

105 Bailey 1989 Canadian Journal of Family Law 90.

### 5.2.6 Divorcing parties are more satisfied with mediation than they are with litigation

As discussed above,<sup>106</sup> mediation proponents cannot rely on the number of agreements reached in mediation to prove its superiority, but seek to do so by asserting that it produces more satisfied clients than litigation does. Satisfaction is a questionable criterion because it is difficult to assess.<sup>107</sup> Moreover, the nature of the divorce experience is such that few parties are likely to express great satisfaction with the outcome, no matter what procedure is followed or what agreement is reached.<sup>108</sup>

Research findings do not lend unequivocal support to the claim that mediation clients are more satisfied. As might be expected, successful mediation produces more satisfied clients than does unsuccessful mediation.<sup>109</sup> Nevertheless many mediation clients do express satisfaction with the experience and say they would recommend it to friends.<sup>110</sup> Rosenberg, referring to various studies, concluded that "the vast majority" of women clients in mandatory mediation are satisfied.<sup>111</sup>

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<sup>106</sup> at par 5.2.4.

<sup>107</sup> See Davis 1989 Family Law 262.

<sup>108</sup> See Teitelbaum and DuPaix 1988 Rutgers Law Review 1118 -1119; Erlanger, Chambliss and Melli 1987 Law and Society Review 591; Winks 1980-81 Journal of Family Law 653.

<sup>109</sup> See Teitelbaum and DuPaix 1988 Rutgers Law Review 1119.

<sup>110</sup> See Fricker and Coates 1989 Family Law 256; Grillo 1991 Yale Law Journal 1548.

<sup>111</sup> Rosenberg 1991 Arizona Law Review 503.

Davis and Roberts<sup>112</sup> also concluded from their interviews with parents who had attended a conciliation bureau in London that men were more likely than women to be dissatisfied with the mediators' stance, which they often saw as favouring their wives. Teitelbaum and DuPaix<sup>113</sup> on the other hand say

"Although a complete analysis is not available, there is reason to think that women are significantly more likely to regard mediation as threatening and balanced against them than are men."

The research that has been done has itself has been criticised for inter alia failing to define the meaning of "satisfaction"; for "self-selection in some studies and judicial prescreening in others";<sup>114</sup> for too small samples, and for looking only at voluntary mediation.<sup>115</sup> In any event, to the lawyer it seems that unless the parties are fully apprised of their legal entitlements<sup>116</sup> before reaching agreement, satisfaction alone cannot be an adequate yardstick. Without a knowledge of the law and of the parties' rights, can the mediator guide the parties towards a fair agreement and one which the children's' best interests? Mediators themselves seem uncertain whether their task is simply to ensure that the parties are satisfied, or whether they must see

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112 Davis and Roberts 1989 Family Law 305.

113 Teitelbaum and DuPaix 1988 Rutgers Law Review 1121.

114 Teitelbaum and DuPaix 1988 Rutgers Law Review 1120.

115 See Teitelbaum and DuPaix 1988 Rutgers Law Review 1119-1121; Grillo 1991 Yale Law Journal 1549; see also Girdner 1989 Canadian Journal of Women and Law 151.

116 See Bottomley in Freeman State Law and Family 299; Grillo on "naming, blaming and claiming" 1991 Yale Law Journal 1565.

to it that the outcome is also fair.<sup>117</sup> This links with another of the claims of mediation, namely that:

#### 5.2.7 Mediation is a fair process which produces fair outcomes<sup>118</sup>

This claim is one which is difficult to sustain, for unlike the law, mediation has no principles or standards of fairness to guide its practitioners,<sup>119</sup> who have to rely on their own ideas of what is fair. Fewer clients are likely to consider mediation to have been fair than are likely to express satisfaction with the process.<sup>120</sup> To ensure fairness, should a mediator not have a thorough knowledge of the relevant divorce law?<sup>121</sup> A further difficulty which was discussed above is that any intervention by the mediator to ensure fairness undermines the mediator's claim to be neutral. In addition, feminists<sup>122</sup> argue that mediation does not produce fair outcomes where the mediator merely focuses on equal treatment of the parties in a particular divorce dispute; mediation, they say, should take place against the wider background of a society in which women are still severely disadvantaged. As Lefcourt<sup>123</sup> says:

117 See Hill 1990 Ohio State Journal of Dispute Resolution 352.

118 See Roberts 1983 Journal of Social Welfare Law 137; Shaffer 1988 University of Toronto Faculty of Law Review 1593.

119 See Lefcourt 1984 Clearinghouse Review 267; Bryan 1992 Buffalo Law Review 512.

120 Teitelbaum and DuPaix 1988 Rutgers Law Review 1120.

121 See Green, Long and Murawski Dissolution of Marriage 215.

122 See Grillo 1991 Yale Law Journal 1567; Bryan 1992 Buffalo Law Review 508.

123 Lefcourt 1984 Clearinghouse Review 267.

"The fundamental premise that must be understood in order to analyze the impact of the use of mediation in family law is that women are less powerful than men in this society."

#### 5.2.8 Mediation saves time and money<sup>124</sup>

Amongst the criticisms of the adversary system of divorce are that it is tardy and that it is expensive.<sup>125</sup> The proponents of divorce mediation argue that as compared with the adversary divorce it saves time and money.<sup>126</sup>

##### 5.2.8.1 Time-saving

Any discussion of this topic must differentiate between private and court-linked mediation. A distinction must also be drawn between saving the court's time, the lawyer's time and the client's time. Here, too, it is important to distinguish between successful and unsuccessful mediation.

Various studies have set out to ascertain whether mediation saves time but the picture which emerges is a confusing one. On the whole mediation sessions in court-linked mediation, with its emphasis on efficiency,<sup>127</sup> will tend to be shorter than those in private mediation. Reference has been made above to the danger that, because of time constraints, pressure may be exerted on the parties to settle quickly.<sup>128</sup> After mediation was made mandatory for custody and visitation

<sup>124</sup> See Shaffer 1988 University of Toronto Faculty of Law Review 170.

<sup>125</sup> See Chapter 4 par 2.

<sup>126</sup> See Bryan 1992 Buffalo Law Review 441.

<sup>127</sup> See Bryan op cit 501.

<sup>128</sup> See Chapter 3 (under heading Access to justice). See also Bryan 1992 Buffalo Law Review 501.

disputes in the Los Angeles Conciliation Court, its Director estimated that 600 days of court time were saved in the first six months.<sup>129</sup> In Canada a Department of Justice study,<sup>130</sup> on the other hand, did not show that mediation saved much court time. A study in England revealed that cases processed in the Bristol County Court, where there was a preliminary mediation appointment, were dealt with much more quickly than cases in the other two courts studied.<sup>131</sup> Nevertheless solicitors who were asked their opinion of the Bristol Courts Family Conciliation Service valued it inter alia because of the time that could be spent on each case.<sup>132</sup> Scott-Macnab and Mowatt<sup>133</sup> emphasise that there must be ample time for mediator and clients to get to know each other and for issues to be thoroughly canvassed. An undue emphasis on time-saving may be dangerous from the point of view of the children of divorce. Determining where the children's' best interests lie is often a complicated and time-consuming task.

It might be thought that lawyers, who find divorce work financially unrewarding and in some instances very time-consuming,<sup>134</sup> might welcome court-linked

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129 See Forster Divorce Conciliation 51.

130 Bailey 1989 Canadian Journal of Family Law 87.

131 See Davis 1991 Family Law 133.

132 See Davis 1982 New Law Journal 355.

133 Scott-Macnab and Mowatt 1986 De Jure 316.

134 See Davis 1982 New Law Journal 356.

mediation as saving them time. However, a lawyer commenting on the Bristol Courts Family Conciliation Service said<sup>135</sup>

"Legal aid costs saved are more than offset by the time spent writing letters between solicitors and the conciliation service and all the toing and froing."

Here it should be noted that the procedure followed at the Family Advocate's offices in South Africa does not seem to require so much of the attorney's time.

A study by Pearson and Thoennes<sup>136</sup> concluded that the average time a successful mediation took was 8.5 months, as compared with the average time in the adversary process of between 10 and 11 months. Unsuccessful mediation, on the other hand, took longer than adversary proceedings. As Knuppel points out, it is likely that the shorter the process, the faster the parties' emotional recovery will be.<sup>137</sup>

However, the negligible time shown to have been saved by the above-mentioned study is unlikely to make much difference to the rate of the parties' emotional recovery. Bryan<sup>138</sup> has also warned that certain studies which have revealed a modest saving of time and cost had serious methodological flaws.

Clearly there is as yet no convincing proof that mediation saves a significant amount of time.

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135 See Forster Divorce Conciliation 52.

136 Pearson and Thoennes 1982 Family Advocate 29.

137 Knuppel 1991 Journal of Dispute Resolution 128.

138 Bryan 1992 Buffalo Law Review 441 fn1.

#### 5.2.8.2 Cost-saving

Goodman<sup>139</sup> notes

"the dearth of reliable data comparing the costs of different dispute-resolution processes".

Yet various studies have compared the costs of mediation with those of the adversary divorce. However, some researchers have fallen into the trap of comparing the cost of mediated divorce cases with those of cases litigated on an opposed basis; whilst most unmediated divorce matters are settled before reaching court, and proceed on an unopposed basis.<sup>140</sup> Thus the Denver study of court-connected custody mediation by Pearson and Thoennes, on which some cost-saving

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139 Goodman 1986 Australian Journal of Family Law 45.

140 See Hoggett and Pearl Family Law and Society 199; MacDougall in Eekelaar Resolution of Family Conflict 38. In South African the Hoexter Commission (Hoexter Report 488) reported that "Since the commencement of the Divorce Act, 70 of 1979, defended divorce actions have been extremely rare, and divorce actions heard in the divorce courts of the Supreme court are almost without exception undefended." Thus Knuppel's statement that "Mediation is perceived to lower costs associated with an adversarial divorce. When parties tenaciously dispute each issue for optimum advantage and contest each procedural matter painstakingly, both attorney fees and court costs accumulate. Mediation attempts to avoid this ruinous contentiousness" does not paint an accurate picture of the average divorce, at least not in this country. The percentage of undefended divorce actions appear to be very similar in the other countries mentioned in this thesis. See also Irving and Irving, as cited by Pearson and Thoennes in Eekelaar and Katz Resolution of Family Conflict 249, who speak of the adversarial system as "pitting the marital couple against each other in mortal combat-".

claims for mediation were based,<sup>141</sup> excluded uncontested cases with their relatively low costs.<sup>142</sup>

Any assessment of cost-saving, like one of time-saving, must also differentiate between successful and unsuccessful mediation. The Denver study did not reveal cost savings in respect of mediation where no agreement was reached.<sup>143</sup>

Looking at costs from the divorcing party's point of view, Bailey<sup>144</sup> contends that mediation is not less expensive. She cites the Canadian Department of Justice study which found that mediation resulted in higher legal fees. She does concede that mediation "may reduce government costs of processing family law cases", although the Canadian Department of Justice study did not find significant savings of this nature. An Australian study cited by Forster<sup>145</sup> did find marked savings in the court costs of "an average counselling case" as compared with an action relating to divorce, but excluding the divorce itself. Crouch believes that the traditional divorce which is handled by two lawyers may be quicker and cheaper than mediation.<sup>146</sup>

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141 See Pearson and Thoennes in Eekelaar and Katz Resolution of Family Conflict 251.

142 See Bailey 1989 Canadian Journal of Family Law 86,87.

143 See Pearson and Thoennes in Dingwall and Eekelaar Divorce Mediation 85.

144 See Bailey 1989 Canadian Journal of Family Law 86, 87.

145 Forster Divorce Conciliation 51.

146 Crouch 1982 Family Advocate 33.

In England in 1982, after calls for the government to provide some financial support to conciliation services,<sup>147</sup> the Lord Chancellor appointed an Inter-Departmental Committee of civil servants to review then existing facilities and to consider whether they should be promoted and developed.<sup>148</sup> The Committee, which issued a report in 1983, focused largely on the costs aspect, and was criticised for so doing.<sup>149</sup> It has often been argued that to assess the effectiveness of mediation on the basis of costs alone is to adopt far too narrow an approach.<sup>150</sup> The Committee itself, while concluding that out-of-court schemes seemed less cost-effective than in-court schemes and that it could not therefore recommend central government funding of such schemes<sup>151</sup>, suggested that more thorough research into in-court schemes was necessary. This led to the creation of the Newcastle Conciliation Project Unit in 1985, which in the event investigated both out-of-court and in-court schemes. Its brief was to draw up a report which would enable the government to decide whether a publicly funded national family conciliation service should be established and if it should, how it should be organised and funded. Once again costs seem to have been the major issue. As Davis<sup>152</sup> wrote:

"at the heart of the research brief lay yet another costings exercise. The test which the brief applied to conciliation services was that they

147 See Davis "Divisions over Conciliation" The Independent 5 May 1989.

148 See Robinson Report.

149 See Davis "Divisions over Conciliation " The Independent 5 May 1989.

150 See Davis and Westcott 1984 Modern Law Review 217; IRS 1989 Civil Justice Quarterly 215.

151 Robinson Report 47.

152 Davis "Divisions over Conciliation" The Independent 5 May 1989.

should pay for themselves through "savings" achieved elsewhere in the system, essentially through reducing the amount of money which lawyers make out of divorce."

The Unit, which published its Report<sup>153</sup> in March 1989, found that existing conciliation services of all types added significantly to the costs of settling disputes, but that out-of-court services added more to costs than did court-based services.

From the above it may be seen that claims that mediation saves costs, like the claims that it saves time, are not proven. Davis has also pointed out that if cost saving were the main objective, other procedural changes could be introduced which would be more effective than mediation.<sup>154</sup>

#### 5.2.9 Mediation is particularly appropriate in family disputes

It is often asserted <sup>155</sup> that disputes between parties whose relationships will continue after the resolution of their dispute are particularly suited to mediation. This viewpoint derives from the writings of Fuller,<sup>156</sup> who considered adjudication inappropriate for "polycentric" problems, which he saw as "many centred" tasks where every action has repercussions for every other aspect of the problem. Thus he saw adjudication as unsuitable where successful association depends on spontaneous and informal collaboration, citing family life as one example. This theory has been taken up by certain writers as supporting the call for mediation in

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153 Newcastle Report 349; see also IRS 1989 Civil Justice Quarterly 214.

154 Davis as cited in Forster Divorce Conciliation 51.

155 See Kirby 1992 Australian Dispute Resolution Journal 144; Shaffer 1988 University of Toronto Faculty of Law Review 171.

156 Fuller 1978 Harvard Law Review 353; Fuller 1971 Southern California Law Review 305.

divorce.<sup>157</sup> It is true that although the spouses are severing their bond, their on-going parental roles will continue to link them to some extent.<sup>158</sup> The argument that upon divorce the family does not come to an end but is merely "restructured" or "reorganised" is clearly focusing on the interests of the children; but comes closer, it is submitted, to wishful thinking than to the reality of most divorces and even the wishes of many divorcing spouses. Davis and Westcott<sup>159</sup> approximate more closely to the truth when they state that after the divorce

"the divorced couple (and in particular, divorced parents) have to find some means of carrying on their separate lives, whilst remaining in contact with each other."

Bailey<sup>160</sup> speaks of the

"ungrounded and politically loaded assumption that separated couples maintain a continuing relationship much the same as those who live together or carry on business together."

Mediation is correctly said to give the parties more opportunity to explore the emotional aspects of their dispute than the adversary divorce procedure would

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- 157 For a discussion of the application of Fuller's theories to the divorce situation, see generally Bailey 1989 Canadian Journal of Family Law 62 et seq. See also Shaffer 1988 University of Toronto Faculty of Law Review 171; Knuppel 1991 Journal of Dispute Resolution 129; Kirby 1992 Australian Dispute Resolution Journal 144; Cappelletti 1992 South African Law Journal 35.
- 158 See Pickett 1991 Journal of Human Justice 31.
- 159 Davis and Westcott 1984 Modern Law Review 215; see also Davis 1983 Journal of Social Welfare Law 140.
- 160 Bailey 1989 Canadian Journal of Family Law 64, and see also 66; see also Fineman 1988 Harvard Law Review 761.

allow.<sup>161</sup> Today nobody would deny that divorce involves emotional as well as legal issues, or that the traditional adversary process is ill-equipped to handle emotional aspects and has largely ignored them in the past. However, the proponents of mediation sometimes go to the other extreme and see divorce as a purely emotional process.<sup>162</sup> In respect of divorce mediation the term "alternative dispute resolution" is something of a misnomer.<sup>163</sup> While the State still interests itself in marriage and divorce, and the rights of spouses and children are at stake, the law's role in divorce cannot be discounted.<sup>164</sup> Thus any claim that divorce should become the exclusive province of the helping professions should be treated with the greatest caution. When emotional aspects are addressed there is also the danger that the lines between divorce counselling and divorce mediation may become blurred. While counselling seems the appropriate method of helping the parties cope with their emotions, mediation is supposed to be forward-looking and to concentrate on the resolution of practical problems.<sup>165</sup>

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161 See Knuppel 1991 Journal of Dispute Resolution 129.

162 See Folberg and Milne Divorce Mediation 188; Fineman 1988 Harvard Law Review 746; Schulman as cited in Chesler Mothers on Trial 445.

163 See Chapter 5 par 2 above. See also Levy and Mowatt 1991 De Jure 64.

164 See Erlanger, Chambliss and Melli 1987 Law and Society Review 589; Mowatt 1988 Tydskrif vir die Suid-Afrikaanse Reg 56; Szwed in Freeman State, Law and Family 271 et seq.

165 See definitions of mediation cited above in Chapter 4; see also Erickson 1991 Hamline Journal of Public Law and Policy 10; Folberg and Milne Divorce Mediation 166; Shaffer 1988 University of Toronto Faculty of Law Review 176.

### 5.2.10 A mediated divorce is better for the children than a litigated divorce.

The adverse effects of divorce on children are well documented and have been discussed above.<sup>166</sup> It is often claimed that a mediated, as against a litigated, divorce reduces those adverse effects.<sup>167</sup> Children will often benefit if parents realise that the hostility between them is harming their children;<sup>168</sup> but mediators must beware of emphasising this point to concerned parents who will resent what they see as an intrusion into their parenting. Mediators can, however, perform a useful role where they remind warring parents that children must be given explanations<sup>169</sup> of what is happening to the family.

Whether children should themselves be involved in the mediation process, and if so, in what way, are issues which are still being debated.<sup>170</sup> How mediators themselves view this question may depend on whether they see themselves as neutral facilitators or as the children's advocates<sup>171</sup> or somewhere between the two;

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<sup>166</sup> See Chapter 3 par 2 above.

<sup>167</sup> See Erlanger, Chambliss and Melli 1987 Law and Society Review 587; Shaffer 1988 University of Toronto Faculty of Law Review 171; Rosenberg 1991 Arizona Law Review 466 at 472.

<sup>168</sup> See Davis and Roberts Access to Agreement 10-11; 93; Rosenberg 1991 Arizona Law Review 472.

<sup>169</sup> See Paquin 1987-88 Journal of Family Law 305.

<sup>170</sup> For a discussion of this issue see Mnookin and Weisberg Children, Family and State 793-795. See also Hoffmann Family Mediation in South Africa 72 et seq.

<sup>171</sup> In terms of the ABA Family Law Sections Standards of Practice for Family Mediators, a mediator has a duty to promote the best interests of the child. See Paquin 1987-88 Journal of Family Law 309.

and also on whether they have the necessary skills in interviewing children.<sup>172</sup> A difficulty that arises here is that a mediator who purports to be the child's advocate cannot also claim to be neutral;<sup>173</sup> nor can it be claimed that the divorcing spouses are in control of the mediation. On the other hand if the mediator preserves total neutrality and allows parents to shape any agreement they choose, the outcome may totally disregard the interests of the children.<sup>174</sup> Paquin<sup>175</sup> suggests that one way of solving the problem of the mediator's neutrality is to appoint another person, preferably a mental health professional, as a child advocate to represent the child during mediation. He concedes that such an appointment may create further problems in removing power from parents, which they may resent. He also concedes that the cost implications of such an appointment may be daunting. Because of those implications, and because we now have a Family Advocate whose brief it is to protect children's interests, the suggestion need not be seriously considered in this country.

In one English mediation centre mediators see children only in a minority of cases and then only if both parents are in favour of the idea.<sup>176</sup> In the United States

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172 Hoffmann Family Mediation in South Africa 72,77.

173 See the discussion of the mediator's neutrality and of party control at pars 5.2.1 and 5.2.2 above; see also Paquin 1987-88 Journal of Family Law 310.

174 See Roberts 1983 Modern Law Review 557.

175 See Paquin 1987-88 Journal of Family Law 311 et seq.

176 See Gee 1992 Family Law 92.

children are being involved in mediation in many different ways.<sup>177</sup> One reason for doing so is the possibility that children who are involved in mediation may be less likely to undermine the agreement flowing from it.<sup>178</sup> In some cases it may be necessary for the mediator rather than the parents to explain the divorce to the children, where they appear to be unable to do so. Some<sup>179</sup> children have views of their own on their parents' divorce and in particular on the questions of custody and access<sup>180</sup> and except for children under the age of about three,<sup>181</sup> are capable of formulating those views. The mediator should in some way determine what those views are. However, as was discussed above, ascertaining the wishes of children is full of pitfalls.<sup>182</sup> In England, in some in-court mediation schemes, the attendance of children is compulsory and the children are simply asked directly whether, for example, they do or do not wish to see one of the parents. The other parent is then told what the child said. One solicitor has branded this approach as an unmitigated disaster.<sup>183</sup> Children may even be treated as parties to

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177 See Paquin 1987-88 Journal of Family Law 305.

178 See Paquin 1987-88 Journal of Family Law 305.

179 See Davis Partisans and Mediators 173 on the ambivalence of some children.

180 See Davis and Roberts Access to Agreement 121.

181 See Hoffmann Family Mediation in South Africa 75.

182 See Chapter 2 par 9.5 above.

183 Sax in Fisher Divorce 23.

mediation.<sup>184</sup> Some writers believe that children should participate, together with their parents, in mediation sessions.<sup>185</sup> Landau, Bartoletti and Mesbur<sup>186</sup> suggest that, depending on the issues in dispute, the parties' expectations of the mediator and the mediator's own preference, the child may be involved in mediation in any of the following types of meeting:

the whole family and the mediator;

one parent, all the children and the mediator;

one parent, one child and the mediator;

all the children and the mediator;

one child and the mediator.

With the exception of the first type, all the above meetings may have much to recommend them in particular circumstances. The first should, however, be treated with caution. It may sometimes be appropriate, but mediators and parents should beware of unnecessarily embroiling children in unpleasant mediation sessions or of leading them to believe that they carry some responsibility for the outcome.<sup>187</sup> In addition, since it is up to parents to reach their own agreements and subsequently to put them into practice, the parents may see the inclusion of

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184 See Paquin 1987-88 Journal of Family Law 305.

185 See Mnookin and Weisberg Child, Family and State 794.

186 Landau, Bartoletti and Mesbur Family Mediation Handbook 56-57.

187 See Mnookin and Weisberg op cit 794; Hoffmann Family Mediation in South Africa 72.

children at mediation sessions as an infringement of their autonomy.<sup>188</sup> Such sessions may serve a useful purpose in bringing home to those parents who are unaware of it, the harm which is being done to their children by their combative attitudes, but this could equally well be done by utilising one of the other types of meeting listed above. It is submitted that our Family Advocate's practice<sup>189</sup> of separate interviews with the children is preferable to a meeting with all the family together.

The claims that the adversary procedure harms children and that mediation is better for them are not yet proven.<sup>190</sup> Krier and Nadig<sup>191</sup> refer to studies in the United States which have shown that mediation leads to

"a minimization of the emotional effects of the divorce on the children."

Shaffer<sup>192</sup>, however, points out that although the claim that mediation is best for children "rests on a number of empirically assessable assumptions", virtually no

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188 See Mnookin and Weisberg *op cit* 794; Hoffmann Family Mediation in South Africa 72. See further, on the dangers of giving children in a divorce situation the illusion of power, Chapter 2---above.

189 See Chapter 4 par 4.2.2 above.

190 See Shaffer 1988 University of Toronto Faculty of Law Review 191; Teitelbaum and DuPaix 1988 Rutgers Law Review 1093; Bailey 1989 Canadian Journal of Family Law 72.

191 Krier and Nadig 1988 Texas Bar Journal 22.

192 Bailey 1989 Canadian Journal of Family Law 72.

empirical research has been done to establish whether it is true. Two research projects conducted by Pearson and Thoennes<sup>193</sup> showed that

"mediation fails to produce consistent, measurable effects in children."

Forster refers to research which indicates that children benefit if their parents benefit, but could find only one study which showed that parents were getting on better with their children after mediation.<sup>194</sup> Other writers<sup>195</sup> have asked whether it is not the divorce itself rather than the adversary divorce procedure which affects children, and have questioned to what extent non-adversary procedure may improve matters.

Feminist writers have pointed out the danger of focusing on children's needs at the expense of the rights of the spouses and particularly the rights of the less powerful spouse, who is usually the wife.<sup>196</sup> Davis,<sup>197</sup> too, alludes to the

"child-welfare orientation of many social workers"

which he argues may blur considerations of justice between the parties.

However, divorce mediation alone cannot be blamed for adopting this approach, for mediation like other forms of divorce negotiation, takes place, or should do, in "the

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193 Pearson and Thoennes in Folberg and Milne Divorce Mediation 445-446.

194 Forster Divorce Conciliation 53-54.

195 Teitelbaum and DuPaix 1988 Rutgers Law Review 1122; Bailey 1989 Canadian Journal of Family Law 72.

196 Bryan 1992 Buffalo Law Review 498.

197 1983 Family Law 10.

shadow of the law".<sup>198</sup> As described above,<sup>199</sup> in South Africa as in other legislatures<sup>200</sup> the law today emphasises the best interests of the child almost exclusively, and it is only if it is not clear what those interests are that other factors should be taken into account. A woman who believes that mediation focuses on the child's interests at the expense of her own may therefore find that the adversary process serves her needs no better.

## 6 DISADVANTAGES OF DIVORCE MEDIATION

### 6.1 Mediators' bias in favour of joint custody<sup>201</sup>

The mediation movement's emphasis on consensus and co-operation, and its propagation of the view that the relationships of family members continue after divorce, have led many of its proponents to claim that joint custody is the optimum solution for the children of divorce,<sup>202</sup> although studies done thus far have not proved this conclusively.<sup>203</sup> Indeed, it has been shown that where the parents' relationship continues to be hostile, joint custody may be extremely harmful to a

198 Mnookin and Kornhauser 1979 Yale Law Journal 950.

199 in Chapter 2 above.

200 See eg Rosenberg 1991 Arizona Law Review 474.

201 On joint custody see also Chapter 3 par 3.8.1 above.

202 See Levy 1984 Family Law Quarterly 532; Bottomley in Freeman State Law and Family 298; Bailey 1989 Canadian Journal of Family Law 76; Shaffer 1988 University of Toronto Faculty of Law Review 189; Pickett 1991 Journal of Human Justice 32,38.

203 See Teitelbaum and DuPaix 1988 Rutgers Law Review 1110.

child. Nevertheless, in the United States and Canada, it seems that mediation does produce more joint custody agreements than does the traditional legal process.<sup>204</sup> In the United States, where in many states there is a presumption in favour of joint custody, it is usually joint legal custody, not joint physical custody, which is ordered.<sup>205</sup> Feminists have attacked the preference for joint custody, pointing out that women may place themselves in an invidious position by bargaining away property and support rights in order to obtain sole custody.<sup>206</sup> They have also argued that joint legal custody merely perpetuates the hierarchical family structure<sup>207</sup> in the sense that despite the increase in joint custody orders, divorced fathers have not started taking more part in the raising of children than they traditionally do during marriage.<sup>208</sup> Thus a father who shares joint legal custody may continue to exercise control over his wife and children after divorce and so hamper his wife's efforts to make a new start for herself and her children; while the wife continues to bear most of the responsibility for child care.<sup>209</sup> In instances

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204 See Pearson in Fisher Divorce 12; Folberg and Milne Divorce Mediation 445; Bryan 1992 Buffalo Law Review 494; Shaffer 1988 University of Toronto Faculty of Law Review 190; Girdner 1989 Canadian Journal of Women and Law 142.

205 See Bryan 1992 Buffalo Law Review 495.

206 See Bailey 1989 Canadian Journal of Family Law 77; Lefcourt 1984 Clearinghouse Review 268.

207 See Bryan 1992 Buffalo Law Review 495.

208 See Delorey 1989 Canadian Journal of Women and Law 38; Girdner 1989 Canadian Journal of Women and Law 137.

where parents can co-operate and both wish to participate in raising their children, joint physical custody may have advantages for the mother in easing her burden of responsibilities within and outside the home. Such cases apart, particular circumstances should be carefully weighed in each case before joint custody is advocated.<sup>210</sup> From the woman's point of view at any rate, the South African courts have been correct in adopting a cautious approach to the award of joint custody.<sup>211</sup>

## 6.2 Mediation cannot succeed where the parties have unequal power<sup>212</sup>

Mediation between parties who are unequal is unlikely to produce a fair result, for as Merry<sup>213</sup> puts it bluntly, "Mediated settlements between unequals are unequal" or as Scutt<sup>214</sup> says:

"To speak of 'mediation' in the context of social, economic, political, sex and gender inequality is nonsense."

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209 See Bottomley in Brophy and Smart Women in Law 176; Delorey 1989 Canadian Journal of Women and Law 41.

210 See Winks 1980-81 Journal of Family Law 651.

211 See Pinion 1994 2 SA 725 (D&C); Clark 1993 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 457. See also Chapter 3 par 3.8.1 above.

212 See Erlanger, Chambliss and Melli 1987 Law and Society Review 590. On the issue of power generally see Bryan 1992 Buffalo Law Review passim.

213 See Merry in Abel Politics of Informal Justice 32, 38-40.

214 Scutt Women and Law 551.

Mediators are aware that parties may have unequal bargaining power and do take steps to redress the power imbalance during mediation sessions,<sup>215</sup> but, as feminist writers have pointed out, this does not resolve the problem if mediators ignore the wider issue of the power imbalance between men and women in society.<sup>216</sup> This power imbalance should be borne in mind even though within an individual relationship it is by no means always the husband who is the dominant partner.<sup>217</sup> Scutt has also noted the anomaly, alluded to above,<sup>218</sup> of a mediator who is ostensibly "neutral" intervening to redress a balance. In both private and public life, women are less powerful than men,<sup>219</sup> and within marriage it is usually the husband who has greater financial and decision-making power.<sup>220</sup> The woman

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215 See Parkinson 1983 Family Law 184; Grillo 1991 Yale Law Journal 1592.

216 See Hill 1990 Ohio State Journal of Dispute Resolution 353; Bottomley in Freeman State Law and Family 298; Pickett 1991 Journal of Human Justice 27; Bryan 1992 Buffalo Law Review 447; Shaffer 1988 University of Toronto Faculty of Law Review 179; Bailey 1989 Canadian Journal of Family Law 93-94; Fineman 1988 Harvard Law Review 730; Griffiths in Dingwall and Eekelaar Divorce Mediation 139; Lefcourt 1984 Clearinghouse Review 267.

217 See Davis and Roberts Access to Agreement 111; Crouch 1982 Family Law Quarterly 240; Shaffer 1988 University of Toronto Faculty of Law Review 179.

218 See par 5.2.2 above.

219 See Bryan 1992 Buffalo Law Review 446 et seq; Shaffer 1988 University of Toronto Faculty of Law Review 166.

220 See Delorey 1989 Canadian Journal of Women and Law 34; Goodman 1986 Australian Journal of Family Law 42.

who focuses strongly on her mothering role and seeks custody at all cost may be in a particularly weak bargaining position during mediation.<sup>221</sup> However, it is often argued to the contrary, particularly by fathers' groups, that it is the husband, who has little experience of child care, who is disadvantaged if he seeks custody.

It should be borne in mind throughout mediation that, in the job market, women are disadvantaged both before and after divorce.<sup>222</sup> Historically and up to the present time women in general have been less well educated than men, and because of their traditionally greater child rearing responsibilities<sup>223</sup> they tend to have shorter career spans and lower paid jobs or lower ranking posts<sup>224</sup>. In the context of mediation it is also important to note that men, through their greater participation in public life, are likely to have developed superior negotiating skills to those of their wives.<sup>225</sup> In studies of bargaining, "women have been shown to be more passive in negotiation".<sup>226</sup>

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221 See Bottomley in Freeman State Law and Family 298; Shaffer 1988 University of Toronto Faculty of Law Review 180; Teitelbaum and DuPaix 1988 Rutgers Law Review 1118, 1124.

222 See Erlanger, Chambliss and Melli 1987 Law and Society Review 603.

223 See Pickett 1991 Journal of Human Justice 40.

224 See Grillo 1991 Yale Law Journal 1569.

225 See Bryan 1992 Buffalo Law Review 485; Griffiths in Dingwall and Eekelaar Divorce Mediation 141.

226 Pearson in Fisher Divorce: American Mediation Research 12.

The family systems approach is often used in divorce mediation<sup>227</sup> as it is in family therapy. This approach has been criticised, for while it focuses on "complementarity, reciprocity and circularity" in family systems it disregards the question of gender inequality both within and outside the family and the fact that the two genders that make up families are reared, informed, and socialized in very different ways.<sup>228</sup>

Bryan contends that even if mediators wish to correct power imbalances, they are not qualified to do so, for in training sessions for mediators scant attention is being paid to this problem. She even goes so far as to say<sup>229</sup> that

"Candid exposition of the depth, breadth and tenacity of power disparities between spouses threatens the survival of this budding profession because it suggests the impossibility of power balancing."

Some writers argue that mediation cannot be blamed for or burdened with the problems of inequality in society.<sup>230</sup> The answer to this is that if the mediation movement purports to provide a new and better way to resolve the problems of divorce, it cannot function in isolation from the society in which those problems

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227 See Folberg and Milne Divorce Mediation 87; Davis Partisans and Mediators 157; Davis 1983 Family Law 11; Coombs 1984 Family Law Quarterly 482; Taylor 1984 Family Law 302; Robinson 1988 American Journal of Family Therapy 67; Robinson 1989 Family Law 467; Bailey 1989 Canadian Journal of Family Law 68; Grillo 1991 Yale Law Journal 1561; Neilson 1990 International Journal of Law and the Family 253-256; Folb and Hill in Family Mediation in South Africa 107.

228 Leitch 1986/87 Mediation Quarterly 164. See also Grillo 1991 Yale Law Journal 1561.

229 See Bryan 1992 Buffalo Law Review 499-500.

230 See Davis and Roberts Access to Agreement 5, 306.

arise, and cannot continue simply to reinforce the existing order.<sup>231</sup> Attention should also be paid to the possible power imbalance between the parties and the mediator. As we have seen, the mediator may in the eyes of the parties be an expert and therefore have strong persuasive power.<sup>232</sup>

### 6.3 Mediation is inappropriate in some cases of divorce<sup>233</sup>

From the above discussion the conclusion may be drawn that if one party is more powerful than the other, the desirability of mediation is highly debatable. The most extreme form of power imbalance between spouses is to be found where there is spousal abuse; and feminists have argued that divorce mediation is undesirable where there has been a history of domestic violence.<sup>234</sup> However, in this area there is on-going debate, for some writers advance, *inter alia*, mediation's ready availability and also its ability to separate other issues from the abuse as reasons why it should be used.<sup>235</sup> In the United States mediators themselves have indicated

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231 See Leitch 1986/87 Mediation Quarterly 169,172.

232 See Bottomley in Freeman State Law and Family 295; Goodman 1986 Australian Journal of Family Law 37; Folberg and Milne Divorce Mediation 391.

233 See Knuppel 1991 Journal of Dispute Resolution 134. On domestic violence and mediation see generally Gagnon 1992 Harvard Women's Law Journal 272 et seq. and sources cited there.

234 See eg Scutt Women and the Law 551; Lefcourt 1984 Clearinghouse Review 267; Bailey 1989 Canadian Journal of Family Law 69; Shaffer 1988 University of Toronto Faculty of Law Review 181-182.

235 See Scott-Macnab 1992 South African Law Journal 282 et seq; Lefcourt 1985 Clearinghouse Review 268 et seq.

that mediation is inappropriate where there are allegations or evidence of child abuse or neglect.<sup>236</sup>

In the past the authorities were reluctant to intrude into cases of domestic violence, as being private matters to be resolved within the family.<sup>237</sup> In various countries recent legislation has for the first time provided adequate safeguards for the victims of domestic abuse.<sup>238</sup> South Africa has followed this trend with the passing of the Prevention of Family Violence Act<sup>239</sup>. Writers in the United States have warned that, following on recent statutory measures, courts may be overwhelmed by domestic abuse cases and may therefore see the referral of such cases to mediation as a means of lightening their own load. There is therefore a danger of the "re-privatisation" of abuse cases.<sup>240</sup> However, mediation, particularly mandatory mediation, of divorce cases where there has been abuse of the wife and/or children is entirely inappropriate for the following reasons:

- (a) from the very fact that the case is being mediated the abuser may receive the message that his actions are not being taken very

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236 Folberg and Milne Divorce Mediation 16.

237 See Woods 1985 Clearinghouse Review 432.

238 On such measures in the United States see Woods 1985 Clearinghouse Review 432.

239 Prevention of Family Violence Act 133 of 1993.

240 See Gagnon 1992 Harvard Women's Law Journal 294.

seriously and are not criminal. According to Lefcourt arrest has been shown to be "the most effective police response to battery";<sup>241</sup>

- (b) what the abused wife or the mother of abused children seeks is the intervention of the law and the prevention of further abuse, not discussion and compromise;<sup>242</sup>
- (c) the mediation outcome may give the abuser continued access to the women and/or children he has been abusing;<sup>243</sup>
- (d) an abused woman may have a strong aversion to meeting her abuser face-to-face.<sup>244</sup> A woman who has long been subjected to abuse is most unlikely to have the necessary ability to assert herself in mediation; and may make undue concessions for fear of further violence;<sup>245</sup>
- (e) the family systems concept of "complementarity" tends to see the victims themselves as partially or wholly responsible for the abuse;

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241 See Gagnon 1992 Harvard Women's Law Journal 276; Davis 1983 Journal of Social Welfare Law 136; Lefcourt 1985 Clearinghouse Review 432..

242 See Lefcourt 1985 Clearinghouse Review 268.

243 *ibid.*

244 See Grillo 1991 Yale Law Journal 1601 and 1606-1607; Shaffer 1988 University of Toronto Faculty of Law Review 182.

245 See Lefcourt 1985 Clearinghouse Review 268.

failing to consider whether the reasons for the violence may lie outside the family.<sup>246</sup>

Some writers claim that mediators are able to discern whether abuse is occurring and can then adapt the mediation process accordingly.<sup>247</sup> However, it seems that some mediators fail to ask the parties about domestic violence<sup>248</sup> and may even be unaware of its prevalence.<sup>249</sup> If abuse cases are to be mediated at all, the subject of domestic violence should be treated in mediation training sessions, and this is being done in some American states. In addition, there should be a screening process to establish whether mediation is appropriate.<sup>250</sup> In Canada, if mediators detect child abuse, standards of practice require them to report the abuse and to "terminate or suspend mediation where the outcome would be harmful to children".<sup>251</sup>

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246 See Bailey 1989 Canadian Journal of Family Law 69. See also Gagnon 1992 Harvard Women's Law Journal 277; Shaffer 1988 University of Toronto Faculty of Law Review 183; Leitch 1986/87 Mediation Quarterly 170; Scott-Macnab 1992 South African Law Journal 286.

247 See Grillo 1991 Yale Law Journal 1584 fn 185 and sources cited there.

248 See Shaffer 1988 University of Toronto Faculty of Law Review op cit 183.

249 In the United States a conservative estimate is said to be that one woman in four is abused by her partner, see figures given by Grillo 1991 Yale Law Journal 1584 fn 184 and Shaffer 1988 University of Toronto Faculty of Law Review 182. The same figure applies in South Africa according to Dr. E.W. Harvey, Director: Family and Community Care, Department of Welfare.

250 See Gagnon 1992 Harvard Women's Law Journal 278.

251 Landau 1990 Canadian Journal of Family Law 195.

Domestic violence is the most glaring example of the type of case which should probably not go to mediation at all, but there are also other circumstances in which it is inappropriate. A party's lack of verbal ability may be one of these.<sup>252</sup> One or both of the parties may not want to go to mediation. This may be for various reasons such as reluctance to end the marriage or a strong wish to have a "day in court."<sup>253</sup> There may be too high a level of conflict between the parties,<sup>254</sup> or one or both of the parties may simply be using mediation to wage an on-going war against the other.<sup>255</sup> Mediation should not be used where there is evidence of psychopathy. However, it takes a skilled mental health professional to detect this.

#### 6.4 The Problem of Access to justice

Goodman notes that the mediation procedure "does not concern itself with [the] protection of legal rights and interests".<sup>256</sup> Roberts similarly <sup>257</sup> identifies, as one of the prominent ideas sustaining the mediation movement, the thought that there should be a move "from a legal to a non-legal world". The question to be asked here is whether in the context of divorce such a move is possible or desirable.

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252 See Goodman 1986 Australian Journal of Family Law 35.

253 See Anon 1987 Family Law 120.

254 See Shaffer 1988 University of Toronto Faculty of Law Review 192 and sources cited there.

255 See Parkinson 1983 Family Law 185.

256 Goodman 1986 Australian Journal of Family Law 49. See also Piper For the Sake of the Children 22; Bailey 1989 Canadian Journal of Family Law 93.

257 Roberts 1983 Modern Law Review 538.

Given the present state of our law it is not possible, for although the abolition of the fault principle was a step in the direction of privatising divorce and did give parties more control in this sphere,<sup>258</sup> the process is not yet complete. When one examines the shortcomings of mediation in ensuring access to justice, which will be set out below, it seems such a move is not desirable either. This is particularly so from the woman's point of view. Feminists point to the gains made by women in the legal sphere over the last thirty years, which they say would never have been made if questions such as the unequal status of spouses, domestic violence and rape had not been aired in public.<sup>259</sup> In mediation they see a "re-privatisation" of the family and a trivialisation of family law issues which threatens the progress which women have made and prevents them from asserting their rights.<sup>260</sup>

The dangers inherent in over-emphasis of the emotional aspects of divorce have already been canvassed above.<sup>261</sup> It has been argued that<sup>262</sup>

"...once adjudicatory forms are abandoned, consideration of individual rights and of justice between the parties can be subverted by notions of treatment and therapy."

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258 See Winks 1980-81 Journal of Family Law 615; Scott-Macnab 1986 De Jure 314.

259 See Lefcourt 1985 Clearinghouse Review 267; Teitelbaum and DuPaix 1988 Rutgers Law Review 1093.

260 See Woods 1985 Clearinghouse Review 431, 435; Lefcourt 1985 Clearinghouse Review op cit 268; Bottomley in Brophy and Smart Women in Law 185; Shaffer 1988 University of Toronto Faculty of Law Review op cit 167, 198; Schulman as cited in Chesler Mothers on Trial 445.

261 See par 5.2.9 above.

262 See Davis 1983 Journal of Social Welfare Law 139.

The following are some of the ways in which mediation fails to provide access to justice:

- (a) Mediation takes place behind closed doors.<sup>263</sup> No record is kept, and no appeal is possible.<sup>264</sup>
- (b) Mediation does not operate in terms of recognised, uniform criteria,<sup>265</sup> and it emphasises relationships rather than principles and rights.<sup>266</sup> Its outcome is therefore extremely uncertain. However, if mediators were to refer to legal norms in the course of mediation they would fall short of mediation's requirement of neutrality; and might lay themselves open to charges of the unauthorised practice of law.<sup>267</sup> Besides, many mental-health mediators are not able to refer to the relevant norms because they have insufficient knowledge of them. Failure to do so may, however, seriously prejudice a party.<sup>268</sup>

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263 See Davis 1983 Family Law 9; Goodman 1986 Australian Journal of Family Law 41.

264 See Lefcourt 1985 Clearinghouse Review 267; Goodman 1986 Australian Journal of Family Law 49; Grillo 1991 Yale Law Journal 1559, 1589, 1608.

265 See Roberts 1983 Modern Law Review 557; Williams 1987 Civil Justice Quarterly 149; Scutt Women and the Law 553; Szwed in Freeman State, Law and Family 278.

266 Grillo 1991 Yale Law Journal 1560.

267 See Bryan 1992 Buffalo Law Review 505-506.

268 Bailey 1989 Canadian Journal of Family Law 92.

- (c) Mediation has no mechanisms for determining whether a party is telling the truth, but relies largely on trust and good will.<sup>269</sup>
- (d) Mediators are not accountable for the outcome of mediation.<sup>270</sup>
- (e) Mediation tends to downplay the legitimate grievances of parties.<sup>271</sup>
- (f) To make mediation mandatory is to deprive parties of their right rather to go to court if they so choose.<sup>272</sup>
- (g) Mediation emphasises the child's interests at the expense of justice between the parties.<sup>273</sup> On the other hand, if a mediator is unfamiliar with the law and with the measures which the law has taken to protect children, the child itself may be disadvantaged.

The traditional legal process, developed painstakingly over many centuries, offers the advantages of cross-examination as a means of arriving at the truth;

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269 Bailey 1989 Canadian Journal of Family Law 71.

270 Grillo 1991 Yale Law Journal 1606.

271 See Kirby 1992 Australian Dispute Resolution Journal 146; Davis 1983 Family Law 9; see also par 5.2.3 above.

272 Davis 1982 New Law Journal 356; see also Kirby 1992 Australian Dispute Resolution Journal 143, citing Discussion Paper 4 issued in 1991 by the Australian Senate Standing Committee on Legal and Constitutional Affairs.

273 Kirby 1992 Australian Dispute Resolution Journal 143, citing Discussion Paper 4 issued in 1991 by the Australian Senate Standing Committee on Legal and Constitutional Affairs.

proceedings conducted in public; a record of the proceedings; rules of evidence and the possibility of appeal.<sup>274</sup> The parties have a right to be heard, which:

"pre-supposes the right to give and adduce evidence and the right to present argument. Implicit in that right is the right to legal representation."<sup>275</sup>

In mediation, which seeks to reduce conflict and sets out to be a "friendly"<sup>276</sup> process, the parties, and more particularly the wife, may not assert their rights at all or may feel guilty if they do so.<sup>277</sup> In the legal process, on the other hand, if one engages a lawyer one has a protagonist who has a thorough knowledge of the relevant law, will inform one of one's rights and endeavour to protect them, and will give one an indication of what the court is likely to decide in the circumstances of the case.<sup>278</sup> Apart from any other considerations, attorneys have their reputations and the danger of malpractice suits to consider.<sup>279</sup>

A further advantage of the legal process over divorce mediation is that through court decisions it is possible for family law to continue to develop in response to

274 See Kirby 1992 Australian Dispute Resolution Journal 140; Bottomley in Brophy and Smart Women in Law 184; Shaffer 1988 University of Toronto Faculty of Law Review 170.

275 Goodman 1986 Australian Journal of Family Law 41.

276 See Wilkins 1984 Family Law 122

277 See Grillo 1991 Yale Law Journal 1608.

278 Woods 1985 Clearinghouse Review 435; Shaffer 1988 University of Toronto Faculty of Law Review 199; Grillo 1991 Yale Law Journal 1597.

279 See Bryan 1992 Buffalo Law Review 519-523.

societal change.<sup>280</sup> It would be regrettable, particularly from the child's point of view, if the remarkable transformation of family law which has taken place over the last few decades were to cease. Society's insights into the needs and problems of children are constantly increasing, as is public awareness of the abuse which many children continue to suffer. In mediation there is no scope for the public assertion of rights and duties. As Grillo<sup>281</sup> says:

"It is ...important in some situations for society to send a clear message as to how children are to be treated, what the obligations of ex-spouses are to each other and to their children, and what sort of behaviour will not be tolerated. Because the mediation movement tends to regard negotiated settlements as morally superior to adjudication, these functions of adjudication may easily be overlooked."

#### 6.5 The problem of confidentiality<sup>282</sup>

Mediation proponents emphasise that confidentiality is essential to the mediation process,<sup>283</sup> for without it, they say, the relationship of trust between the parties and the mediator,<sup>284</sup> and the frank and open discussion of problems, both of which characterise mediation, would be absent. In subsequent court proceedings or

280 See Shaffer 1988 University of Toronto Faculty of Law Review 165, 194; Kirby 1992 Australian Dispute Resolution Journal 139; Bryan 1992 Buffalo Law Review 506.

281 Grillo 1991 Yale Law Journal 1561.

282 For extensive discussions of confidentiality in mediation see Folberg and Milne Divorce Mediation Chapter 16; McCrory 1988 Modern Law Review 442 et seq; Gibson 1992 Journal of Dispute Resolution 25 et seq.

283 See Levy and Mowatt 1991 De Jure 73; Folberg and Milne Divorce Mediation 319; McCrory 1988 Modern Law Review 452, 461.

284 See Gibson 1992 Journal of Dispute Resolution 27.

discussions with third parties neither the mediator nor the parties should be compelled to divulge anything that has been revealed during mediation, whether orally or in written documents. It is doubtful, however, that many clients entering mediation for the first time know that mediation is supposed to be confidential or expect it to be so. Gibson <sup>285</sup> speaks of some mediation programmes which have high settlement rates even although they do not guarantee confidentiality, and he questions whether confidentiality really is essential.

Confidentiality in mediation is usually ensured by a stipulation in the initial written agreement or "memorandum of understanding" between the parties and the mediator. In terms of such an agreement, neither the mediator nor the parties will be obliged to reveal anything that transpired during mediation. In the Standards of Practice for Lawyer-Mediators in Family Disputes<sup>286</sup> adopted by the Family Law Section of the American Bar Association, it is provided that the mediator must not voluntarily disclose any information obtained through the mediation process without the prior consent of both participants. In Australia, and in some States in the United States,<sup>287</sup> confidentiality is ensured by legislation relating to mediation. In Britain the issue has not yet been addressed by legislation, but the National Association of Family Mediation and Conciliation Services makes provision in its Code of Practice for the confidentiality of discussions and correspondence between

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285 Gibson 1992 Journal of Dispute Resolution 43.

286 Standards of Practice for Lawyer Mediators in Family Disputes sII, as cited in 1984 Family Law Quarterly 455-468.

287 See Levy and Mowatt 1991 De Jure 75; Kirby 1992 Australian Dispute Resolution Journal 142; Ritter 1988 Texas Bar Journal 26-27.

a conciliatory, both parties and their legal advisers. The Code of Practice also states that the courts are likely to regard such discussions and correspondence as privileged. It warns, however, that mediators cannot give a guarantee of absolute confidentiality because they may at their discretion report that a criminal offence involving children has been or is liable to be committed.<sup>288</sup>

Two main problems arise in respect of confidentiality in mediation. One of those relates to the problem of access to justice, discussed above, and of public acceptability.<sup>289</sup> In mediation as a closed, confidential process with no record and no appeal, there is no remedy for any miscarriage of justice. To obviate this, Gibson<sup>290</sup> suggests the review of mediation cases by a third party.

The next problem is whether there should be exceptions to the rule of confidentiality of mediation. The particular case which comes to mind is that of abuse, and especially child abuse.<sup>291</sup> If, in the course of mediation, mediators become aware of abuse or threatened abuse they may have to terminate the mediation.<sup>292</sup> They should also be obliged to report the abuse, and not, it is

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288 National Association of Family Mediation and Conciliation Services Code of Practice s 3, as cited in 1984 Family Law 107-108.

289 On public accountability see Gibson 1992 Journal of Dispute Resolution 27.

290 Gibson 1992 Journal of Dispute Resolution 55 et seq.

291 See Gibson 1992 Journal of Dispute Resolution 49, 51 et seq. At 53, however, Gibson pleads for the reporting of other types of abuse in the same way.

292 See par 6.3 above.

submitted, have a discretion whether to do so or not.<sup>293</sup> This would be in line with recent provisions on the reporting of child abuse; besides which, there might be serious repercussions for mediators who failed to report abuse. A statutory provision compelling the disclosure of abuse would clearly override a private agreement that mediation was confidential, and, it seems, it would also override a statutory provision ensuring the confidentiality of mediation.<sup>294</sup> Some American statutes which provide for confidentiality of mediation also make provision for exceptions to that rule, particularly in respect of abuse.<sup>295</sup>

In South Africa, statutory provisions compelling the reporting of child abuse are to be found in the Child Care Act<sup>296</sup> and the Prevention of Family Violence Act<sup>297</sup>. Section 42(1) of the Child Care Act<sup>298</sup> imposes a duty to report child abuse on various professionals, including social workers. It provides that every social worker

"who examines, attends or deals with any child in circumstances giving rise to the suspicion that that child has been ill-treated, or suffers from any injury, single or multiple, the cause of which probably might have been deliberate"

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293 as suggested by Gibson 1992 Journal of Dispute Resolution 54.

294 See Folberg and Milne Divorce Mediation 323.

295 See Ritter 1988 Texas Bar Journal 26; Folberg and Milne Divorce Mediation 322; Gibson 1992 Journal of Dispute Resolution 30.

296 Child Care Act 74 of 1983.

297 Prevention of Family Violence Act 133 of 1993.

298 Child Care Act s 42 (1).

must immediately notify the Director-General concerned. Section 4 of the Prevention of Family Violence Act is wider in scope for it does not restrict the duty to report to members of various professions, but provides that any person who, inter alia, examines, attends to or advises a child in circumstances which ought to give rise to the reasonable suspicion that the child has been ill-treated, or suffers from any injury the probable cause of which was deliberate, must immediately report the circumstances to a police official or a commissioner of child welfare or a social worker. In addition, while the Child Care Act imposes the duty to report child abuse only on those mediators who are social workers, the relevant provision of the Prevention of Family Violence Act applies to all persons and therefore all mediators. However, both Acts impose the duty to report only on persons who have had direct contact with the child.<sup>299</sup>

## 7 CONCLUSIONS

### 7.1 General Conclusions

An assessment of the claims of divorce mediation reveals some of them to be vague and most of them to be unproven. In addition, as for example in the case of conflict reduction, it is open to question whether perceived benefits of mediation always do benefit clients.

That the parties control the outcome of mediation seems at best only partially true. How much control parties do exercise depends to some extent on their own view of

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299 South Africans should, however, heed the lesson which the English learned in, for example, the notorious "Cleveland" and "Rochdale" cases, where doctors and social workers were found to have been over-zealous in the reporting of supposed child abuse and particularly sexual abuse cases. See Lyon and de Cruz Child Abuse 34 - 41 and 54 -57.

the mediator's role, and is also closely linked with the vexed question of the mediator's neutrality, which in turn is linked with the question whether the mediator should attempt to redress power imbalances. The minute the mediator departs from a neutral stance, as s/he inevitably does, the parties cannot be said to be in complete control. When it comes to mediator neutrality, questions of professional and personal mind-sets cast doubt on the whole concept; as do professional concerns at both an individual and wider level. The bias of mediators in favour of joint custody is well documented, and is a subject of concern to women in particular. Concern has also been expressed that mediators with mental-health backgrounds may attach too much importance to a rather old-fashioned view of the family. It seems, therefore, that parties complaining of bias displayed by the legal profession and who feel that the adversary system does not give them a voice may find themselves no better served in this respect by mediation. In the United States the dangers of mediator bias have been recognised and are starting to be addressed in legislation.

It is generally acknowledged that mediation can improve communication between parties, but mediation's concomitant goal of conflict reduction itself carries risks, especially for disadvantaged members of society. The traditional procedure may be preferable for those who wish to assert their rights.

That agreement is often reached in mediation is not in itself a reason to prefer that process to the traditional one where few cases go to litigation. The argument that agreements reached in mediation are longer lasting is as yet unproven.

The research which has led to the claim that mediation leads to greater client satisfaction is of questionable validity, and the term needs to be clearly defined. In any event, few clients in the divorce context are ever likely to be truly satisfied. It

is also of importance from the law's point of view that satisfaction be based on full acquaintance with the relevant rights. The same goes for the claim that mediation is a fair process, for fairness is as vague a term as satisfaction and the question to be asked is according to what rules or standards is mediation claimed to be fair?

Mediation's claims of greater efficiency in the sense of time and cost saving are unproven.

The claim that mediation is especially suitable where relationships between parties will continue after settlement of the dispute, and is therefore especially suitable for divorce cases, should be treated with caution. Not all contact between spouses after divorce can be categorised as an "on-going relationship".

Today nobody would question the adverse effects of divorce on children, but the claim that mediation serves to lessen those effects is unproven. Lawyers may be criticised for never seeing the children, but neither do many mediators.

Among the disadvantages of mediation is the problem of an unequal distribution of power between parties and the frequent failure of mediators, when they try to redress the balance, to take wider power imbalances in society into account. - It must be conceded, however, that the courts do not have a history of doing so either. A further difficulty related to unequal power is, as already stated, that any attempt to correct power imbalances marks a departure from a neutral stance.

Mediation may be completely inappropriate in certain circumstances, but especially where there has been a history of family violence.

From the lawyer's point of view, the biggest question mark hanging over mediation relates to access to justice. In its annual report in 1987-1988, the Centre for Socio-Legal Studies stated that mediation creates considerable and justifiable anxieties

about equity and justice in the way participants are treated.<sup>300</sup> Mediation provides no guarantees that justice will be done between the parties, or that the parties' legal entitlements will be respected. A further concern is that if mediation becomes the accepted method of settling divorce disputes, the development of family law through the courts may be hampered.

Insistence on the confidentiality of mediation gives rise to concern too, for it links with the problem of access to justice for mediation clients. In addition, in certain circumstances as, for example, where there is family violence, mediators may be obliged to disclose information imparted during mediation sessions.

In summary: the divorce mediation movement arose as a result of dissatisfaction with traditional legal procedure, but analysis shows that it too has serious shortcomings.<sup>301</sup> The claims of mediator neutrality and party control in particular, although absolutely core concepts of mediation, rest on extremely shaky foundations. This being so, one must question whether divorce mediation can seriously be propounded as an additional divorce procedure. As stated above, it cannot be an alternative procedure.<sup>302</sup>

Nevertheless, it is gaining adherents and is today seen by many of its proponents as the solution to the problems associated with divorce. How can a better foundation be laid for it and concerns about it be addressed? This will form the subject of the next chapter.

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300 Centre for Socio-Legal Studies Annual Report 1987-1988.

301 See Erlanger Chambliss and Mellie 1987 Law and Society Review 588.

302 See Chapter 5 par 2 above; see also Piper For the sake of the Children 22.

## 7.2 Is divorce mediation a better solution for children?

It is generally acknowledged that divorce affects children more adversely than it does adults, and that the adversary procedure does little to mitigate the damage and may even exacerbate it. Mediation's claims that it is the preferable procedure from the child's point of view have nevertheless not yet been proven.

As pointed out at the beginning of this chapter, divorce mediation does not purport to be simply a means of protecting the children of divorce. Nor can the interests of the children be considered in complete isolation. Whether mediation benefits children, therefore, is closely linked with the question whether it benefits their parents who are the parties to the mediation. Dissatisfaction with the procedure may affect parents adversely, and this may rebound on the children.

Children are particularly affected by certain of the disadvantages of the adversary procedure which were discussed above.<sup>303</sup> These are:

- (a) the children's' interests are given insufficient attention. Parents often use the children as mere bargaining chips in their parents' battles. The Family Advocates' Offices were recently established in response to these problems, however;
- (b) the adversary procedure does nothing to reduce hostility between the parties, and may even exacerbate it. Everybody agrees that the less hostility there is between the parents, the better it is for the children;
- (c) the adversary procedure tends to be protracted. The child therefore lives through a long period of uncertainty and instability;

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<sup>303</sup> See Chapter 4, par 2 above.

- (d) children are seldom seen by the parties' lawyers; or asked directly what their wishes are.

Does divorce mediation eliminate these problems? Some answers have emerged in the discussion in this chapter.

Certainly all mediators are aware of the importance of the children's interests, and try to persuade parents to concentrate on these rather than on their grievances against each other. It was pointed out above, however, that not all parents need reminding of their responsibilities to their children and that some might resent it.

The frequency with which the bargaining power of the parties is discussed in the literature on mediation does lead one to question whether this procedure is succeeding any better than the adversary one in eliminating the use of children as bargaining chips between the parties.

Some mediators have strong views on child care which may lead them to favour particular solutions such as joint custody, for example. Such a subjective approach may not always operate to the child's advantage. Many mediators similarly refer optimistically to divorce as a "restructuring" of the family, which might be desirable from the child's point of view but is hardly in accord with the reality of most divorces.

Children have to rely on others to ensure that they have access to justice, and as was discussed, it is questionable whether mediation always does this.

The improvement of communication between the parties and the reduction of conflict are also amongst mediation's primary aims, which it does generally achieve. It should, however, be remembered that from the point of view of mothers, in particular, conflict reduction may not always be desirable.

Mediation has not yet been proved to be speedier than the adversary procedure.

Mediators have not reached unanimity on whether children should be involved in mediation, and on how this should be done.

As was stated above, longer-lasting agreements would certainly operate in favour of children, but the claim that mediation does produce such agreements is not yet proven.

Confidentiality in mediation should never operate to prevent the report of child abuse.

To summarize, certain aspects of mediation, such as its strong focus on the interests of children, and on improved communication between parties and on the reduction of conflict, certainly make it attractive from the child's point of view. Until other difficulties which have been highlighted in this chapter have been addressed, however, these factors alone cannot tip the scales in favour of mediation.

## CHAPTER 7

### AREAS OF CONCERN IN DIVORCE MEDIATION

#### 1 INTRODUCTION

As noted in the previous chapter, the claimed advantages of divorce mediation are sometimes vague and almost without exception unproven. Divorce mediation also has certain serious disadvantages. The divorce mediation movement is nevertheless well entrenched in many overseas countries,<sup>1</sup> and in South Africa, although still in its infancy<sup>2</sup> it is the focus of widespread interest and is seemingly here to stay.<sup>3</sup> The increasing number of organisations<sup>4</sup> which are concerned with divorce mediation attests to this. Nevertheless it is not possible to predict whether it will become the dominant form of divorce dispute resolution.<sup>5</sup>

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1 See Dougherty 1988 Texas Bar Journal 28; Green, Long and Murawski Dissolution of Marriage 186.

2 See Hoffmann Family Mediation in South Africa 150.

3 Scott-Macnab 1987 De Jure 42; Scott-Macnab 1992 South African Law Journal 282. With reference to Scott-Macnab's assertion that interest in mediation is firmly entrenched in academe a cautionary note should be sounded, however. Of 18 publications cited in support of this assertion, by far the majority were authored by Scott-Macnab himself and/or Mowatt. The names of only 4 other authors are cited in the list.

4 See Chapter 5 par 3.2.2.6 above.

5 See King and Piper How the Law thinks about Children 83.

In other countries mediation, especially independent mediation, has not gained the widespread acceptance for which its proponents would have wished.<sup>6</sup> Whilst Pearson<sup>7</sup> in 1988 said that the United States in the preceding decade had seen an explosion of divorce mediation Knuppel, writing in 1991, spoke of a lull in divorce mediation there.<sup>8</sup> Nor, according to practitioners, is it firmly established in this country yet.<sup>9</sup> They put this down to:

- (a) ignorance of the procedure. It is believed that because of lack of funds there is insufficient marketing. SAAM maintains that funds should be made available to a co-ordinating national multi-disciplinary body such as itself so that divorce mediation may be established in a responsible fashion;.
- (b) reluctance on the part of both attorneys and clients<sup>10</sup> to accept mediation. Attorneys see mediation as a lesser fee-generator than

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6 See Westcott in 1987 Family Law 120; Neilson 1990 International Journal of Law and the Family 235; Knuppel 1991 Journal of Dispute Resolution 133-4; Dougherty 1988 Texas Bar Journal 31; Grillo 1991 Yale Law Journal 1552; Fisher Australian Dispute Resolution Journal 195; Folberg and Milne Divorce Mediation 21..

7 Pearson in Fisher Divorce 1.

8 Knuppel 1991 Journal of Dispute Resolution 134.

9 in a questionnaire submitted to that body by the author. Responses on this point were received from Mrs Madeleine van der Steege, then Chairperson of SAAM, Mrs EM Dooley, Director of the Family Life Centre, Mrs Linda Macum, Executive Director of ADRASA, Mr Charles Cohen, member of the Council and of the Board of Directors of ADRASA.

10 On client resistance in England see Neilson 1990 International Journal of Law and the Family 246.

litigation. They are also criticised for undoing mediated agreements.

Similar reasons are advanced in the United States.<sup>11</sup> Knuppel<sup>12</sup> speaks of public resistance to divorce mediation in the sense that many persons express approval of the idea but say that if they themselves were to divorce they would choose the most adversarial lawyer they could find.

In spite of these drawbacks divorce mediation, both here and abroad, has gained such a foothold<sup>13</sup> that it cannot be ignored. It is therefore necessary to investigate ways in which concerns about it may be addressed and in which the procedure may be improved. The first priority is research to examine its claims and more particularly its theoretical basis. Which profession or professions are best suited to the practice of divorce mediation, or whether there should be inter-disciplinary co-mediation, must also be considered.

## 2 THE NEED FOR RESEARCH

As mentioned in the previous chapter, many writers have issued warnings on the dangers of the unproven claims of mediation.<sup>14</sup> Since mediation seeks to establish

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11 See Grillo 1991 Yale Law Journal 1552.

12 Knuppel 1991 Journal of Dispute Resolution 133.

13 See Erickson 1991 Hamline Journal of Public Law and Policy 8.

14 See eg Scutt Women and the Law 552; Roberts 1983 Modern Law Review 537; Bailey 1989 Canadian Journal of Family Law 60; Szwed in Freeman State, Law and Family 276. See also Chapter 6 passim.

itself as a legitimate process in the context of divorce, research is necessary<sup>15</sup> on its objectives, its claims, its structure and its practice. Some has already been undertaken, mostly of an empirical nature, but there have been calls for more and better research.<sup>16</sup> Goodman comments that although much has been written on mediation most of the writing has been "descriptive, theoretical and exhortatory".

Such research as has been done on divorce mediation up until now has not dispelled doubts and concerns about the movement, to which one writer has referred as an ideology "which has not been submitted to serious evaluation".<sup>17</sup> Crouch has even questioned what he sees as the movement's underlying philosophy, namely that "you can compromise anything".<sup>18</sup> This question may serve a useful function in leading us to ask the further question why, if informal justice systems are as satisfactory as their proponents would have us believe, it was deemed necessary in the past to develop formal justice systems.

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15 See IRS in 1989 Civil Justice Quarterly 220.

16 See eg Bailey 1989 Canadian Journal of Family Law 94; Kirby 1992 Australian Dispute Resolution Journal 145 in fine; Bottomley in Freeman State, Law and Family 300-301; Green, Long and Murawski Dissolution of Marriage 194.

17 Goodman 1986 Australian Journal of Family Law 38.

18 Crouch 1982 Family Advocate 33. See also Chapter 6 par 5.2.3 above.

According to a report issued by the Centre for Socio-Legal Studies at Oxford in 1988,<sup>19</sup> recent research has revealed mediation "as a much more problematic business than many enthusiasts have acknowledged".<sup>20</sup>

Empirical research done thus far<sup>21</sup> includes the following:

- (a) Research undertaken by the Center for Policy Research at Denver,<sup>22</sup> namely;
  - (i) the Denver Custody Mediation Research Project which was termed "quasi-experimental." Cases involving custody and visitation were randomly assigned for mediation and non-mediation treatment. A third group, namely persons who had rejected mediation, were also studied. The research took the form of fixed-choice interviews at three different stages, with a total of 1,398 interviews being conducted over a period of three years;
  - (ii) the Divorce Mediation Research Project, which involved research on public sector custody and visitation mediation in three American states. Again fixed-choice questionnaires were used at three times, as well as court records for people who had mediated or used conventional court procedure five years previously;

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19 Centre for Socio-Legal Studies Annual Report 1987-1988.

20 See Goodman 1986 Australian Journal of Family Law 38.

21 For a detailed report on research done up until 1989 see Chapter 4 of the Newcastle Report.

22 On research undertaken by this Centre see Pearson in Fisher Divorce 2-7.

- (iii) research in Delaware on child support mediation. In that State child support mediation is mandatory. Court files were examined and interviews conducted with some families which had used mediation and with some who had not. Interviews were also conducted with lawyers.
- (b) The "Conciliation in Divorce" research project conducted at the University of Bristol from 1981 to 1984, comprising a study of court records, observation of preliminary appointments in Bristol County Court, and interviews with parties to contested divorce proceedings.<sup>23</sup>
- (c) Research conducted during 1982-1984 at the South-East London Family Conciliation Bureau, an independent divorce mediation bureau. The research took the form of the scrutiny of records, and interviews with fifty-one parents who had attended joint conciliation appointments at the Bureau.<sup>24</sup>

Empirical research into divorce mediation has been the target of much criticism. Complaints have been made of methodological shortcomings<sup>25</sup>, such as:

- (a) samples being too small or not chosen at random;<sup>26</sup>

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23 See Davis in Dingwall and Eekelaar Divorce Mediation 95.

24 See Davis in Dingwall and Eekelaar Divorce Mediation; Newcastle Report 30-31.

25 See Pearson and Thoennes in Dingwall and Eekelaar Divorce Mediation 72; Bailey 1989 Canadian Journal of Family Law 73-74; Grillo 1991 Yale Law Journal 1549; Levy 1984 Family Law Quarterly 525.

26 See Kirby 1992 Australian Dispute Resolution Journal 145.

- (b) anecdotal reports<sup>27</sup>;
- (c) a simplistic comparison of mediation with the adversarial procedure;<sup>28</sup>
- (d) a self-congratulatory<sup>29</sup> approach or "advocacy disguised as research"<sup>30</sup>;

Another area which it is necessary to research is what motivates people to engage in the practice of mediation.<sup>31</sup>

Important State-initiated research projects in Britain include

- (a) that of the Inter-Departmental Committee on Conciliation, which published its report in 1983. This project has been discussed above;<sup>32</sup>

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27 See Kirby 1992 Australian Dispute Resolution Journal 145; Levy 1984 Family Law Quarterly 531.

28 See Levy 1984 Family Law Quarterly 530-531; Grillo 1991 Yale Law Journal 1549 fn 9; Bailey 1989 Canadian Journal of Family Law 73.

29 See Davis in 1989 Family Law 256.

30 Levy 1984 Family Law Quarterly 533. See also Crouch 1982 Family Law Quarterly 220 in fine.

31 See Kirby 1992 Australian Dispute Resolution Journal 145; Winks 1980-81 Journal of Family Law 640; Crouch 1982 Family Law Quarterly 220.

32 For further details on this project see Chapter 5 par 5.2.8.2 above.

- (b) that of the Conciliation Project Unit of the University of Newcastle, which published its report in 1989.<sup>33</sup> Its overall task<sup>34</sup> was to submit a report which would allow the government to decide whether a publicly funded national family conciliation service should be established, and if so, how it should be organised and funded. More detailed terms of reference included instructions :
- (i) to gather information on how existing schemes were operating;
  - (ii) to examine the question of costs; and
  - (iii) to assess the effectiveness of various kinds of conciliation, with particular reference to the nature and durability of agreements reached, reduction of conflict, the satisfaction and well-being of parties, and the skills and training of successful conciliatory.

In its report it stressed that while mediation brought about important social benefits, the decision whether to introduce a national service was one of policy which it was for government to take. It did, however, stress that "some rationalisation of the confusing network of services currently available is a priority need".<sup>35</sup>

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33 For further details of this project see also Chapter 5 par 5.2.8.2 above.

34 See Newcastle Report 2.

35 See Newcastle Report Summary 17.

It is remarkable that in spite of the wide scope of this research project, there was no brief to investigate the basic nature of mediation or 'conciliation' as it was then termed in England.<sup>36</sup> The unit was aware that there was no clear-cut meaning to be attached to the term. It canvassed all schemes which claimed to be providing a mediation or conciliation service in respect of family disputes, and came to the conclusion that the common denominator was the direct involvement of both parties to the dispute. It then adopted this as a definition<sup>37</sup> for the purpose of its study of the costs and effectiveness of various schemes, and delved no further into the theoretical background of mediation. The direct involvement of both parties seems rather a thin thread on to which to hang a supplementary divorce procedure, one for which government subsidisation is being sought.

In South Africa research into divorce mediation has until now largely been confined to academic work.<sup>38</sup> As far as the writer is aware, only one completed South African dissertation, that of Folb, has been based on empirical research.<sup>39</sup> It was an investigation into the attitudes of a number of attorneys towards divorce mediation.

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36 See Chapter 5 par 3.2.1. above.

37 See Newcastle Report 3.

38 See the sources cited in Scott-Macnab 1992 South African Law Journal 282 fn2. See also Folb Attorneys' Attitudes; Eckard in Hoffmann Family Mediation 42.

39 Folb Attorneys' Attitudes. See also Folb and Hill in Hoffman Family Mediation 108.

It is clear that although there has been some research into divorce mediation, much more must still be done. Logically, and as many writers have pleaded,<sup>40</sup> the question whether divorce mediation is founded on a sound theoretical base should be addressed first. If a sound theoretical framework is then found to exist, it will also be necessary to determine whether the principles which have been discerned are being observed in practice. It will, therefore, be necessary to observe mediation in action, as has been advocated by Dingwall.<sup>41</sup>

Provided that a sound theoretical basis for mediation can be shown to exist, other aspects of the process merit closer scrutiny too. The most important of these is the question of who should mediate.

### 3 WHICH PROFESSION SHOULD PRACTISE MEDIATION?

Up until now mediators have been drawn primarily from either the helping or the legal professions. In the United States no single profession predominates, while in England most mediators are social workers. In South Africa it was the helping professions which were the pioneers, but lawyers have recently been taking an increasing interest in mediation. Traditionally, members of these professions have been somewhat distrustful and suspicious of each other,<sup>42</sup> possibly because they have little insight into the nature of each other's work. Lawyers have for long

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40 See Kirby 1992 Australian Dispute Resolution Journal 145; Fisher 1989 Family Law 260; IRS 1989 Civil Justice Quarterly 220; Roberts 1983 Modern Law Review 537.

41 See Chapter 4 fn 109 above.

42 See Davis Partisans and Mediators 207; Neilson 1990 International Journal of Law and the Family 248-249; Bryan 1992 Buffalo Law Review 516. See also Chapter 2 par 9.2 above.

been seen to have a monopoly on divorce work<sup>43</sup>, but mental health workers are now suspected of attempting to obtain that monopoly for themselves<sup>44</sup>. It is to be hoped that recent moves towards inter-disciplinary co-operation will improve the professions' attitudes towards the other.

### 3.1 Members of the helping professions as mediators

Members of the helping professions have insight into the emotional problems surrounding divorce and are adept at dealing with persons in crisis. While not losing sight of mediation's goal of resolving disputes, they are able to help parties improve their communication skills, to express their emotions and to cope with them. However, using mental health workers as mediators also has certain drawbacks.

In the first place, they lack knowledge of the legal aspects of divorce. It is submitted that this knowledge is essential for as long as divorce remains the legal as well as emotional process<sup>45</sup> which it is, even though some mediators have asserted that it has become a purely emotional process and not a matter for the legal profession. It is of particular importance that a mediator should have some knowledge of the financial consequences which the law attaches to divorce.

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43 See Davis 1989 Family Law 261.

44 See Davis Partisans and Mediators 163; Bottomley in Freeman State, Law and Family 296 et seq; Levy 1984 Family Law Quarterly 532-533; Goodman 1986 Australian Journal of Family Law 48; Bailey 1989 Canadian Journal of Family Law 70; King and Piper How the Law thinks about Children 83,85.

45 See Chapter 5 above.

Secondly, social workers, in particular, have been criticised for the views on the family which their training and professional background have inculcated into them and which they import into the mediation process. As noted above, feminist critics have said that social workers incline to a rather narrow view of the family, one which disadvantages women.<sup>46</sup> Davis<sup>47</sup> has criticised their almost exclusive focus on children or "child-saving" as he terms it, and has pointed out that the object of mediation is not a mechanism for safeguarding children's interests "but a means of seeking reasonable compromise solutions to disputes over specific issues". This quotation highlights the dangers,<sup>48</sup> which will be examined in more detail below, of mediation by one professional only. Social workers, like other professionals, are inclined in mediation to concentrate on those divorce problems which they, through their particular training and experience, have the skills to address.<sup>49</sup>

A further criticism relates to the use mental health professionals make in mediation of their professional skills. Divorce is no longer regarded by the mental health professions as evidencing pathology in a family. Nevertheless mental health professionals, with their emphasis of the emotional aspects of divorce, do not

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46 See Chapter 6 par 5.2.1 above.

47 Davis 1983 Family Law 10.

48 See par 3.3 below.

49 See Piper How the Law Thinks about Children 76.

always distinguish clearly between mediation on the one hand, and counselling or therapy on the other.<sup>50</sup> The difference is explained by Davis and Roberts:<sup>51</sup>

The family therapist attempts to treat what is defined as a disorder (or "pathology") within a family by changing the organization of that family and thereby altering the perceptions and behaviour of its members. In contrast, a fundamental assumption underlying the mediator's intervention is that the parties are competent, first, to define the issues for themselves; and second, to arrive at their own decisions following joint negotiation.

This quotation highlights the dangers,<sup>52</sup> which will be examined in more detail below, of mediation by one professional only. Social workers, like other professionals, are inclined in mediation to concentrate on those divorce problems which they, through their particular training and experience, have the skills to address.<sup>53</sup> It should at all times be remembered that divorce mediation sets out to help all members of the immediate family who are affected by the divorce. As has been discussed,<sup>54</sup> mediation differs in this respect from the work done in this country by the Family Advocate, whose specific brief it is to safeguard the interests of the children of divorce.

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50 See Davis 1983 Family Law 11; Roberts 1983 Modern Law Review 551 et seq; Goodman 1986 Australian Journal of Family Law 33-34; Neilson 1990 International Journal of Law and the Family 259.

51 See Davis and Roberts Access to Agreement 8.

52 See par 3.3 below.

53 See Piper How the Law Thinks about Children 76.

54 See chapter 5 above.

Mediation clients have been known to complain about mediators' therapeutic approach.<sup>55</sup> Mediation is supposed not to look back but forward, and to be geared to the resolution of problems arising out of the divorce situation. In considering this difficulty relating to mediation conducted by mental-health professionals, it must be remembered that their claim to play an important or exclusive part in divorce mediation is based on their insight into emotional problems and indeed on their expertise in counselling and therapy.

### 3.2 Lawyers as mediators

Lawyer-mediators, through their training and professional experience, acquire all the knowledge of the legal aspects of divorce which the mental-health professionals lack;<sup>56</sup> but the same training and experience have not usually equipped them to deal with the emotions which surface during mediation.<sup>57</sup> Nor, in legal practice,<sup>58</sup> do divorce lawyers gain much experience in coping with their clients' emotions simply because they do not have much time to do so.

It is sometimes asserted that the whole concept of a conciliatory approach is alien to lawyers who are schooled in the adversarial approach to law. This criticism lacks substance, for fewer than ten percent of divorce cases handled by lawyers go to trial. It is true that until recently negotiating skills have not been taught in law

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55 See Neilson 1990 International Journal of Law and the Family 253.

56 See Raby 1993 Family Law 11.

57 See la Cock 1983 De Rebus 290.

58 See also Chapter 4 par 2.1 above.

schools,<sup>59</sup> but they are nevertheless acquired by lawyers in the course of their practice. It is submitted that it is not so much the conciliatory approach which is difficult for lawyers to grasp, as the concept of control of the outcome by the parties. Lawyers, in their capacity as expert advisers, steer their clients<sup>60</sup> towards the outcome which they consider most beneficial for their client and it goes against the grain for them not to intervene in a solution which they do not like.

New initiatives may, however, ensure that in the future lawyers are more familiar with the concepts of mediation and more willing to be conciliatory. In England the Solicitors' Family Law Association, founded in 1982, encourages its members to adopt "a conciliatory rather than a litigious approach" in family law matters, and to explain to clients that

a family dispute is not a contest in which there is one winner and one loser, but a search for fair solutions.<sup>61</sup>

Members of ADRASA<sup>62</sup> in South Africa are similarly becoming familiar with the conciliatory approach. Courses in Alternative Dispute Resolution are now being offered by Law Faculties in various South African universities.

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59 See Robinson 1989 Family Law 466.

60 See Parkinson 30 November 1988 Law Society's Gazette 4.

61 See pamphlet published by Solicitors Family Law Association, Keston; see also Neilson 1990 International Journal of Law and the Family 236. On the Code of Conduct of the Solicitors' Family Law Association see Schäfer 1985 De Rebus 323.

62 See Chapter 5 par 3.2.2.6 above on ADRASA.

### 3.3 Interdisciplinary co-mediation

There is a growing perception that neither the legal nor the helping professions have at their disposal all the skills and knowledge which mediation ideally requires.<sup>63</sup> For this reason the concept of interdisciplinary co-mediation is attractive.<sup>64</sup> Such co-mediation is usually conducted by a team of two mediators, one of whom is a lawyer and one a mental health worker. This procedure has much to recommend it. Mediation of the full range of divorce issues can be offered.<sup>65</sup> Since the team combines legal and mental-health knowledge, there is no need for crash courses which try to impart a smattering of knowledge of, say, the financial consequences of divorce to mental health professionals, or of, say, child psychology to lawyers. During mediation sessions the mediators do, however, gain insight into the other's approach and sometimes both contribute to the discussions of all problems.<sup>66</sup> This co-operative approach must surely help to allay the distrust of each other which the professions often manifest.<sup>67</sup> If a new mediator is teamed with an experienced one, this is also an ideal on-the-job training method.<sup>68</sup> Another advantage is that

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63 On the shortcomings of each profession see Knuppel 1991 Journal of Dispute Resolution 130.

64 See Shaffer 1988 University of Toronto Faculty of Law Review 175.

65 See Parkinson 1990 Family Law 477; Walker 1991 Family Law 13.

66 See Parkinson 1989 Family Law 138.

67 See eg Bryan 1992 Buffalo Law Review 516.

68 See Gold in Folberg and Milne Divorce Mediation 223.

often practitioners of co-mediation choose to work in teams of one man and one woman<sup>69</sup> in order to obviate any problems of gender bias or perceived gender bias.

Cost is also contained when, at some sessions in which specific topics are to be discussed, only one mediator may be present.<sup>70</sup> In an article on co-mediation, Parkinson appears to imply that the fee which is charged in London for a co-mediation session compares favourably with the comparable fee for other divorce procedures. Co-mediators do recommend, however, that each client also consult his or her own attorney on any agreements which may be reached in mediation<sup>71</sup>; which must add to the cost of the procedure. Thus it seems that co-mediation offered by private mediators is at present not an option which the average citizen can afford.

Co-mediation has been practised in the United States<sup>72</sup> since the early days of mediation, but, as in so many areas of mediation, research is needed to evaluate its claims and compare it with other types of mediation.<sup>73</sup> In England, a co-mediation pilot project "Solicitors in Mediation" ran for two years and was followed by the

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69      *ibid* 210, 216.

70      A disadvantage of co-mediation is that, since two professionals are involved, it may be more expensive than other mediation. It is argued, however, that this may not be so, because fewer co-mediation sessions will be needed.

71      See Parkinson 30 November 1988 Law Society's Gazette 4.

72      On inter-disciplinary co-mediation in the United States see generally Gold in Folberg and Milne Divorce Mediation Chapter 11.

73      See Gold in Folberg and Milne Divorce Mediation 209.

establishment of the Family Mediators Association in 1988.<sup>74</sup> The Association offers training courses in mediation with particular emphasis on co-mediation skills. The courses last five days and are followed by a period of practical training.<sup>75</sup> Its members practise inter-disciplinary co-mediation in accordance with a code of practice drawn up by an inter-disciplinary group. In South Africa, too, the trend towards inter-disciplinary co-operation is discernible, with an independent multi-disciplinary mediation team having been established in Johannesburg which offers comprehensive mediation.<sup>76</sup>

Very few mediators have sufficient knowledge of all the issues that may be relevant in mediation. Co-mediation is the best solution yet devised in response to this problem. It is not without problems itself, however. As stated above, it is likely to be expensive. One mediation session also consumes much professional time. In addition, co-mediators, like single mediators, may find themselves in conflict with professional codes of ethics. The question of professional ethics will be addressed below.

### 3.4 Professional ethics

Both lawyers and mental health workers may find that the practice of mediation conflicts with their professional codes of conduct. Professional ethics problems in

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74 On co-mediation in England see Parkinson 1989 Family Law 48-49; Parkinson 1989 Family Law 135-139; Parkinson 1990 Family Law 477.

75 Parkinson 1990 Family Law 479.

76 This is called the "Divorce Mediation Centre". See SAAM newsletter 14 November 1993.

mediation are a study on their own<sup>77</sup> and it is not the author's intention to investigate them here. However, mention will be made of a few common problems. An attorney who mediates between a divorcing couple may be infringing rules prohibiting him from representing clients with conflicting interests, or from practising law in association with a nonlawyer, or from splitting fees with a nonlawyer.<sup>78</sup> Mental health professionals who mediate alone or co-mediate with a lawyer-mediator may find themselves accused of the unauthorised practice of law. Attorneys may also find they have infringed rules relating to the practice of psychology. Attorneys may also face malpractice suits for, *inter alia*, failing to elicit full financial disclosure or failing to inform clients of their rights.<sup>79</sup> The professional bodies concerned need to address these ethical problems which will probably require legislative intervention.

#### 4 SHOULD FINANCIAL ISSUES BE MEDIATED?

Whether financial aspects of a divorce should be mediated was touched on in the discussion of the role of the Family Advocate.<sup>80</sup> This is a vexed question. On the one hand, it is true that it is very difficult to exclude financial aspects from the

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77 See on this subject Green, Long and Murawski Dissolution of Marriage 199 et seq; Crouch 1982 Family Law Quarterly 219 et seq; Crouch 1982 Family Advocate 27 et seq; Silberman 1982 Family Law Quarterly 107 et seq.

78 See Silberman 1982 Family Law Quarterly 109 et seq. 129.

79 See eg the discussion of Lange v Marshall in Silberman 1982 Family Law Quarterly 117 and in Shaffer 1988 University of Toronto Faculty of Law Review 187.

80 See Chapter 3 par 5 above.

discussion of any divorce issue, and that to discuss custody and/or access in isolation is unrealistic and may even prejudice one of the spouses.<sup>81</sup> This has come to be realised even in England where originally only child-related issues were mediated.<sup>82</sup> On the other hand, mediators with only a mental health background lack the necessary knowledge to mediate financial issues and should not attempt to do so.<sup>83</sup> Once again, this dilemma points to the superiority of interdisciplinary co-mediation over other types of mediation. However, even when a lawyer mediates, mediation is not as effective a tool for obtaining full disclosure as is the court process<sup>84</sup> and, in particular, cross-examination. Feminist writers who are concerned about the power imbalance between husband and wife in the financial as in other areas, are sceptical about the benefits of the mediation of financial issues.<sup>85</sup> In many cases it is naïve to trust the parties to make full disclosure during mediation, yet to seek to compel it seems to be in conflict with the spirit of mediation and is also impracticable. Parties entering mediation should be apprised of this problem. In addition, the whole issue needs further consideration by mediation proponents.

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81 See Winks 1980-81 Journal of Family Law 638.

82 On this topic see the writings of Parkinson on co-mediation in 1989 Family Law 48-49; 1989 Family Law 135 et seq; 1990 Family Law 477 et seq.

83 See Parkinson 1983 Family Law 184; National Family Conciliation Council Code of Practice 2(iv).

84 See Davis 1982 New Law Journal 356.

85 See Lefcourt 1984 Clearinghouse Review 269; Woods 1985 Clearinghouse Review 433; Bryan 1992 Buffalo Law Review 506-513; Scutt Women and the Law 552-553.

## 5 QUALIFICATIONS AND TRAINING OF FAMILY MEDIATORS

Family mediation is gathering momentum but is not yet recognised as an independent profession. At this stage various questions arise on the practice of divorce mediation. What prior qualifications should mediators have, what further specialised training should they undergo, and what should be the content and duration of training courses? In South Africa<sup>86</sup> as in other countries answers are still being sought to these questions.

Family mediators are drawn chiefly from the ranks of the helping and legal professions. Even though they have professional qualifications they normally undergo further and specialised training in mediation before they practise it.

### (a) United States

In the United States, the Academy of Family Mediators has laid down standards for Associate and Senior membership.<sup>87</sup> Associate members must have at least an undergraduate degree plus two years of professional experience. Senior members must have the same qualifications plus further practical experience, reviewed by more experienced mediators. However, the problem of qualifications is by no means resolved in the United States,<sup>88</sup> although certain states have laid down rules on this topic. Concern has been expressed that most of these states do not even

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86 See Hoffmann Divorce Mediation in South Africa 131.

87 See Dutenhaver 1988 Mediation Quarterly 7.

88 Scott-Macnab Mediation in the Family Context 92.

require mediators to have an undergraduate degree.<sup>89</sup> The Commission on Qualifications of the Board of the Society of Professionals in Dispute Resolution, however, reported in 1988 that it had found no evidence that formal academic qualifications were "necessary to competent performance as a neutral".<sup>90</sup> In the light of concerns expressed above<sup>91</sup> about access to justice this is a questionable stance.

(b) England

The National Association of Family Mediation and Conciliation Services in England introduced the accreditation of practitioners in 1992. Until recently, it required mediators in its affiliated services to be social workers or to be trained in marriage guidance. The Association now also admits persons from other backgrounds such as, surprisingly, teaching or nursing to its training courses, but does apply a selection procedure, selecting trainees "on the basis of their aptitude for mediation plus an educational/professional qualification."<sup>92</sup> It is submitted that a first degree in law or one of the social sciences should be a prerequisite for any mediator.<sup>93</sup> The National Association runs core training programmes for new mediators.<sup>94</sup>

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89        *ibid* 86-87, 90 et seq.

90        *ibid* 92-97.

91        in Chapter 6 par 6.4.

92        National Family Conciliation Council Annual Report 1992 21.

93        See on this point Gagnon 1992 Harvard Women's Law Journal 293.

94        National Family Conciliation Council Annual Report 1990 15.

Training is done at both national and regional levels and attention is paid to both theoretical issues and skills training. Supervised mediation sessions also form part of the course. Uniformity of training has not yet been achieved in England, for as stated above, the Family Mediation Association does its own training, as do the probation services.<sup>95</sup>

(c) South Africa

In South Africa, as seen in a previous chapter,<sup>96</sup> various bodies are offering training courses in divorce mediation. No attempts have been made to co-ordinate these courses nor is there unanimity on what the prior qualifications of mediators should be. SAAM has not laid down qualifications for candidates for mediation training.

What should be the content of courses in divorce mediation? In South Africa there is as yet no agreement on this point.<sup>97</sup> One's opinion on this may differ according to one's profession. Thus mediators with a social work background emphasise training "rooted in the social work disciplines".<sup>98</sup> Lawyers, on the other hand,

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95 See Walker 1991 Family Law 13.

96 Chapter 5.

97 See Van der Steege in Hoffmann Family Mediation in South Africa 127.

98 Davis 1983 Family Law 9; King and Piper How the Law thinks about Children 76.

stress knowledge of court procedure, family law, financial aspects of divorce and discovery.<sup>99</sup>

In South Africa, as in the United States, the favoured type of short training course is one that lasts approximately forty hours, but Hoffmann points out that this should be followed by advanced training.<sup>100</sup> There is no unanimity on the requisite content of the forty-hour course. If its object is to explain the theory of divorce mediation to students and also to train them in mediation skills and techniques, forty hours is an adequate time in which to do so. Many such courses, however, set out also to explain the rudiments of the necessary mental- health and legal knowledge during that period,<sup>101</sup> which is a totally unrealistic goal.<sup>102</sup> This problem could be obviated if members of the different professions, once they had been taught the basic mediation skills, engaged in interdisciplinary co-mediation only.

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99 See Knuppel 1991 Journal of Dispute Resolution 130; Neilson 1990 International Journal of Law and the Family 247-251. Loeb believes that a much wider range of legal knowledge is essential. See Loeb 1984 Family Law Quarterly 453.

100 Bryan 1992 Buffalo Law Review 499; Hoffmann Family Mediation in South Africa 132.

101 See eg the description of the programme of the Academy of Family Mediators in Hoffman Family Mediation in South Africa 134. See also Scott-Macnab Mediation in the Family Context 86.

102 See Shaffer 1988 University of Toronto Faculty of Law Review 175.

Another type of training is now offered in university law faculties<sup>103</sup>, where the subject of alternative dispute resolution is addressed at the post-graduate level.

Divorce mediation forms only a small element of such courses, however. Perhaps in the future, if the demand for divorce mediation warrants it, degree courses may be instituted which will give potential divorce mediators a qualification combining the necessary legal and mental-health knowledge. Persons with such a dual qualification could play an important role in family advocate's offices too.

## 6 STANDARDS OF PRACTICE

A matter which causes concern in South Africa, as it does elsewhere,<sup>104</sup> is that of standards of practice for mediators. In South Africa SAAM has drawn up an Ethical Code and has also laid down conditions for different categories of membership in its Constitution. In its Mission Statement it declares that one of its aims is to develop and maintain standards of practice.

In the United States standards of practice have been laid down by the Family Law Section of the American Bar Association, and the Academy of Family Mediators

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103 On the necessity of teaching mediation at university level, see Kirby 1992 Australian Dispute Resolution Journal 142. Alternative Dispute Resolution courses have been offered at law schools in the United States for over ten years, according to Rycroft. See SAAM Newsletter 15 March 1994. See also Hoffman Family Mediation in South Africa 131 et seq.; Lawton 1988 Texas Bar Journal 61-62.. Among South African universities at which alternative dispute resolution features in the law syllabus in some way, are the Universities of the Witwatersrand, Natal/ Durban, Cape Town, Pretoria and Rhodes University.

104 See Green, Long and Murawski Dissolution of Marriage 213 et seq; Shaffer 1988 University of Toronto Faculty of Law Review 198, 200; Rosenberg 1991 Arizona Law Review 467.

has laid down Membership Standards.<sup>105</sup> Not all persons who proclaim themselves to be mediators belong to professional bodies, however, so the standards of practice of those bodies cannot be imposed upon them. Various State legislatures have started to address this problem and have recently scrutinised the qualifications of mediators. Some states<sup>106</sup> have promulgated rules regulating qualifications. Absent regulatory legislation, other problems which arise are that mediators are not obliged to undergo accredited training courses,<sup>107</sup> and that persons who have themselves not undergone any mediation training are free to offer training courses.<sup>108</sup> The public therefore is at risk of exposure to so-called mediators who have no relevant qualifications and no training in mediation. If mediation aims to establish itself as a profession and hopes for credibility, this is a problem which will have to be addressed as a matter of urgency. The pattern of events in the United States teaches us that regulation by professional bodies does not afford adequate protection to the public and that legislation will be essential.<sup>109</sup>

## 7 CONCLUSIONS

For what reasons has mediation not proved to be the complete answer to the problems of divorce, nor gained the widespread acceptance its adherents had hoped for? Various reasons emerge, the first of which is that divorce mediation has been

105 See Hoffmann Family Mediation in South Africa 132.

106 See Scott-Macnab Mediation in the Family Context 85 et seq; Dutenhaver 1988 Mediation Quarterly 6.

107 See Davis 1983 Family Law 10.

108 See Dutenhaver 1988 Mediation Quarterly 9.

109 See Scott-Macnab Mediation in the Family Context 89.

insufficiently researched. There is need for research, firstly, to determine whether the theoretical basis of mediation really stands up to scrutiny. If it does, empirical research to determine whether the theory can be and is being applied in practice is also necessary.

Questions which have not yet been resolved relate to the roles of the professions in mediation. Interdisciplinary co-mediation may prove to be the answer, but is probably too expensive for the vast majority of divorcing parties.

Because the question of money is interwoven with other divorce issues, it seems logical that financial issues should be addressed in mediation. However, not all mediators have the requisite knowledge to steer financial discussions, nor can mediation ensure financial disclosure. There is nevertheless a serious lacuna in the service provided by mediation if money matters are disregarded.

Co-operation between the various professional bodies is needed to resolve the questions of professional ethics which have arisen. For the sake of the protection of the public, there should be a degree of uniformity concerning the qualifications, training, and standards of practice of mediators. Legislative intervention will probably be required to regulate these matters as well as questions of ethics.

## CHAPTER 8

### CONCLUSIONS

In this thesis the question to which an answer was sought whether alternative dispute resolution, and in particular divorce mediation, are a better means of protecting the interests of children on divorce than the traditional adversarial procedure.

Before this question could be answered, however, it was necessary to examine the concept of the "best interests". This examination revealed that the concept continues to be a vague and unsatisfactory one and that it is difficult for any one person to say with certainty what would be in the best interests of a child in a particular divorce case. Because each divorce case involves different people and different facts, guide-lines provide only a partial solution to the problem. In the sphere of custody, the "joint custody" and "primary caretaker" concepts may serve to reduce the area of judicial discretion on the child's best interests; but each of these concepts has its own disadvantages, as was discussed above. It seems that despite its drawbacks the "best interests" criterion will continued to be applied for want of anything better.

It was also necessary to consider the effects of divorce on children's lives. Much research has been done on this problem, and although the findings are sometimes divergent, it is clear that the effects are too serious to be ignored.

In response to the notoriously unsatisfactory divorce procedure, there have been two new developments in South Africa. One was the establishment of Family Advocates' Offices in terms of the Mediation in Certain Divorce Matters Act 24 of 1987, and the other was the emergence in South Africa during the 1980s of

the Divorce or Family Mediation movement. At first glance it might seem that South Africa too, like countries such as England and the United States, now has both court-linked and out-of-court or independent mediation.

What mediation is, what its theoretical basis is, and how it is practised were investigated. This investigation revealed that in the practice of divorce mediation a clear and consistent procedure has emerged; but that a sound theoretical basis for it is lacking. Some of the claimed advantages of divorce mediation, such as fairness and increased client satisfaction, have been shown to be vague; and all of the claimed advantages except that of improved communication are unproven. Certain serious disadvantages have also been found to exist. It is submitted that these difficulties place a question mark over the whole divorce mediation movement. Two basic and interwoven concepts of mediation are those of party control and of the mediator's neutrality; but it seems that neither can be fully attained in practice. Divorce mediation has also been shown to be undesirable where there is a power imbalance between the parties. No ready solution to that problem is at hand however, for power imbalances between husbands and wives will exist as long as there is gender inequality in society. Of particular concern to the lawyer researching divorce mediation is the question of the parties' access to justice, which in various respects mediation fails to provide. From this point of view the adversarial procedure, with all its faults, is still preferable. Linked with the question of access to justice is that of confidentiality. The trend in divorce mediation is towards confidentiality of proceedings, but it is submitted that closed doors cannot guarantee access to justice.

All these difficulties call for careful consideration of the claims of mediation and for further research, especially empirical research. It is submitted that divorce mediation can only survive if it can establish a sound theoretical base.

If it is to survive, certain other problems arise. One of these is the question which profession should be mediating. It seems that no one profession provides all the knowledge and skills which mediation ideally requires, particularly if the full spectrum of divorce issues including financial ones are to be canvassed. Interdisciplinary co-mediation has much to commend it but is too expensive ever to be a viable solution to the divorce problems of more than a small segment of the population. The as yet unresolved questions of the qualifications and training of mediators also require urgent attention. Since all the emphasis today is on conciliatory approaches to divorce problems, perhaps the time has come to introduce a first degree course combining some law and some psychology courses, as well as some training in negotiating skills. Those obtaining this degree might become independent mediators or might help to staff the Family Advocates' Offices and the Family Court if this were to be established.

Questions of uniformity of training courses and of standards of practice of mediators will also have to be addressed, probably by means of legislation, if mediation is to gain credence and perhaps establish itself as an independent profession.

In a previous chapter<sup>1</sup> it was discussed whether divorce mediation was better for children than the adversarial procedure. Certain features of mediation were found to be of particular benefit to children, such as its emphasis of their

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1 Chapter 6 par 7.2.

interests and its efforts to reduce conflict between the divorcing parents. It was pointed out, however, that the protection of the interests of children is not the sole aim of divorce mediation. While its advantages from the point of view of children argue strongly in its favour, they do not on their own make mediation the optimum divorce procedure. The other troublesome questions surrounding mediation still need to be addressed.

This study has revealed that the Family Advocate is not practising mediation in the generally accepted sense of the term. Nevertheless the establishment of Family Advocates' Offices provides the best solution yet devised in the quest for better protection of the interests of children on divorce. Certain reservations must be expressed, however, on matters such as inadequate funding and staffing of the Offices; the combination of too many roles in the person of the Family Advocate; and the ever-present danger, in court-linked mediation, that parties may be pressurised or coerced into agreement especially if time and staff are at a premium.

As mentioned above, mediation has certain well known disadvantages and, besides, its claims must be treated with extreme caution. In any event, private mediation is beyond the means of most people in this country. Co-mediation appears to be the best type of divorce mediation yet devised, but it is expensive, as is mediation where both parties also employ their own lawyers. If we wish to help most divorcing couples and their children, it seems we shall have to seek a court-linked solution. The best one yet devised is the "multi-door" family court. The Chief Family Advocate<sup>2</sup> has suggested that the Office of the

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2 Bosman in Hoffmann Family Mediation in South Africa.

Family Advocate represents, in embryonic form, the model of a family court<sup>3</sup> which was recommended by the Hoexter Commission. It is submitted that this model should not be forgotten simply because Offices of the Family Advocate have been established. Whereas the Family Advocate is the child's representative, at the family court the interests of all parties would receive attention.

If the recommended social component of the family court were introduced, with its separate reception, conciliation and supporting services, there would be a reception process "where family problems will be sifted and classified; where both legal advice and social counselling will be available"<sup>4</sup> and where parties could be referred for marriage counselling if it appeared that there was some chance of their being reconciled. The author considers the suggestion that problems be sifted and classified to be of the utmost importance. It is also desirable that the reception service be available to families at an early stage, even before any action has been instituted and before problems become exaggerated.

The reception process could eliminate some of the perceived problems in the Office of the Family Advocate, such as that of one official fulfilling too many roles. In this thesis it has been stressed that parties should always have access to legal advice given by qualified persons. In the reception process, such legal advice would be available to the parties, but it is to be hoped that it would not be given by the same person who might mediate their case. The availability of

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3 See Chapter 4 par 3 above.

4 Hoexter report 522.

a separate mediation process could also be explained, but not foisted on reluctant parties, for it is submitted that the concept of compulsory mediation is irreconcilable with mediation's claim of party control and infringes on the parties' right to follow the usual court procedure if they so wish. It is to be hoped that a Family Court would house, under one roof, experts from various professions who would be readily available to parties according to what was decided during the "sifting and classifying" procedure; but also that lawyers might, in the interests of justice, be present at any of the proceedings in the family court if their clients so desired.

Finally, it is submitted, although the family court is seen by the author as the optimum solution to divorce problems, in any such court the dangers, referred to in this thesis, of rigidity of procedure and of possible coercion of parties, should always be borne in mind.