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The voice of children in divorce proceedings: a critical consideration of the provisions in the Mediation in Certain Divorce Matters Act 24 of 1987 and the role of the Family Advocate in divorce proceedings. Is it not time for an overhaul of this Act?

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CHAPTER 1 : INTRODUCTION AND BACKGROUND

1.1 BACKGROUND

The divorce statistics are very high in South Africa, as a number of marriages breakdown and children become inevitably involved. In respect of persons who are going or who went through a divorce, children will be involved and will be affected by the divorce.[1] South Africa follows the adversarial system in our court actions, whereby two parties are pitted against each other, and a "winner" must emerge, and as such a divorce action is no place for children to be exposed to.

The Mediation in Certain Divorce Matters Act 24 of 1987 (hereinafter referred to as Mediation Act) was established to assist the courts and divorcing parties to reach an amicable resolution to matters pertaining to the divorce as well as the arrangements made between the parties regarding the care and access of the minor children.[2] The Mediation Act was passed as a result of the Hoexter Commission which was tasked to assist courts with ensuring that the welfare of minor children in divorce matters is adequately addressed.[3] Unfortunately, not all the recommendations made by the Hoexter Commission were contained in the Mediation Act. The recommendations made by the Hoexter Commission was first contained in the Family Court Bill 62 of 1985. Some of the provisions contained in this Bill were the creation of a "Children's Friend", an independent social agency[4], to carry out an investigation into the welfare of minor children of divorcing parties. In my opinion, the work done by the Hoexter Commission was ground-breaking, in that the views of the legal fraternity were taken into consideration, as well as consideration given to the Canadian Family Advocate concept[5]. However this Bill was rejected in totality by Parliament and a new Bill was passed, which is the Mediation Act as we know it today,[6] but the concept of the Family Advocate was retained as discussed in the Hoexter Commission report.[7] With the drafting of the second Bill, the true

[1] 'Statistics SA' available at www.statssa.gov.za (accessed 11 May 2019)
[2] B Clark 'No holy cow – Some caveats on family mediation' (1993) 56 *THRHR* pages 455 - 462.
[3] N Glasser 'Can the family advocate adequately safeguard our children's best interests?' (2002) 65 *THRHR* pages 74 – 86.
[4] Ibid at page 76.
[5] Ibid at page 76.
[6] B Clark ' No holy cow – Some caveats on family mediation' (1993) 56 *THRHR* at page 455.
[7] N Glasser 'Can the family advocate adequately safeguard our children's best interests?' (2002) 65 *THRHR* page76

essence and meaning of "mediation" was omitted, as the Family Advocate does not perform any mediation at all, but rather an evaluation of the family and who will be the better parent.[8]

The Mediation Act provides for the appointment of Family Advocates at the High Courts as well as over smaller regions and towns in the country.[9] The primary function of the Family Advocates is to ensure that the children involved in a parental divorce will be taken care of after the divorce, to decide who will be the primary caregiver and provide daily residence to the children, and to make sure the other party will have reasonable access to the minor children.

The question that arises is whether the Mediation in Certain Divorce Matters Act 24 of 1987 provides sufficiently for the participation of children in divorce proceedings, and whether this Act is still in line with the Constitution of the Republic of South Africa,[10] (hereinafter referred to as the 1996 Constitution) as well as the Children's Act 38 of 2005, and contains the values set out in the last two Acts. If one has regard to the recommendations made in the Hoexter Commission report, the rights and welfare of minor children should be properly considered by the Family Advocate, which means a full and proper investigation should be conducted for their reports to the court.[11]

The purpose of this study is accordingly to analyse whether the provisions in the Mediation in Certain Divorce Matters Act 24 of 1987 (hereinafter referred to as the Mediation Act) is adequate in having children's voices heard and ensuring sufficient child participation in divorce proceedings, with specific regard to the 1996 Constitution as well as the Children's Act 38 of 2005 (hereinafter referred to as the Children's Act). One cannot examine the Mediation Act without referring to the Family Advocate, a role created as a result of the Mediation Act. The study will examine how the Family Advocate submits reports to the courts, to consider whether child participation is adequate and if "mediation" actually took place during the compiling of their report.

1.2 SIGNIFICANCE OF THE STUDY

[8] Ibid
[9] S 2 of the Mediation in Certain Divorce Matters Act 27 of 1987.
[10] Constitution of the Republic of South Africa Act 108 of 1996 (1996 Constitution).
[11] N Glasser 'Can the family advocate adequately safeguard our children's best interests?' (2002) 65 *THRHR* page 76.

South Africa has a high occurrence of divorces. One only needs to look at the statistics kept by Statistics South Africa to see the extent of such occurrence.[12] In some divorces, children are involved, and their interests need to be protected.

However, the Mediation Act is outdated and needs to be revised to be in line with the purposes and outcomes of the Children's Act. The Mediation Act was enacted before the 1 996 Constitution of the Republic of South Africa came into operation and does not necessarily underpin the values contained therein with regard to the rights as contained in Section 28 of the 1996 Constitution, read together with the Section 12 of the United Nations Convention on the Rights of the Child. Furthermore, as stated above, the Title of the Act is very misleading, as no "mediation" actually takes place. The Family Advocate will compile a report for the divorce court with a recommendation. The report is therefore forensic and not therapeutic, as the report of the Family Advocate "involves an evaluation of the parenting abilities of the parties".[13]

The Children's Act has, to some extent, enhanced the workings of the Family Advocate's offices by including the drafting of a Parenting Plan. It states in Section 33(b)(ii) that:

> "(*aa*) a family advocate, social worker or psychologist contemplated in section 33 (5) (a) to the effect that the plan was prepared after consultation with such family advocate, social worker or psychologist;"

The Children's Act is most certainly a step in the right direction with regard to child participation. However, the Mediation Act is silent the issue of Parenting Plans. It is a "new" concept brought forward by the Children's Act. A Parenting Plan is a settlement that the divorcing parties reaches amongst each other to set out firm guidelines as to the care and contact of the minor children. This Parenting Plan is more often than not as a result of mediation between the parties and Social Workers are equipped to help parties reach such an agreement.

1.3 RESEARCH QUESTIONS

In order to achieve the purpose of this dissertation, I have formulated the following research questions on this topic:

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[12] See footnote 1 above.

[13] B Clark 'No holy cow – Some caveats on family mediation' (1993) 56 *THRHR* at page 455.

1.3.1 To what extent are the provisions of the Mediation Act concerning the participation of children in divorce proceedings adequate?

1.3.2 If one has regard to the Constitution of South Africa and the Children's Act 38 of 2005, are the provisions in the Mediation Act sufficient for child participation? How does the Family Advocate make a recommendation to court?

1.3.3 What is the position of children's participation in divorce proceedings in other jurisdictions?

1.3.4 What can be done to improve children's participation in divorce proceedings in South Africa?

1.4 LITERATURE REVIEW

A survey of the literature, more specifically articles written by scholars, on the findings of the functioning of the family advocate reveal that there are benefits of having mediation and child participation in divorces[14]. The articles mostly discuss the operational frames in other jurisdictions and the successes they have with their family court systems where mediation is used.[15]

Furthermore, the literature critically discusses the working environment of the family advocate's offices.[16] Mediation is said to be a very useful tool, however in South Africa, very little mediation is practiced,[17] and most scholars such as Prof De Jongh and A Boniface are of the opinion that mediation in family matters should be mandatory.

The literature is silent on the Mediation Act itself. No research has been done on the importance of the role of the family advocate in promoting mediation and the participation of children in divorce matters, and there is limited literature on this.

1.5 CONCEPTUAL FRAMEWORK

[14] A E Boniface, 'Resolving Disputes with Regards to Child Participation in Divorce mediation*'* (2013) 18 *Speculum Juris* at page 142.
[15] M De Jong 'Australia's family relationship centres: A possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015' (2017) *Juta Journal of South African Law* page 309.
[16] G J Van Zyl 'The family advocate 10 years later' (2000) *Obiter*.
[17] M De Jong 'An acceptable, applicable and accessible family law system for South Africa – Some suggestions concerning family court and family mediation' (2005) *TSAR* 33 – 47.

The 1996 Constitution of the Republic of South Africa clearly states that the best interest of the child in any situation or legal action regarding them is paramount.[18] The right of children to be heard is also embedded in the Children's Act, more specifically Section 10. This is in line with international instruments such as the 1989 United Nations Convention on the Rights of the Child as well as the African Charter on the Rights and Welfare of the Child. With these instruments in mind, can it be said that the family advocate sufficiently safeguards the rights of children to participate in divorce proceedings within the ambit of the Mediation Act, which created the offices of the Family Advocate?[19] The best interest of the child is paramount in any proceeding affecting them. Therefore, the Family Advocate needs to ensure that the child's needs and interests are sufficiently protected. The scope of the family advocate needs to be expanded to include actual mediation and parental training.

1.6 RESEARCH METHODOLOGY

The research methodology to be used in this study will comprise be doctrinal research and literature reviews.

The statutes which need to be referred to in my study will be the Mediation in Certain Divorce Matters Act 24 of 1987, the Children's Act 38 of 2005 and the Constitution of the Republic of South Africa Act 108 of 1996, together with references to international instruments such as the United Nation Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. In all the above instruments child participation is mentioned but for the Mediation Act. In fact, if one has regard to the Mediation Act, the word "enquiry" is used instead of "mediation".

Journal articles written on the subject will be examined together with the legislation and international instruments. The content of the articles will mainly be around the working of the family advocate and how other jurisdictions are dealing with their family law and divorce issues. No empirical study is anticipated.

The literature review will look at other jurisdictions, more specifically Australia, as this jurisdiction has the most success in family court matters. In my opinion, as mediation is the

[18] Section 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996.
[19] N Glasser 'Can the family advocate adequately safeguard our children's best interests?' (2002) 65 *THRHR* pages 74 – 86.

median used, it will inevitably entail that the children will also participate. Mediation is a more relaxed environment and not a rigid Court environment.[20]

In other jurisdictions which was considered, are closer to home and within the African context, namely Zimbabwe, Namibia and Botswana, where child participation in these jurisdictions seems to be very limited to non-existent in divorce cases.[21]

1.8 ANTICIPATED LIMITATIONS

This study will not be looking at the Divorce Act 79 of 1970 (Divorce Act), as it makes no provision to the manner in which the Family Advocate should deal with child participation in divorce proceedings. Section 6 of the Divorce Act states that:

> " (1) 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; and;
> (b) 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)."

The scope of this study is limited to the working of the Family Advocate's offices within the paradigms of the Mediation Act and that of the Children's Act, and if it affords children sufficient participation in divorce proceedings.

To discuss the Divorce Act with regards to the best interest of the child and child participation may be a scope for another study.

1.9 ETHICAL ISSUES

In that this study will mostly comprise of a desktop study and literature review, there are no anticipated ethical issues. This is not an empirical study, so no data collection from children was done. Ethical clearance was obtained by the University of Kwazulu-Natal under Protocol number 5800.

[20] M de Jong 'An acceptable, applicable and accessible family-law system for South Africa – some suggestions concerning family court and family mediation' (2015) *TSAR* at page 33.
[21] Case law and legislation of these countries.

1.10 SUMMARY

The aim of this study is to point out that there is a gap in the literature regarding the role of the Family Advocate to provide mediation for families going through divorce and to adequately provide for the participation of children in the divorce proceedings.

A discussion regarding the systems used in Australia as well as other African countries as to the use of mediation or appropriate other systems for the voice of the child to be heard, is also explored.

CHAPTER 2 : LITERATURE REVIEW

2.1 THE MEDIATION IN CERTAIN DIVORCE MATTERS ACT 24 OF 1987

2.1.1 The history of the Act

The above Act was assented to on 16 June 1987. The Act (hereinafter referred to as "the Mediation Act") was enacted as a result of the Commission of Inquiry into the Structure and Functioning of the Courts RP 78/1983, also referred to as the Hoexter Commission.[22] The enactment of this Act has promoted children's rights and was far more forward-thinking than legislation in other African countries. Taking into account the circumstances of the time when the Report was compiled,[23] the Report and the Act were far ahead of their time, with regard to the rights of minor children.

The Hoexter Commission and its Report was intended to assist the Courts in deciding on the best interest of the minor child. The Offices of the Family Advocate was created in terms of the Mediation Act to facilitate this. The functions of the Family Advocate includes monitoring, to mediate and to evaluate the parents.[24] However, the title of the Act is very misleading, as no "mediation" in the true sense of the word actually takes place.[25] It is mostly an evaluation of the abilities of the parents and making a recommendation to the court.[26]

The "mediation" by the Family Advocate could be described as:[27]

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[22] N Glasser 'Can the family advocate adequately safeguard our children's best interests*?* (2002) 65 *THRHR* pages 74 – 86.
[23] During 1983 – 1987 Was the height of the Apartheid era and human rights were greatly ignored.
[24] G J Van Zyl 'The Family Advocate 10 years later' (2000) *Obiter*.
[25] B Clark 'No holy cow – Some caveats on family mediation' (1993) 56 *THRHR*.
[26] Ibid at page 455.
[27] G J Van Zyl 'The Family Advocate 10 years later' 2000 *Obiter* page 378.

"(a) Mediation by the Family Advocate is mostly, at least to some extent, not completely voluntarily submitted to by both parties.

(b) The Family Advocate and the experts assisting him or her actively participate in the decision-making process.

(c) Mediation by the Family Advocate often involves the establishment of facts on which the parties disagree. Although cross-examination is avoided, questioning does take place.

(d) Mediation by the Family Advocate by necessary implication also involves an evaluation of the parenting abilities of the parties since the Family Advocate is duty-bound to assure the court that, whatever the agreement between the parties, that which is agreed upon will be in the best interest of the children. The Family Counsellor, or as occurs in many cases, other experts such as a psychologist, is a key figure in the evaluation process.

(e) The children, depending on their age, intellectual and emotional maturity, are participants in the mediation or evaluation process."

The practical working of the Family Advocate will be discussed next.

2.1.2 Practical application of the Act

Procedure:

Upon the issue of summons to begin the divorce action; Annexure "A" needs to be completed if there are minor children involved.[28] This Annexure "A" needs to be forwarded to the Family Advocate's offices of the region where the parties are residing, together with the Particulars of Claim in the summons. The person designated at the offices of the Family Advocate will peruse these documents and decide whether an inquiry is necessary.[29] If the parties have reached an agreement in terms of the divorce, the Family Advocate will either endorse the settlement agreement or indicate that they do not agree. The feeling was, however, that most of the Family Advocate's reports are "rubber-stamped."[30] If the Family Advocate is of the opinion that an enquiry is necessary, the parties will be given a date to attend their offices,

[28] Regulation 2 to the Mediation in Certain Divorce Matters Act 24 of 1987.
[29] Section 4(1) and (2) of the Act.
[30] N Glasser 'Can the family advocate adequately safeguard our children's best interests?' (2002) 65 *THRHR* page 80.

together with the minor children. An interview is mostly no longer that one to two hours, due to workload and available space.[31]

Shortcomings in terms of Mediation:

Even in the event of an inquiry being held, no "mediation" actually takes place. The parties will be asked questions, and the child/ren will also be interviewed if they are of a certain age and maturity. The recommendation made by the offices of the Family Advocate is often not as a result of a mutual agreement reached between the parties.[32] It is also evident that the offices of the Family Advocates are overburdened and under-resourced.[33] The reports they compile are, therefore, forensic and not therapeutic.

Reasons given for not doing mediation in the true sense of the word is that the Family Advocate has a conflict in acting as a facilitator on the one hand, and thereafter as an expert witness.[34]

2.2 LIMITATIONS: THE DIVORCE ACT 70 OF 1979

The Divorce Act 70 of 1979 (hereinafter referred to as "the Divorce Act") will not be discussed in this study, as it may be the subject for another study altogether. The same arguments raised in terms of the Mediation Act may also be raised for the Divorce Act, namely that it is outdated and does not conform with the values in the 1996 Constitution.[35]

It must, however, be mentioned that Sections 6(3) and 6(4) of the Divorce Act expressly allows the views of the minor child to be heard by the Court.[36] Given the fact that this concept of child participation is not new to our law, our courts have been very loath to have children participate in proceedings affecting them. It is only as recently as *Ex Parte van Niekerk*[37] in 2004 that the High Courts considered Section 28 of the 1996 Constitution, which states that

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[31] G J Van Zyl 'The family advocate 10 years later' (2000) *Obiter.*
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] The Constitution of the Republic of South Africa Act 108 of 1996.
[36] "(3)A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which- shall include the power 'to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent."
(4) For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties. or any one of them to pay.the costs of the representation.
[37] *Ex Parte van Niekerk and Another: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T).

children's voices need to be heard and that they need to participate in proceedings affecting them. The facts of this case, briefly, are that the Applicant's parents got divorced, and the Court did not want to take the children's views into consideration that they do not want to have contact with their father. The Centre for Child Law and Prof Ann Skelton intervened to have the minor children's views heard by the Court.[38]

2.3 CURRENT AND INTERNATIONAL LEGISLATION

One would think, that with the acceptance of the Constitution of South Africa, and with human rights pushed to the forefront, that the Mediation Act would by now have been amended to be in line with the provisions contained in the Bill of Rights and more specifically the rights of minor children.

The provisions of the 1996 Constitution, more specifically Section 28(2)provides that:

> "A child's best interests are of paramount importance in every matter concerning the child."

The Constitutional Court has, in various cases, tried to define what the "paramount"-principal entails,[39] however, that discussion does not fall within the ambit of this paper.

With the new dispensation and the 1996 Constitution, came the eye-opening world of international law and international instruments. The courts may now, in terms of Section 39(1) of the Constitution, consider international law.[40]

There are two very specific child-cantered international instruments, namely the United Nations Convention on the Rights of the Child (hereinafter referred to as CRC)[41] and the African Charter on the Rights and Welfare of the Child (hereinafter referred to as the ACRWC).[42] These two instruments need to be considered carefully with specific regard to the Mediation Act.

Article 12 of the Convention on the Rights of the Child provides that:

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[38] A Skelton and C du Toit 'Guidelines for legal representatives of children in civil matters' 2016 *Pretoria University Law Press (PULP)* in association with Legal Aid South Africa.
[39] *S v M* 2007 (12) BCLR 1312 (CC). Judge: Sachs J.
[40] 39. (1) When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.
[41] Adopted 20 November 1989 and entered into force 2 September 1990.
[42] Adopted 1 July 1990 and came into force in 1999.

> "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall, in particular, be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

Similarly, Article 4 of the ACRWC provides that:

1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

It is therefore clear from the above Articles that a child or children have the right to express their views in judicial matters concerning them, and most certainly, a divorce has a profound effect on them for the rest of their lives. It, therefore, begs the question, do the offices of the Family Advocate adequately provide for this?

The Committee on the Rights of the Child[43] compiled a General Comment on the Right of the Child to be heard. The General Comment clearly states:

> "132. The Committee urges States parties to avoid tokenistic approaches, which limit children's expression of views, or which allow children to be heard, but fail to give their views due weight. It emphasizes that adult manipulation of children, placing children in situations where they are told what they can say, or exposing children to risk of harm through participation are not ethical practices and cannot be understood as implementing article 12."[44]

[43] 1 July 2009 CRC/C/CG 12 Geneva "The Right of the Child to be heard".
[44] Page 26 of the English version.

It must once again be mentioned that compared to our immediate neighbours in Africa,[45] South Africa has made strides in trying to implement these two international instruments and the specific articles.

2.4 NEW DAWN: THE CHILDREN'S ACT

The much-anticipated Children's Act[46] which came into operation on 1 April 2010, is very much in line with the CRC and the ACRWC, and children's rights made a major leap with this legislation. The Children's Act has two very important provisions with regard to the topic under discussion.

Firstly, the Children's Act makes provision for mediation, actual mediation, and not just using of the word "mediation". This is specifically provided for in Sections 21, 33, 69, and 71.

The second important provision which has an influence on the working of the Family Advocate's offices, is that of a Parenting Plan, as contained in Section 33 and 34[47] of the

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[45] More specifically Botswana, Namibia and Zimbabwe, who will be discussed more fully in this paper under Chapter 4.

[46] Act 38 of 2005 (hereinafter referred to as "the Children's Act").

[47] **33. Contents of parenting plans.**—(1) The coholders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.
(2) If the coholders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.
(3) A parenting plan may determine any matter in connection with parental responsibilities and rights, including—
(*a*) where and with whom the child is to live;
(*b*) the maintenance of the child;
(*c*) contact between the child and—
(i) any of the parties; and
(ii) any other person; and
(*d*) the schooling and religious upbringing of the child.
(4) A parenting plan must comply with the best interests of the child standard as set out in section 7.
(5) In preparing a parenting plan as contemplated in subsection (2) the parties must seek—
(*a*) the assistance of a family advocate, social worker or psychologist; or
(*b*) mediation through a social worker or other suitably qualified person.
34. Formalities.—(1) A parenting plan—
(*a*) must be in writing and signed by the parties to the agreement; and
(*b*) subject to subsection (2), may be registered with a family advocate or made an order of court.
(2) An application by coholders contemplated in section 33 (1) for the registration of the parenting plan or for it to be made an order of court must—
(*a*) be in the prescribed format and contain the prescribed particulars; and
(*b*) be accompanied by a copy of the plan.
(3) An application by coholders contemplated in section 33 (2) for the registration of a parenting plan or for it to be made an order of court must—
(*a*) be in the prescribed format and contain the prescribed particulars; and
(*b*) be accompanied by—

Children's Act. Parties to a divorce can compile a Parenting Plan and submit the same to the Family Advocate for approval, much like an Agreement of Settlement. The provisions in the Parenting Plan, however, can be as a result of mediation by a Social Worker, or any other suitably qualified person.

The most noteworthy stipulation of the Children's Act which encourages child participation, is found in Section 10, which states:

> "Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."

The provisions in the Children's Act are much more in line with the Children's Charter as well as the African Charter. It, therefore, begs the question, do we still need the Mediation Act and its outdated provisions?

2.5 MEDIATION BENEFITS AND DRAWBACKS

There are benefits of using mediation in family law matters, rather than the adversarial system which our courts are currently using.[48] These benefits for adults are well known, however for minor children it includes:

> "The benefits include a reduction of anxiety; a better understanding of the process and an easier adjustment by the child to post-divorce conditions. Child inclusive mediation takes care of a child's emotional wellbeing after parental separation and parental relationships and responsiveness also improve as a result thereof. The inclusion of children fulfils the rights of the child but also repairs the parental relationship to a large degree and improves the emotional availability of parents to

(i) a copy of the plan; and
(ii) a statement by—
(*aa*) a family advocate, social worker or psychologist contemplated in section 33 (5) (a) to the effect that the plan was prepared after consultation with such family advocate, social worker or psychologist; or (*bb*) a social worker or other appropriate person contemplated in section 33 (5) (b) to the effect that the plan was prepared after mediation by such social worker or such person.
(4) A parenting plan registered with a family advocate may be amended or terminated by the family advocate on application by the coholders of parental responsibilities and rights who are parties to the plan.
(5) A parenting plan that was made an order of court may be amended or terminated only by an order of court on application—
(*a*) by the coholders of parental responsibilities and rights who are parties to the plan;
(*b*) by the child, acting with leave of the court; or
(*c*) in the child's interest, by any other person acting with leave of the court.
(6) Section 29 applies to an application in terms of subsection (2).

[48] M De Jong 'An acceptable, applicable and accessible family law system for South Africa – Some suggestions concerning family court and family mediation' (2005) *TSAR* 33 – 47.

children and results in agreements with which the parents and children are still happy with a year later. When a child contributes to the mediation process, it helps ensure that the agreements reflect what is best for the child. A child's perception can also be used to confirm whether the adult parties are telling the truth and can help contribute to "an atmosphere of mutual co-operation"[49]

It is therefore clear that these benefits for children in mediation and divorce should be considered if one has regard for the best interest of the child and meaningful child participation.

Very recently, the South African Law Reform Commission has also noted that mediation is beneficial and should be the preferred method in family disputes.[50]

It is even mentioned in their Executive Summary that:

> 'In the past, there has always been an assumption that the courts were best suited to decide questions of custodial rights and access to children and to decide family disputes in general. However, this assumption has come to be questioned in recent years. The limitations associated with adversarial litigation have become firmly acknowledged, while mediation as an effective dispute resolution mechanism seems to have become a preferred procedure.'[51]

This discussion paper refers to the previous paper of 2015, wherein alternative dispute resolution in family matters was brought to the fore.[52] The Family Advocate's offices currently does not have the capacity to deal with alternative dispute resolutions.[53] Other problems which was identified include:

- Reducing conflict (the negative effect of adversarial and protracted court proceedings on children);
- the limited capacity of the Office of the Family Advocate (established in terms of the Mediation in Certain Divorce Matters Act of 1987);

[49] A E Boniface 'Resolving Disputes with Regards to Child Participation in Divorce mediation' (2013) *Speculum Juris* page 143.
[50] South African Law Reform Commission Discussion June 2019 Paper 148 Project 100D 'Alternative Dispute Resolution in Family Matters'.
[51] Ibid page iv.
[52] M de Jongh 'Australia's family relationship centres: A possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015' (2017) *Juta Journal of South African Law.*
[53] South African Law Reform Commission Discussion June 2019 Paper 148 Project 100D 'Alternative Dispute Resolution in Family Matters' page 2.

 parenting education;

 hearing the voice of the child; and

 the process to be followed when allegations of child abuse are raised during divorce or separation proceedings.'

It further states that:[54]

> 'c) As a result, family cases are often highly emotional and characterised by significant financial, interpersonal and psychological stress for family members. The non-legal (emotional, interpersonal and relational) problems often fuel and complicate the legal problems. This is particularly true in high-conflict cases. While small in number, these cases take up a disproportionate volume of the resources of the justice system and have devastating effects on the children.
>
> d) Relationships are ongoing. It is the restructuring of familial relationships rather than their termination that is the central objective of the family law process. Unlike parties to other types of civil case, parties in family law cases must frequently sustain a long-term working relationship after the legal issues have been resolved. Family relationships seldom actually end; they are simply reorganised. Spouses must continue to parent while jointly navigating problems and renegotiating obligations as personal and financial circumstances change. This implies both a need for dispute resolution processes that sustain relationships and a need for post-resolution support mechanisms.'

The drawbacks on mediation are that the mediator, or legal representatives, must guard against an imbalance of the parties (where the husband wields more financial power over the wife).[55] Furthermore, if the mediator is not suitably qualified in terms of the legal framework, an unjust settlement may be agreed upon.[56] There may also be a history of domestic violence involved or child abuse. In these circumstances, mediation may not be suitable or advisable.[57] The parties to mediation must also be mindful of not 'putting the child in the middle' of the parent's dispute and cause more harm and anxiety to the child.[58]

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[54] Ibid page 15.
[55] B Clark 'No holy cow – Some caveats on family mediation' (1993) 56 *THRHR*.
[56] B Clark 'No holy cow – Some caveats on family mediation' (1993) 56 *THRHR* page 459.
[57] M de Jong 'A pragmatic look at mediation as an alternative to divorce litigation' (2010) *TSAR* 515 – 531.
[58] A E Boniface 'Resolving Disputes with Regards to Child Participation in Divorce Mediation' (2013) 18 *Speculum Juris* page 144.

Even in South Africa's diverse cultural population, mediation has been practiced on an informal basis for many years.[59]

Mediation is far more beneficial to the parties and children, in that it gives them an opportunity for their views to be heard and they are not just marginalized in the divorce process,[60] as is the case with the adversarial justice system mainly used in South African Courts.

It then begs the question, why are the offices of the Family Advocate not practicing mediation in the normal sense of the word?

CHAPTER 3: ANALYSIS OF PRESENT LEGISLATION IN SOUTH AFRICA

3.1 DISCUSSION ON THE FUNCTIONS OF THE FAMILY ADVOCATE IN THE MEDIATION ACT

As stated in Chapter 1, the Children's Act is the most advanced piece of legislature in South Africa with regard to the State's obligation to bring children's rights in line with international legislation[61]. However, with divorce matters and the procedure currently followed by the Family Advocate, we have two different sets of legislation regularizing the finalization of divorces where minor children are involved.

Firstly, the Family Advocate's offices have to act in accordance with the Mediation Act, whereby an Annexure "A" form must be completed on the issue of the divorce summons. The Family Advocate will then decide if an enquiry is needed to determine if Annexure "A" is in the best interest of the minor children. If the Family Advocate is not satisfied with the statements made in Annexure "A", they will call the parties for an enquiry.[62] The Family Advocate does not mediate between the parties, their function is to make a recommendation to the divorce court.[63] Without this recommendation or report from the Family Advocate, the divorce court will not issue a decree of divorce.[64] The recommendation to the Court is in a

[59] A E Boniface 'African-style Mediation and Western-Style Divorce and Family Mediation: Reflections for the South African Context' (2012) *Potchefstroom Electronic Law Journal.*
[60] M de Jong 'An acceptable, applicable and accessible family-law system for South Africa – some suggestions concerning a family court and family mediation' (2005) *TSAR.*
[61] Section 28 of the Constitution of the Republic of South Africa Act 108 of 1996.
[62] G J Van Zyl 'The Family Advocate 10 years later' 2000 *Obiter* at page 376.
[63] Section 4(1) of the Mediation in Certain Divorce Matters Act 24 of 1987.
[64] Sections 6(1) and 6(2) of the Divorce Act 70 of 1979 which reads as follows:

form of a report, which is filed with the Registrar of the Regional Court or any division of the High Court. In this regard, see Section 4(1)(b)[65] which reads as follows:

> 'if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him by the court.'

When the parties enter into an agreement regarding the provisions of the minor children, the Family Advocate still has to "approve" or endorse the stipulations in the agreement. If the Family Advocate is not satisfied with it, he or she will not endorse the agreement and the court will then refuse to accept the agreement.

This is where, secondly, a Parenting Plan comes into operation, and where the Family Advocate needs to take cognizance of the provisions in the Children's Act. Before the enactment of the Children's Act, a settlement between parties specifically with regard to the provisions of minor children were not referred to as a Parenting Plan. The Parenting Plan needs to comply with certain requirements as set out in Sections 33 and 34 of the Act.[66] The provisions contained in the Parenting Plan, can be drafted after mediation by a Social Worker, or any other suitably qualified person, who assisted the parties in coming to the settlement in the Parenting Plan.[67]

There is not much in terms of case law in our courts regarding the Mediation Act and work of the offices of the Family Advocate, however some of the cases found are briefly discussed hereunder.

As stated in Chapter 1, the office of the Family Advocate does not mediate due to their conflict of acting as a facilitator on the one hand, and thereafter as an expert witness.[68] This conflict was highlighted in the matter of *Van den Berg v Le Roux*[69]. In this case, the Family

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6(1) 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.
(2) For the purposes of subsection.(l) the court may cause any investigation which it' may deem necessary, to be carried out and may order any person to appear before it and may order the parties or any one of them .to pay the costs of the investigation and appearance.

[65] Of the Mediation Act.
[66] See footnote 38 above as to contents of a Parenting Plan.
[67] Section 5(a) and (b) of the Children's Act.
[68] Page 11 Chapter 1 of this dissertation.
[69] *Van den Berg v Le Roux* [2003] 3 All SA 599 (NC).

Advocate of the Northern Cape region compiled a report and interviewed the parties, whereafter she was accused of being biased and was precluded from testifying at the hearing of a subsequent application.[70]

In the matter of *Terblanche v Terblanche*[71] the Court commented on the functions and duties of the Family Advocate, stating that:

> "The Family Advocate is particularly well equipped to perform such functions and duties, having at his or her disposal a whole battery of auxiliary services from all walks of life, including family counsellors appointed in terms of the Act and who are usually qualified social workers, clinical psychologists, psychiatrists, educational authorities, ministers of religion and any number of other persons who may be cognisant of the physical and spiritual needs or problems of the children and their parents or guardians, and who may be able to render assistance to the Family Advocate in weighing up and evaluating all relevant facts and circumstances pertaining to the welfare and interests of the children concerned."[72]

It is unfortunate that the Family Advocate does not always make use of these experts that the court is referring to in the matter above. Their expertise will be of much assistance to the courts and to the children whose parents are in the midst of a divorce,

The most instructive case on participation of a minor and his wishes having been heard, is in the matter of *Soller NO v Greenberg & Another*.[73] The child in this matter was a 15-year-old boy who wanted to change a custody order, as it was referred to at that stage. The court specifically referred to Section 28(1)(h) of the Constitution, which provides that:

"Every child has the right –

(h) To have a legal practitioner assigned to the child by the state and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result."

The child's parents were divorced in February 2001. The boy wanted to vary the custody order to enable him stay with his father, who was considered a bad role-model, but nonetheless loved by the minor child. The court made a distinction between the role of the

[70] At page 606, paragraph 17.
[71] *Terblanche v Terblanche* [1992] 3 All SA 644 (W).
[72] At page 646 supra.
[73] *Soller NO v Greenberg & Another* (2004) JOL 12124 (W).

Family Advocate and that of a legal practitioner appointed for the child. The court stated on page 5 that:

> "[22] The office of Family Advocate was created in terms of the appropriately named "Mediation in Certain Divorce Matters Act". The title of this legislation comprises within its use of the word "mediate" the concepts of "negotiation" perhaps leading to a "settlement" and in so doing acting as a sort of go-between between the parties. If such attempts at moderation of disputes through discussion and counselling are unsuccessful then the Family Advocate, as required by legislation, reports to the court on the facts which were found to exist and makes recommendations based on professional experience. In so doing the Family Advocate acts as an advisor to the court and perhaps as a mediator between the family who has been investigated and the court.
>
> [23] The Family Advocate is not appointed the representative of any party to a dispute neither the mother, father nor any child. In a sense, the Family Advocate is required to be neutral in approach in order that the wishes and desires of disputing parties can be more closely examined, and the true facts and circumstances ascertained."

The question is therefore why the office of the Family Advocate is not able to mediate conflicts between divorcing parties as to the rights and access of minor children, and bringing the views of the minor children before court.

3.2 THE CHILDREN'S ACT AND ITS INFLUENCE ON MEDIATION

With the enactment of the Children's Act in 2010, the offices of the Family Advocate should take note of the provisions in the Children's Act, when dealing with divorces and other access matters. The Children's Act encourages child participation as set out in Section 10. The Children's Act furthermore makes provision for actual mediation to take place. It can be stated that the Children's Act provides a far wider scope for the Family Advocate to operate in, than the narrow confinements of the Mediation Act.

The South African Law Reform Commission is aware of the benefits of mediation as opposed to the adversarial system within family law, hence their discussion paper on alternative dispute resolution.[74] In their terms of reference, they state their goals of investigation to be:

> To develop recommendations for the further improvement of the family justice system that will –
>
> a) be orientated to the needs of all children and families;
>
> b) foster early resolution of disputes; and
>
> c) minimise family conflict.[75]

With the alternative dispute resolution forum, the court procedure is less formal and child participation will be more readily practised, and the views of children will be heard. In fact, the SALRC even commented in their report that:[76]

"The problem in South Africa is, however, that there currently is a lack of adequate alternative dispute resolution machinery for family disputes to supplement the crippled court system. The Rules Board initiative may have made some improvements, but it is once again a loose-standing ad-hoc initiative available only to a small minority. It is necessary to determine the root causes of the low levels of mediation."

Mediation is specifically provided for in Sections 21, 33, 69, and 71 of the Children's Act.[77] Clearly the legislature saw the need for proper mediation to take place, hence the inclusion of these sections. Section 33 of the Children's Act is often referred to as "the

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[74] South African Law Reform Commission Discussion June 2019 Paper 148 Project 100D 'Alternative Dispute Resolution in Family Matters'.
[75] Ibid at page 8.
[76] Ibid at page 26.
[77] Section 21(3) (Rights of unmarried fathers) provides that:
(3) (*a*) If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1) (a) or (b), the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.
(*b*) Any party to the mediation may have the outcome of the mediation reviewed by a court.
Section 69 (Pre-hearing conferences) states that:
(1) If a matter brought to or referred to a children's court is contested, the court may order that a prehearing conference be held with the parties involved in the matter in order to—
(*a*) mediate between the parties;
(*b*) settle disputes between the parties to the extent possible; and
(*c*) define the issues to be heard by the court.
Section 71 deals with lay forums and provides that:
1) The children's court may, where circumstances permit, refer a matter brought or referred to a children's court to any appropriate lay forum, including a traditional authority, in an attempt to settle the matter by way of mediation out of court.

mediation clause", which in fact gives the Family Advocate the necessary powers to attempt mediation. Section 33(5) states that:

> "In preparing a parenting plan as contemplated in subsection (2) the parties must seek—
> (*a*) the assistance of a family advocate, social worker or psychologist; or
> (*b*) mediation through a social worker or other suitably qualified person."

The Children's Act is stressing the importance of the child's right to participate in court proceedings; hence Section 69(3) provides that:

> 'The child involved in the matter may attend and may participate in the conference unless the children's court decides otherwise.'

There is no similar provision in the Mediation Act and the offices of the Family Advocate have to apply their own discretion as to whether a child will participate in the proceedings.[78] In other words, the Family Advocate will interview a child, but as to whether the child's views are actually taken into consideration when the report to court is done, is another question.[79] Factors as to whether the child is of a mature age and whether the conflict between the parties may have influenced the child, must also be considered, in having the views of the child heard. When the parties and children are interviewed, the Family Advocate or Counsellor must remain neutral at all times, so as to encourage co-operation by the parties for the purpose of finding a possible solution in the event of disputing parties.[80]

The Children's Act makes very specific reference to what must be considered to be "in the best interest of the child". This is set out in Section 7 of the Children's Act, and reads as follows:

> 'Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely:
> (*a*) the nature of the personal relationship between—
> (i) the child and the parents, or any specific parent; and
> (ii) the child and any other caregiver
> or person relevant in those circumstances;
> (*b*) the attitude of the parents, or any specific parent, towards—
> (i) the child; and

[78] G J Van Zyl 'The Family Advocate 10 years later' 2000 *Obiter* at Page 377.
[79] Ibid page 379.
[80] Ibid page 379.

(ii) the exercise of parental responsibilities and rights in respect of the child;
(*c*) the capacity of the parents, or any specific parent, or of any other caregiver or person, to provide for the needs of the child, including emotional and intellectual needs;
(*d*) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from—
(i) both or either of the parents; or
(ii) any brother or sister or other child, or any other caregiver or person, with whom the child has been living;
(*e*) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
(*f*) the need for the child—
(i) to remain in the care of his or her parent, family and extended family; and
(ii) to maintain a connection with his or her family, extended family, culture or tradition;
(*g*) the child's—
(i) age, maturity and stage of development;
(ii) gender;
(iii) background; and
(iv) any other relevant characteristics of the child;
(*h*) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
(*i*) any disability that a child may have;
(*j*) any chronic illness from which a child may suffer;
(*k*) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
(*l*) the need to protect the child from any physical or psychological harm that may be caused by—
(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment,

violence or harmful behaviour towards another person;

(*m*) any family violence involving the child or a family member of the child; and

(*n*) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.'

The "best interests" factors were listed in the case of *McCall v McCall*[81]. The "best interest" principal was developed in case law as early as the 1900, the most prominent of which is the case of *Fletcher v Fletcher*[82]. The Family Advocate has to follow the worldwide trend of moving from the "rights of parents" to the "rights of children" and the responsibility of parents towards their children.[83] It is for this reason that the factors mentioned in Section 7 above are of great importance and of relevance when dealing with children.

In terms of the Children's Act and the Magistrate's Court Act 32 of 1944, a Children's Court is established in every jurisdiction or town, therefore it is easily accessible.[84] Every town thus has a Children's Court. In contrast to this, the Family Advocate's offices are not situated in every town, they are mostly close to the High Courts and are therefore not as easily accessible to people living in rural areas. In view of this, a further strain is put on the resources of the Family Advocate to service people living in rural areas, as they have to travel to these often-remote areas to deliver their services. There may not be enough time to provide the assistance to divorcing parties and minor children by giving counselling and other expert services.

Regarding legal representation in matters affecting a child, a Children's Court may order that a child be represented by an attorney separate from his or her parents, if it is in the best interest of the child to do so and to have the child's views heard.[85] In contrast to this, at an enquiry held by the Family Advocate, no legal representation is allowed. A suitably qualified attorney, who is experienced in working with children, may bring the child's wishes to the attention of the Court.[86]

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[81] *McCall v McCall* 1994 SA (3) 201 (C).

[82] *Fletcher v Fletcher* 1948 (1) SA 130 (A).

[83] D A Louw 'Children'sperception and experience of the family advocate system' (2004) 32 *International Journal of the Sociology of Law* 17–37 at page 20.

[84] Section 42 of the Children's Act.

[85] Section 55 of the Children's Act which provides that:
(1) Where a child involved in a matter before the children's court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to Legal Aid South Africa referred to in section 2 of the Legal Aid South Africa Act, 2014.

[86] A Skelton, C du Toit 'Guidelines for legal representatives of children in civil matters' 2016 *Pretoria University Law Press (PULP)* in association with Legal Aid South Africa page 2.

3.3 WHAT CAN BE DONE TO IMPROVE CHILDREN'S PARTICIPATION IN DIVORCE PROCEEDINGS?

Traditionally, children had very limited access to court proceedings; it was held that our courts, as upper guardian of minor children, would act in the best interest of the child.[87] Children's feelings, views and opinions were therefore not fully considered. Clearly this standpoint cannot be substantiated anymore in view of the provisions of the 1996 Constitution[88] and the international instruments, such as Section 12 of the United Nations Convention on the Rights of the Child.

> In *Soller NO v Greenberg & Another*[89] referred to above, the court stated that:
> "[1] This matter concerns the custody of a fifteen-year-old boy **who, himself, seeks variation of a custody order**. The judgment deals with the appointment of a legal practitioner to represent the interests of a child in terms of the provisions of section 28 of the Constitution of the Republic of South Africa (Act 108 of 1996). A distinction is drawn between such appointment and the office of the Family Advocate. **At the heart of the application is the extent to which the views and desires of a young adult should be decisive of custodial and access issues**…." (my emphasis).

Divorce and the impact of this process has a traumatic effect on the parties and the family unit as a whole.[90] On top of the trauma, the adversarial system may make the experience more devastating. Children of divorcing parents are 'often in need of therapy as they are often emotionally compromised by the changes in their life. The children's emotional experience of divorce should be considered when a family intervention is being facilitated.'[91] This being said, it is clear that if children participate in the proceedings, understand what is going on and receive the necessary therapy[92], the impact of the divorce may be mitigated:[93]

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[87] A Skelton, C du Toit 'Guidelines for legal representatives of children in civil matters' 2016 *Pretoria University Law Press (PULP)* in association with Legal Aid South Africa, also at page 2.
[88] Section 28(2).
[89] *Soller NO v Greenberg & Another* (2004) JOL 12124 (W).
[90] T Robinson, E Ryke & Cornelia Wessels 'Professional views of mental health and legal professionals relating to the divorcing family and parenting plans' (2018) 19 *Child Abuse Research: A South African Journal* pages 14 – 26.
[91] Ibid at page 18.
[92] See also M de Jongh 'Australia's family relationship centres: A possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015' 2017 *Juta Journal of South African Law* at page 304.
[93] Ibid at page 19 and 20.

> "Parents and children with a good understanding of and that are knowledgeable about the divorce process enable more realistic expectations. Input from the divorcing family assists in compiling well represented parenting plans."

Children's participation and views should thus be included in the divorce proceedings, to ensure a more child-centred outcome (and less of the parent's own conflict)[94], and the most effective way to accomplish this is with alternative dispute resolution, which includes mediation.[95]

It has been established in the chapters above that the inquiries by the offices of the Family Advocate are mostly forensic and not therapeutic, meaning that their enquiries are more of a fact-finding expedition and not to necessarily determine what the child's views are in terms of future placement with a parent. In that the inquiries by the Family Advocate are not therapeutic, they should in fact become more child-friendly by offering some form of counselling.[96]

In the United Nations Convention on the Rights of the Child 12 General Note[97], the United Nations Committee on the Rights of the child, mentioned that:

> "The views of the child must be 'given due weight in accordance with the age and maturity of the child'. This clause refers to the capacity of the child, which has to be assessed in order to give due weight to her or his views, or to communicate to the child the way in which those views have influenced the outcome of the process. Article 12 stipulates that simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming her or his own views."

It is significant to note that the Committee specifically mentions that:[98]

> "54. The Committee's experience is that the child's right to be heard is not always taken into account by States parties. The Committee recommends that States parties ensure, through legislation, regulation and policy directives, that the child's views are solicited and considered, including decisions regarding placement in foster care or

[94] Ibid at page 24.
[95] South African Law Reform Commission Discussion June 2019 Paper 148 Project 100D 'Alternative Dispute Resolution in Family Matters'.
[96] T Robinson, E Ryke & Cornelia Wessels 'Professional views of mental health and legal professionals relating to the divorcing family and parenting plans' (2018) 19 *Child Abuse Research: A South African Journal* at page 18 – 20.
[97] CRC/C/GC/12 1 July 2009.
[98] Ibid at page 13

homes, development of care plans and their review, and visits with parents and family."

Children are entitled to legal representation in Children's Court matters, but not at the Family Advocate enquiry. Section 6(4) of the Divorce Act 70 of 1979 provides that:

> "For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation."

Section 6 of the above Act is entitled "Safeguarding of interests of dependent and minor children". Therefore an argument can be made that children should be represented independently from their parents in acrimonious divorce litigation. Not all cases will require legal representation, however the rights of children should be protected by professionals (attorneys) who are well versed in representing children, as representation of children do require special skills and an inexperienced attorney may cause more harm than good.[99] In the matter of *Soller NO v Greenberg & Another*[100] the role of the legal practitioner was described as:

> "The legal practitioner stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child. This task is not without certain inbuilt limitation. The legal practitioner does not only represent the perspective of the child concerned. The legal practitioner should also provide adult insight into those wishes and desires which have been confided and entrusted to him or her as well as apply legal knowledge and expertise to the child's perspective. The legal practitioner may provide the child with a voice but is not merely a mouthpiece."

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[99] T Robinson, E Ryke & Cornelia Wessels 'Professional views of mental health and legal professionals relating to the divorcing family and parenting plans' (2018) 19 *Child Abuse Research: A South African Journal.* See also in the matter of *Soller NO v Greenberg & Another* (2004) JOL 12124 (W) the court's discussion on removing Mr Soller from the matter at paragraph 16: "Irrespective of the result of any appeal, I do not believe that Mr Soller should be assigned to represent the interests of Kevin Greenberg in these or any other proceedings. The aforesaid judgment refers to Mr Soller as a person who has demonstrated "piratical recklessness" in his approach to important litigation, who has "aided and abetted a client to disobey a court order and commit a crime" where that client was a father experiencing problems in gaining access to his child and argued that he was not obliged to maintain this child, who is "a serial offender who habitually holds the High Court and its Judges in contempt and treats its orders in similar fashion", who "does not avail himself to disciplinary bodies", who "reacts with compulsive aggression whenever thwarted by a court . . .[revealing] a personality totally unsuited to meet the demands of the attorneys profession", who "sees conspiracies wherever he is frustrated in his own course of action". It is hardly surprising that I am not satisfied that Mr Soller could or should be considered as a representative of Kevin Greenberg in these or any other proceedings."

[100] (2004) JOL 12124 (W) at paragraph 27.

The question of whether an attorney can take instructions from a child will depend on the age and maturity of the child.[101] It will depend on whether a child is able to express themselves adequately and it is possible to have a conversation with the child, and thus to determine the child's wishes and their perception of the event of their parents going through a divorce.[102] In this regard, the wording of Article 12 of the UNCRC is instructive.[103]

CHAPTER 4: OTHER JURISDICTIONS

It is necessary to discuss how other jurisdictions deal with children's matters and what methods or legislation they use with regard to family matters, more specifically to have the voice of the child heard.

One of the jurisdictions that will be discussed is Australia, due to the historic connection the Mediation Act has with Australia, and its current legislation with the use of the Australian Family Relationship Centres.

When considering international instruments at the beginning of this study, Africa has come to the forefront. A discussion about neighbouring countries to South Africa is therefore necessary for this study. Countries such as Namibia, Zimbabwe and Botswana are discussed to give context to the development of South African law on children's rights.

This chapter is not a comparative study in the true sense of the word, but merely exploring what other jurisdictions are doing differently, or not at all, to South Africa.

4.1 AUSTRALIA

[101] A E Boniface 'Resolving Disputes with Regards to Child Participation in Divorce mediation*'* (2013) 1 *Speculum Juris* at page 132.
[102] A Skelton, C du Toit 'Guidelines for legal representatives of children in civil matters' 2016 *Pretoria University Law Press (PULP)* in association with Legal Aid South Africa.
[103] Article 12(1): 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

From the literature available on the subject, it is clear that one jurisdiction has made mediation work efficient and operational. Much has been written on the Australian family law,[104] and how they have implemented it away from the adversarial court system.[105]

There are various reasons for comparing South African family law to that of Australian family law. The Hoexter Commission also found it prudent to refer to the Australian family law system,[106] when they made their recommendations on the Mediation Act. Further reasons for comparing South African family law to that of Australia include the similarities experienced by the countries, such as the existence of indigenous or customary communities with cultural and language barriers with the Western communities. The legal systems have undergone similar developments, in moving away from a fault-based divorce systems to no-fault divorce systems.[107]

The development of Australian Family Relationship Centres is very good example of how well mediation in family matters can work. A comprehensive study in this regard was conducted by M de Jong in 2017.[108] It is worth mentioning why these centres are so successful in their application, and why it causes less trauma on the minor children involved.

The centres are an entry hub for parties wishing to proceed with a divorce, or any other family-related matter.[109] There is a group parent education session, during which parents are educated on issues such as:

> "…the value of parenting plans and cooperation; the developmental and psychological needs of children; the negative effect of children's exposure to parental conflict; the issue of children's participation in decision making about arrangements; the value and limitations of shared parenting; available sources to help with family violence and

[104] M de Jong 'Divorce mediation in Australia – valuable lessons for family law reform in South Africa' (2007) 40 *Comparative and International Law Journal of Southern Africa* , pp 280 – 305; M de Jong 'Australia's family relationship centres: A possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015' (2017) *Juta Journal of South African Law.*

[105] M de Jong 'International trends in family mediation: are we still on track?' (2008) 71 *THRHR* pages 454 - 472.

[106] M De Jong 'An acceptable, applicable and access ible family-law system for South Africa – some suggestions concerning a family court and family mediation' 2005 *TSAR.*

[107] Helga Schultz 'A legal discussion of the development of family law mediation in South African law, with comparisons drawn mainly with the Australian family law system' (unpublished LLM thesis, University of Kwazulu-Natal, 2011).

[108] M de Jong 'Australia's family relationship centres: A possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015*'* 2017 *Juta Journal of South African Law.*

[109] Ibid Page 311.

child abuse; and the pitfalls of litigation as an option for dealing with disputes concerning children."[110]

The Australian government has also noted benefits with regard to their family relationship centres, such as a reduction of applications to family courts and the use of lawyers, which in turn is cost effective on public funds.[111] It has also improved the relationships between children and parents, as well as more contact between the "non-custodial" parent.[112]

Australia further developed the Family Law Act of 1975 to include a division which is titled 'Principles for Conducting Child related Proceedings'.[113]

'In terms of this division, there are five principles for conducting child related proceedings, namely:

(a) the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings;

(b) the court is actively to direct, control and manage the conduct of the proceedings;

(c) the proceedings are to be conducted in a way that will safeguard, first, the child concerned from being subjected to, or exposed to, abuse, neglect or family violence, and secondly, the parties to the proceedings against family violence;

(d) the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child focused parenting by the parties; and

(e) the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.'

It is therefore clear that these family relationship centres, rather than court institutions, have a more significant benefit in providing for child participation in matters concerning them,[114] and the family as a whole. South African families could benefit from such family relationship centres, where emotional help and assistance could be much more beneficial than having to use a court as your first port of call for help in a divorce situation.

4.2 OTHER AFRICAN COUNTRIES

[110] Ibid Page 312.
[111] Ibid Page 314.
[112] Ibid Page 314.
[113] Ibid Page 310.
[114] Ibid Page 315.

I have considered legal systems closer to home, namely other African states directly neighbouring South Africa.

The African Charter on the Rights and Welfare of the Child was adopted by the African Union (formerly known as the Organisation of the African Union) on the 11th July 1990.[115] Thus far, 49 out of 55 African countries have ratified this instrument.[116]

The African Charter on the Rights and Welfare of the Child is a regional instrument that caters for the specific and unique African continent problems. It came about as the result of Africa feeling unrepresented at the United Nation's drafting of the CRC document.[117] The shortcomings of the Convention of the Rights of the Child were particularly noticeable in Africa in the following:

'in the areas of sexual abuse, protection of the girl child, child soldiers, child marriages and the protection against harmful traditional practices'[118]

In an African context, the extended family is recognised in the ACRWC under Article 20.[119] The South African Children's Act[120] has also incorporated this African tradition of including the extended family, even in mediation, at Section 70 and 71. There are many other examples of how the ACRWC has influenced African domestic law.[121] It is imperative that African states implement the provisions of the African Charter, to improve the lives of children.

4.2.1 Namibia

Namibia achieved independence from South Africa in 1990. As a result, in Namibia, much of South African law was mixed in with statutory law as well as customary law and constitutional law.[122]

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[115] BD Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: a zero-sum game?' (2008) 23(1) *SA Public Law* 1-29.
[116] Website of the African Committee of Experts on the Rights and Welfare of the Child, ACERWC https://www.acerwc.africa/ratifications-table/ accessed on 21 September 2020.
[117] BD Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: a zero-sum game?' (2008) 23(1) *SA Public Law* at page 6.
[118] Ibid page 5.
[119] Ibid page 25
[120] Act 38 of 2005.
[121] BD Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: a zero-sum game?' (2008) 23(1) *SA Public Law* at page 14.
[122] Julia Sloth-Nielsen, Lorenzo Wakefield and Nkatha L Murungi 'Does the Differential Criterion for Vesting Parental Rights and Responsibilities of Unmarried Parents Violate International Law? A Legislative and Social Study of Three African Countries' (2011) 55 *Journal of African Law*, No. 2, pp. 203-229.

The Namibian Parliament passed the Child Care and Protection Act 3 of 2015 on the 30th January 2019. This Act was contemplated as early as 2011.[123] In passing this law, the Namibian Government has made great strides towards having the rights of children acknowledged and protected in terms of the international instruments mentioned above.

In terms of the Child Care and Protection Act 3 of 2015 (hereinafter referred to as the Child Care Act), provision is made for the establishment of a Children's Advocate. However, this Children's Advocate does not have the same functions such as the South African Family Advocate. In terms of Section 25, the function of the Children's Advocate is described as:

> "**25.** (1) There must be a Children's Advocate in the Office of the Ombudsman, established in terms of Article 89 of the Constitution and regulated by the Ombudsman Act, 1990 (Act No. 7 of 1990), who must assist the Ombudsman in the performance of its functions relating to children by -
>
> (a) receiving and investigating complaints, from any source, including a child, concerning children who receive services under this Act or any other law or relating to services provided to children under this Act or any other law or concerning any violation of the rights of children under the Namibian Constitution or any law, and where appropriate, attempting to resolve such matters through negotiation, conciliation, mediation or other non-adversarial approaches;
>
> (b) monitoring the implementation of the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and any other international instruments relating to child protection which are binding on Namibia;
>
> (c) monitoring the implementation of this Act and any other law pertaining to children;
>
> (d) bringing proceedings in a court of competent jurisdiction as contemplated in section 5(1)(a)(ii)(dd) of the Ombudsman Act, 1990 (Act No. 7 of 1990) to further the interests of children; and
>
> (e) raising awareness throughout Namibia of the contents of this law and the protection of children generally.
>
> (2) The Council may request the Ombudsman to provide it with an annual report on the activities of the Children's Advocate contemplated in subsection (1), which report must contain -

[123] Ibid at page 221.

(a) details of the nature of any complaints received and investigations undertaken in respect of children;

(b) findings of any monitoring activities undertaken;

(c) details of any court appearances to further children's interests in terms of this Act;

(d) an overview of awareness-raising activities; and

(e) information about any other activities linked to his or her functions under this Act."

This Namibian Children's Advocate is not the same institution as the South African Family Advocate. There are thus no reports for courts on rights of access for divorcing parties, or enquiries with children done by the Namibian Children's Advocate, as the practice is in South Africa in terms of the Mediation Act. It is more of a monitoring body, where complaints may be lodged, with regard to matters relating to children.

Section 119, however, provides for parenting plans to be entered into by parties who are the co-holders of parental responsibilities and rights. Furthermore, Section 119 is significant in that it provides for the voice of the child to be heard and for mediation to take place.[124] A parenting plan in terms of Section 119 is recorded by a children's court in the area where the child is ordinarily resident, much as the provisions of the Children's Act of South Africa.[125]

It is therefore clear that Namibia has made efforts to bring their legislation and law on children's rights in line with international instruments.

4.2.2 Botswana

[124] Section 119 (4) and (5) provides that: (4) A parenting plan must -
(a) be in the prescribed form;
(b) be in writing and signed by the parties to the plan in the presence of two witnesses and must give due consideration to the views of the child in question; and
(c) be in the best interests of the child as set out in section 3.
(5) Before concluding the parenting plan the co-holders of parental responsibilities and rights in respect of a child may seek advice from a legal practitioner, social worker, traditional leader or other suitable professional or make use of mediation through a social worker or other person suitably qualified to do mediation.

[125] Section 119(7): 'A parenting plan concluded in terms of subsection (2) may be registered with the clerk of the children's court within whose area of jurisdiction the child concerned is ordinarily resident.'

Botswana has also ratified the ACRWC.[126] As with Namibia, Botswana's legal system is also mostly based on the Roman Dutch common law that prevailed in South Africa.[127] The Children's Act 2009 was promulgated on 8 June 2009 after a decade in the making.[128]

Child participation is prominently featured in the Botswana Children's Act. Child participation is contained in Section 8. It is one of the most prominent domestic legislatures in Africa to promote child participation.[129] Section 8(2) provides that:

> '*(a)* adequate information, in a manner and language that the child understands, about
> (i) the decision to be made,
> (ii) the reasons for the involvement of persons or institutions other than his or her parents, other relatives or guardian,
> (iii) the ways in which the child can participate in the decision-making process, and
> (iv) any relevant complaint or review procedures;
> *(b)* the opportunity to express the child's wishes and views freely, according to the child's age, maturity and level of understanding;
> *(c)* any assistance that is necessary for the child to express those wishes and views;
> *(d)* adequate information regarding how the child's wishes and views will **be** taken into account;
> *(e)* adequate information about the decision made and a full explanation of the reasons for the decision; and
> (f) an opportunity to respond to the decision made.'

As with Namibia, there is no body such as the South African Family Advocate. Mention is made in Section 35 of a Botswana National Children's Council. The function of this Council is set out in the Third Schedule of the Botswana Children's Act, which is mostly for the appointment and monitoring of ministerial functions relating to children. It is not nearly as comprehensive as the Namibian Children's Advocate or Ombudsman as discussed above.

4.2.3 Zimbabwe

Zimbabwe ratified the ACRWC on the 19th January 1992. Zimbabwe does not have an institution such as the Family Advocate, but civil society took matters in their own hands and

[126] Website of the African Committee of Experts on the Rights and Welfare of the Child, ACERWC https://www.acerwc.africa/ratifications-table/ accessed on 21 September 2020
[127] Julia Sloth-Neilsen 'A new children's law in Botswana: reshaping family relations for the twenty-first century' (2012) 27 *The International Survey of Family Law* page 28.
[128] Ibid page 27.
[129] Ibid page 38.

created the "Justice for Children Trust".[130] The Zimbabwean courts will refer matters to this Trust to compile a report.[131] However since it is a Non-governmental institution, the Courts are not bound to refer cases to them.

Zimbabwe adopted the Children's Act (Chapter 5:06) in 2001.[132] Provision is made for the establishments of Children's Courts in terms of Section 3 of the Act. However, enquiries may be held in the absence of the child as per Section 19 of the Act. This may severely side-line the child's participation in matters affecting them.[133]

4.3 Conclusion

Compared to these African states, South Africa is more advanced in having the voices of children heard in matters affecting them. South Africa is unique in having the Mediation Act and the offices of the Family Advocate. However, despite having these advances, participation of children in divorce matters could be improved.

CHAPTER 5 : CONCLUSION

5.1 INTRODUCTION

This chapter will discuss the findings I have uncovered with regard to the impact of divorce on families and my assertion that mediation may alleviate some of the trauma which families, and especially children, may go through.

Over the years the rights of children have been recognised internationally and domestically.[134] South Africa has, compared to its African counterparts,[135] made great strides to protect the rights of children.[136] This does not mean that the South African legal system should be complacent and accept the *status quo*. There is a lacuna in terms of the rights of children to have their voices heard, more especially during divorce proceedings.

[130] Founded in 2002 see http://www.hrforumzim.org/ accessed 19 April 2020.
[131] *R N Dangarembizi v M Hunda High Court of Zimbabwe Harare* Case no. 447/2018.
[132] B Bhaiseni 'Zimbabwe Children's Act alignment with international and domestic legal instruments: unravelling the gaps' (2016) 6 *African Journal of Social Work*.
[133] Ibid page 5.
[134] In terms of the UNCRC and the African Charter and Section 28(2) of the Constitution of South Africa.
[135] Discussions on countries such as Namibia, Botswana and Zimbabwe in Chapter 4 above.
[136] Section 28 of the Constitution.

5.2 CONTRIBUTIONS OF THIS STUDY

This paper has specifically discussed the Mediation Act 24 of 1987 and the circumstances surrounding its development. The impact the 1996 Constitution[137] had on children's rights was also discussed. The 1996 Constitution paved the way for international law to be considered.[138]

What is of more profound importance is the work the Family Advocate does in assisting our courts to make an order regarding divorcing parents and the arrangements for the minor children. The procedure to be followed by the family advocate was discussed in detail in Chapter 4.

The legal position in this regard which pertains in other jurisdictions was also discussed. A more in-depth discussion was given on the operation of Australia's family courts, followed by other African countries such as Namibia, Botswana and Zimbabwe, which are closer to home. However the operation of the law in these African countries did not give much more insight into the problem, as they do not have institutions such as the Family Advocate.

5.3 RECOMMENDATIONS

Divorce has a profound impact on people's lives, as well as that of minor children.[139] The impact of a divorce on minor children should be minimized at all costs, so as to not cause them any further trauma. The recommended way to try and minimize this impact is for the children to have the necessary therapy and to be taught the necessary coping skills to deal with all the trauma and difficulties of a separation of the parents[140], following a divorce or dissolution of a civil union.[141]

A court is not the ideal place for a child to be, neither should it be. It is thus the duty of the Family Advocate to convey to the court that the children born of the parties' marriage in a divorce, are adequately taken care of and that the necessary arrangements are in place for

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[137] The Constitution of the Republic of South Africa Act 108 of 1996.
[138] Section 233 of the Constitution of the Republic of South Africa Act 108 of 1996.
[139] T Robinson, E Ryke & Cornelia Wessels 'Professional views of mental health and legal professionals relating to the divorcing family and parenting plan' (2018) 19 *Child Abuse Research: A South African Journal* at pages 21.
[140] A E Boniface 'Resolving Disputes with Regards to Child Participation in Divorce mediation' (2013) 18 *Speculum Juris* at page 143.
[141] In terms of the Civil Union Act 17 of 2006.

their well-being. A child should be made to feel comfortable and secure with their living arrangements.[142] The way to achieve this, is to have a properly trained person speak to children and to assure them that the court and the parties have their best interest at heart, and that they understand the process of the divorce.[143]

On evaluating the work of the Family Advocate, with specific regard to mediation, it is sad to note that:

> 'counselling is not part of our functions and therefore parties should be referred to proper institutions and not the Family Advocate, if they have a need for counselling. The functions of mediation and evaluation should ideally be separated so that the focus can be correctly placed. To expect parties to participate in a mediation attempt, knowing quite well that the facts and information provided will later be used as part of the evaluation process, should the mediation attempt fail, militates against the idea of mediation.'[144]

The reason why the above is 'sad', is that a more therapeutic approach is necessary to mitigate the trauma of a divorce on children and to provide the necessary counselling. The work of the Family Advocate could be improved by a more child-focussed approach which should include actual mediation and training for parents on how to deal with the fallout of a divorce, such as is provided by the Australians Family Relationship Centres which provide a screening service on first intake, advising parties with regard to available resources and education on how to help children through the divorce, and where they are advised that mediation, if suitable, is mandatory.[145] Mediation and alternative dispute resolution should be the first port of call for parties in family matters, not the traditional winner takes all approach as perceived by the adversarial system.[146]

It is submitted that the Mediation Act should be more in line with the 1996 Constitution and the international instruments, in providing adequate opportunity to have children's voices heard during a divorce.[147] The Family Advocate can play a vital role in family dispute

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[142] T Robinson, E Ryke & Cornelia Wessels 'Professional views of mental health and legal professionals relating to the divorcing family and parenting plans' (2018) 19 *Child Abuse Research: A South African Journal* at pages 18 – 20.
[143] Ibid.
[144] G J Van Zyl 'The Family Advocate 10 years later' 2000 *Obiter* at page 388.
[145] M de Jongh 'Australia's family relationship centres: A possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015' 2017 *Juta Journal of South African Law* at page 311.
[146] Ibid at page 299; see also Robinson T, E Ryke & Cornelia Wessels 'Professional views of mental health and legal professionals relating to the divorcing family and parenting plans' (2018) 19 *Child Abuse Research: A South African Journal* at pages 18 – 20.
[147] Section 28(2) of the Constitution of South Africa as well as General Note 12 of the UNCRC.

resolution, as stated in the South African Law Reform Commission Discussion June 2019 Paper 148 Project 100D 'Alternative Dispute Resolution in Family Matters'.[148] The report noted the important role of the Family Advocate and further stated that:

> "The conflicting role of the Family Advocate was considered in Issue Paper 31[149] and the following responses were received:
>
> i) The Family Advocate should play a supervisory or mentoring role, particularly in outlying areas.
>
> ii)The Family Advocates may also mediate matters, but the mediator must then be precluded from continuing to act in an enquiry. An important aspect of the mediation guidelines would be that no one can act in multiple, sequential roles. Family advocates may indeed mediate, but it does cause a conflict of interests with their other roles. Both the mediatory and adversarial role of the Family Advocate should be retained.
>
> iii) Should suitably qualified and registered mediators be involved in a matter, the Family Advocate should defer to such mediator and act in a strictly supervisory role.
>
> iv) Currently presiding officers in the Children's Court in many regions prefer to refer matters to social workers of NPO or NGO child protection organisations rather than the Office of the Family Advocate. The reasons given are that cases can be more speedily dealt with and a better quality of report provided by an agency with known credentials in the field of child protection.'

It is clear from this report that the South African Law Reform Commission has noted the value of mediation and in the recommendations[150] that the Family Advocate should play a more active role in mediation, rather than just to provide an evaluation.

Given the above factors mentioned, it is my submissions and final recommendations that:

- The offices of the Family Advocate employ services of accredited mediators;
- Children who are of a sufficiently mature age and understanding be allowed to participate in such mediation sessions;
- Where necessary, children receive counselling to help them cope with the trauma of their parents divorcing;

[148] At page 34.
[149] South African Law Reform Commission *Family dispute resolution: Care of and contact with children* Project 100D Issue Paper 31 December 2015.
[150] South African Law Reform Commission Discussion June 2019 Paper 148 Project 100D 'Alternative Dispute Resolution in Family Matters'

- The Family Advocate should, in achieving the above goals, make more use of Social Workers to assist divorcing families.

5.4 SUMMARY

This study suggests that if the Mediation Act and the Offices of the Family Advocate are to be appropriate and adequate in their operation they should ensure that the voice of the child is heard during divorce proceedings in accordance with legislation, the 1996 Constitution and the UNCRC[151] and the ACRWC. Child participation is internationally recognised in international instruments, which has been fully discussed. The current legislation in South Africa was discussed. There are three different statutes dealing with children during divorce, namely the Mediation Act, the Divorce Act and the Children's Act. None of these pieces of legislation is coherent in regard to child participation during divorce, although the Children's Act is far more advanced and in line with international legislation.[152]

There is also a dearth of literature on the Mediation Act itself, however, much has been written on the benefits and drawbacks of mediation in divorce matters.[153] Mediation is a tool which is used with moderate success in Australia[154].

The Mediation Act and by extension the Family Advocate could play a more vital and focussed role in family dispute resolution, as contemplated by the South African Law Commission and their reports[155]. The Family Advocate should provide a more holistic service to the divorcing family, such as providing training to parents and referring traumatised children for counselling, in much the same way as the Australian system.[156] The Family Advocate should move away from the mere provision of a report for the court as to which parent is better suited to have care and custody of minor children. This does not provide the necessary help

[151] Section 28 of the Constitution of South Africa and Article 12 of the United Nations Convention on the Rights of the Child.
[152] Such as the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.
[153] A E Boniface 'Resolving Disputes with Regards to Child Participation in Divorce mediation*'* (2013) 1 *Speculum Juris* pages 130 -147..
[154] M de Jongh 'Australia's family relationship centres: A possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015' 2017 *Juta Journal of South African Law.*
[155] South African Law Reform Commission's Issue Paper 31 of 2015 and the recent [155] South African Law Reform Commission Discussion June 2019 Paper 148 Project 100D 'Alternative Dispute Resolution in Family Matters'.
[156] M de Jongh 'Australia's family relationship centres: A possible solution to creating an accessible and integrated family law system as envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015' 2017 *Juta Journal of South African Law.*

and support a divorcing family needs and is not in accordance with international requirements for the children of divorce.

It is unfortunately true that the offices of the Family Advocates are severely under-resourced and that there may not be sufficient time to do any mediation work, as they are already under-staffed[157]. However, the benefits of mediation to the divorcing family as a whole should be taken into consideration in improving the South African family law. The recommendations made by the South African Law Commission and their reports is a clear indication that perhaps in the future mediation will become mandatory.

[157] N Glasser 'Can the family advocate adequately safeguard our children's best interests?' (2002) 65 *THRHR* pages 82. Also see G J Van Zyl 'The family advocate 10 years later' 2000 *Obiter* at page 375.

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