

***PERSPECTIVE OF THE OFFICE OF THE
FAMILY ADVOCATE***

MEDIATION IN THE OFFICE OF THE FAMILY ADVOCATE

IMPACTING LEGISLATION

The statutory mandate of the Family Advocate is the Mediation in Certain Divorce Matters Act 24 of 1987. The term mediation is only commented on in the long title of the Act.

Further impacting legislation, in which mediation is used by the Office of the Family Advocate:-

- The Recognition of Customary Marriages Act 120 of 1998;
- Judicial Second Amendment Act 55 of 2003;
- Children's Act 38 of 2008;
- Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996.

MEDIATION IN THE OFFICE OF THE FAMILY ADVOCATE

The Divorce in Certain Mediations Act largely underwrites the view that mediation relating to the minor child's best interests in Family Law in SA was approached in terms of this Act in a very insular fashion – it took place between a mother and father.

The Children's Act 39/2005 turned that notion on its ear and mediation processes became legislated and was consistent with an Africanized value system in that it was not limited to a mother and father but also included significant others. This approach has given significant consideration to how children in approximately 99% of households are raised.

Process of Mediation

- **A marked distinction in mediations of the Family Advocate is that the Family Advocate mediates on what would be in the best interests of the child , not necessarily both parties;**
- The process of mediation currently incorporates the spirit of “Ubuntu” - for lack of the correct description simply put “humanity to others or I am (who I am) because of you”;

Trends

- The Family Advocate has a fair degree of success in Section 21 and Section 33 applications – parental rights and responsibilities or parenting plans;
- The Family Advocate will successfully mediate matters with the parties and the mediation agreement will be scuppered by litigation/trigger happy attorneys;
- Consent papers contain “facilitation clauses” for parties future challenges;
- It should be said that such clauses should consider the long term impact on parenting:-
 - * Does it induce less conflict in higher conflictual matters?
 - * Does it also disempower future direct communication between parties?
 - * Does it create a dependency on a facilitator for communication?
- Parties believe that the mediation process can be extended on a daily basis to resolve routine communication challenges that the parties experience;
- The Family Advocate’s report will recommend what the parties have successfully mediated on and it will include clauses such as ‘if the parties experience further challenges in enforcing the agreement/court order a facilitator/or a mediator should be appointed;

- Incorrect perceptions of parents about parenting and mediation, unrealistic expectations of parents – the intensive degree of control they want to exercise in all situations;
- The view that only one parent can parent in the child's best interest and the other parent should follow;
- Lack of insight into co-parenting especially where co-parenting has not been practiced, once parents have been provided with sufficient information on how they are able to cope with conflict they reach a point of agreement sooner;
- In matters that are conflictual parents want the child's opinion to prevail if they believe it supports their position;
- Children who participate in mediation provided they are old enough “feel safe” in the mediation often provide the break through needed in mediation.

Challenges:

- This approach may not be cost effective and create a process for the financially empowered to benefit as opposed to those who are not financially empowered;
- The absence of regulated tariffs for mediation create an open field where even the most inexperienced mediator can command an “elastic fee”;
- Mediators or mediation bodies nationally are unable to reach agreement on accreditation levels and fees with each province/body/person supporting the view that “to each his own”;
- The benefits of mediation in SA is removed from the populist term of ‘Ubuntu ‘ and literally becomes very difficult for the indigent to access as a result of its costs.

COURT ANNEXED MEDIATION

- There is general acceptance that Court Annexed Mediation will not usurp Family Advocate's legislative functions/role. The advisory committee would like to know from the Family Advocate how they could add value to the process.

HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

MALTA PROCESS

“The Malta Process, developed within the framework of the Hague Conference on Private International Law, promotes co-operation with certain countries of Islamic legal tradition for the resolution of complex transfrontier family conflicts, notably the issues of protection of contact rights between parents and children, and the issues of parental child abduction. ”

*Jacques Barrot, Vice-Chair of the European Commission
(Union pour la Méditerranée - Nice, France, 28 June 2008)*

The Malta Process aims to encourage dialogue between experts (especially judges) from countries which are parties to the *Hague Child Abduction Convention* and to the *Hague Child Protection Convention*, and **MORE THAN 80 EXPERTS GATHERED IN MALTA TO DISCUSS CROSS-FRONTIER CHILD PROTECTION** countries that are not parties to these Conventions and whose legal systems are influenced by or based upon Shariah law.

- To promote the development of mediation structures to help resolve cross-border family disputes concerning custody, of or contact with, children, including cases of unilateral removal of a child to another State, where the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and co-operation in respect of Parental Responsibility and measures for the Protection of Children* do not apply.
- The information on mediation services in international family law should include, first of all, list of mediators or mediation organisations providing such services.
- The lists should contain information on the mediator's training, language skills and experience as well as the contact details.
- The Central Contact Point should furthermore facilitate information on costs of mediation, which should include mediation fees as well as other connected costs.

- In addition the Central Contact Point should make information available on the mediation process itself, *i.e.* the mediation models, used / available, how mediation is conducted and what topics may be covered in mediation.
- The information should be as detailed as possible; information on the availability of co-mediation, as well as that of specific forms of co-mediation, such as bi-national mediation, should be included.

PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES IN THE CONTEXT OF THE MALTA PROCESS

Characteristics of Mediators / Mediation Organisations identified by Central Contact Points

The following are among the characteristics the Central Contact Point should take into account when identifying and listing international family mediators or mediation organisations:

- A professional approach to and suitable training in family mediation (including international family mediation);
- Significant experience in cross-cultural international family disputes;
- Knowledge and understanding of relevant international and regional legal instruments;
- Access to a relevant network of contacts (both domestic and international);
- Knowledge of various legal systems and how mediated agreements can be made enforceable or binding in the relevant jurisdictions;

- Access to administrative and professional support;
- A structured and professional approach to administration, record keeping, and evaluation of services;
- Access to the relevant resources (material / communications, etc) in the context of international family mediation;
- The mediation service is legally recognized by the State in which it operates, *i.e.* if there is such a system;
- Language competency.

It is recognized that, in States where the development of international mediation services is at an early stage, many of the characteristics listed above are aspirational and cannot, at this point, be realistically insisted upon.

THANK YOU

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