RESEARCH ARTICLE

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AN EVALUATION OF MEDIATION IN HIGH-CONFLICT SITUATIONS: A REFLECTION ON MEDIATING PARENTING PLANS

1. INTRODUCTION

Conflict occurs because people are different.[1] Human beings have different habits, personalities, wants, needs, and aspirations.[2] This difference causes conflict. Thus, conflict is everywhere and inevitable, and it exists within the family unit.[3] For example, issues pertaining to child maintenance, parental responsibilities and rights, domestic violence and divorce, to name a few, give rise to conflict. High-conflict,[4] on the other hand, is viewed differently in the sense that the conflict has escalated to such an extent that greater intervention is required, in order to resolve the dispute.[5]

1 Patelia & Chicktay 2015:2.
2 Patelia & Chicktay 2015:2-3.
3 Moore 2014:3.
4 In terms of the 2021 Oklahoma Statutes Title 43. Marriage and Family §43-120.2, high-conflict has been given a special definition. It is defined as any action for the dissolution of marriage, legal separation, paternity or guardianship in which minor children are involved and the parties demonstrate a pattern of ongoing litigation, anger and distrust, verbal abuse, physical aggression or threats of physical aggression, difficulty in communicating about and cooperating in the case of their children, or conditions that, in the discretion of the court, warrant the appointment of a parenting coordinator.
5 The following aspects are considered to be high-conflict:
- either of the parties has a criminal conviction for (or has committed or is alleged to have committed) a sexual offence or an act of domestic violence;
- child-welfare agencies have become involved in the dispute;
- several or frequent changes in lawyers have occurred;
- issues related to the court proceedings have gone to court several times or frequently;
- the case has been before the courts for a long time without an adequate resolution;

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However, the focus should not be on the conflict, but rather on how the conflict can be resolved. Needless to say, the most predominant way of resolving conflict, generally, is by way of litigation.[6] Litigation is a dispute-resolution process.[7] Notwithstanding litigation's negative connotation,[8] many people continue to opt for this process, in order to resolve their disputes.[9] This should not be the case if other, more suitable, dispute-resolution processes exist. A more suitable process should rather be used to resolve the specific dispute. One may argue that people may not be aware that a more suitable process exists and that they are aware of the alternative processes. However, they do not understand the process sufficiently, in order to use the process.

This article aims to explore family mediation under alternative dispute resolution in South Africa. This article also evaluates whether mediation has the potential or power to resolve high-conflict cases by reflecting on my experience as a family law mediator in mediating parenting plans.

2. MEDIATION AS A DISPUTE-RESOLUTION PROCESS

Even though mediation is not currently the default method of resolving disputes, it has been around for many decades in South Africa.[10] Mediation was commonly practised in traditional African communities, where there was a breach of customary law.[11] Instead of sanctions, corrective mechanisms were employed to resolve the dispute.[12] However, colonialism impacted on the manner in which conflict was and still is resolved in South Africa.[13] Colonialism disturbed this tradition, as it promoted adjudication over consensual dispute-resolution processes.[14] Consequently, litigation and arbitration became the default method of resolving disputes in South Africa.[15]

- there is a large amount of collected affidavit material related to the divorce proceeding, and
- there is repeated conflict about when a parent should have access to the child.

In *TC v SC* 2018 4 SA 530 (WCC):par. 3, a high-conflict parent is described as a person who manifests all-or-nothing thinking, inflexibility, unwillingness to compromise, and a tendency to accuse and blame.

6 De Jong 2017(b):298.

7 De Jong 2017(b):298. Litigation is generally "too lengthy, too formal and too intricate" (De Jong 2010:515).

8 PwC "Litigation can be inefficient and expensive. Why litigate?", https://www.pwc.com/gx/en/services/forensics/dispute-services/litigation.html (accessed on 19 April 2023).

9 De Jong 2005(a):95.

10 Heaton 2014:582.

11 Brand *et al.* 2016:1.

12 Soyapi 2014:1441-1469.

13 Brand *et al.* 2016:2.

14 Brand *et al.* 2016:2.

15 Brand *et al.* 2016:2.

Recently, there has been a shift from adjudication to more amicable dispute-resolution processes. For example, Rule 41A of the Uniform Rules of Court (Rule 41A) came into effect on 9 March 2020.[16] This rule introduces mediation as a process prior to pursuing litigation. Therefore, before initiating an action, application, or an urgent application, a party must notify the opposition, providing them with an opportunity to agree to the referral of the matter to mediation or they may refuse mediation, providing sound reasons.[17] In *Koetsioe and Others v Minister of Defence and Military Veterans and Others*, the court held that Rule 41A suggests that a party should fervently consider mediation prior to giving notice in terms of the said rule.[18]

Another example is the recently amended mediation rules in the Magistrates Courts that came into effect on 9 June 2023.[19] The mediation rules states that "in every new action or application, the plaintiff or applicant shall … serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation".[20] The new mediation rules are intended to give the parties to litigation the option of submitting the issue to mediation, either voluntarily or in response to a court enquiry.[21] These new Magistrates Court mediation rules are in line with Rule 41A which is applicable in the High Court.

Within the family law arena, the South African Law Reform Commission (SALRC) is seeking to overhaul the manner in which family-related disputes are resolved.[22] The SALRC is thus seeking to introduce the Family Dispute Resolution Bill. It is hoped that the Bill will make family mediation compulsory. This Bill will be discussed in more detail later in this article.

It is thus evident that there is statutory support for the use of mediation to resolve selected disputes, as legislation is being developed to advance the use of mediation as a first resort.

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16 GNR48 of 12 January 1965: Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (*Government Gazette* No. 999), rule 41A.

17 GNR48 of 12 January 1965: Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (*Government Gazette* No. 999), rule 41A (2) and (3).

18 Koetsioe and Others v Minister of Defence and Military Veterans and Others [2021] ZAGPPHC 203 (6 April 2021):par. 6.2.

19 GNR3371 of 5 May 2023: *Rules Board for Court of Law Act* 107/1985: Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa (*Government Gazette* No. 48518), rules 70-79.

20 GNR3371 of 5 May 2023: *Rules Board for Court of Law Act* 107/1985: Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa (*Government Gazette* No. 48518), rule 72(1).

21 GNR3371 of 5 May 2023: *Rules Board for Court of Law Act* 107/1985: Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa (*Government Gazette* No. 48518), rules 72 and 73.

22 South African Law Reform Commission "Discussion Paper 148 (Project 100D) Alternative Dispute Resolution in Family Matters", https://www.justice.gov.za/salrc/dpapers/dp148-prj100D-ADR-FamilyMatters-Nov2019.pdf (accessed on 28 February 2023).

2.1 Defining the mediation process

Mediation is a dispute-resolution process where a third party assists the disputing parties to amicably resolve their dispute, which results in a mutually acceptable outcome.[23] Mediation is also defined as facilitated negotiation, as the mediator assists the parties in negotiating a settlement.[24] The goal of mediation is thus consensus-seeking between the disputing parties.[25]

Family mediation is more specifically described as:

> a process in which the mediator, an impartial third party who has no decision-making power, facilitates the negotiations between separating parties with the object of getting them back on speaking terms and helping them to reach a mutually satisfactory settlement agreement that recognises the needs and rights of all family members.[26]

Family mediation has also been described as:

> a process in which those involved in family breakdown, whether or not they are a couple or other family members, appoint an impartial third person to assist them to communicate better with one another and reach their own agreed and informed decisions concerning some, or all, of the issues relating to separation, divorce, children, finance or property by negotiation.[27]

Consequently, family law or family matters is a unique area to mediate, as it deals with high-conflict and sentimental issues and the parties are usually in an ongoing relationship.[28]

There is a distinct way in which family mediation is conducted. Generally, the mediator meets with the parties in joint and private meetings (caucus).[29] In family mediation, the mediator is more inclined to have the parties in the same room for the duration of the mediation, as the mediator assists the parties to enhance their communication.[30] Accordingly, the mediator seldom has private meetings with the parties. In commercial mediation, parties meet in a joint session to hear the mediator's opening statement. The parties are then afforded an opportunity to present their opening statement, whereafter they break into private sessions with the mediator.[31]

23 De Jong 2005(a):96.
24 Boniface 2015:398.
25 De Jong 2010:517, 519.
26 De Jong 2010:514.
27 "The UK's Family Mediation Council: Code of Practice for family mediators, 2016", https://www.familymediationcouncil.org.uk/us/code-practice/definitions/ (accessed on 1 March 2023).
28 Heaton 2014:577.
29 Moore 2014:490-498.
30 O'Leary 2014:24-25.
31 Brand *et al.* 2016:34-43.

2.2 The key features of a mediation process

Mediation has certain key features. First, it is generally a voluntary process,[32] where mediation is initiated by the parties who would like to mediate their dispute. This is done through private agreements to mediate a dispute and is known as private mediation.[33] In private mediation, parties should not be forced to mediate; instead, they should elect the process for themselves. Hence, mediators even convey to the parties that they can end the mediation at any time.

In comparison, mediation necessitated by legislation is known as statutory mediation,[34] which occurs within the framework of legislation. The referral to mediation is usually voluntary, although, in some cases, it is compulsory.[35] An example of compulsory statutory mediation is in terms of the *Children's Act,*[36] where sec. 33(5) stipulates that "in preparing a parenting plan … the parties must seek mediation through a social worker or other suitably qualified person".[37] An example of voluntary statutory mediation is in terms of the *Companies Act*.[38] The *Companies Act* makes provision for voluntary mediation; in other words, a person may refer a corporate dispute to an accredited entity for mediation other than filing a complaint with the Companies Tribunal.[39]

Secondly, a mediator should be impartial and neutral.[40] Impartiality refers to the attitude of the mediator. The mediator should be unbiased and not favour or take any party's side. Neutrality refers to the behaviour or relationship between the mediator and the parties. The mediator should not seek to gain any benefit from one of the parties as compensation for favours in conducting the mediation. In other words, the mediator should have no stake in the outcome, except receiving his or her fees.[41]

Thirdly, the mediation process is flexible and informal.[42] The mediator decides on the process to be followed; he or she manages the process. There are no rules of evidence or discovery of documents. The mediator should, therefore, create a relaxing environment for the parties to have a conversation.

32 Heaton 2014:583; O'Leary 2014:52.
33 Patelia & Chicktay 2015:25.
34 O'Leary 2014:52.
35 Heaton 2014:583.
36 Children's Act 38/2005.
37 Heaton 2014:583. In this instance, voluntariness of the mediation process does not refer to voluntary participation in the process, but rather to reaching an agreement voluntarily. This dictates that parties can be forced to participate, but they cannot be forced to reach an agreement within the mediation.
38 Companies Act 71/2008.
39 Companies Act:sec. 166.
40 De Jong 2010:518.
41 Boniface 2015:398.
42 De Jong 2010:519-520.

Fourthly, the mediation process and the discussions in the joint and private meetings are confidential and without prejudice.[43] Confidentiality and privacy dictate that "the mediation is conducted behind closed doors; outsiders can only observe proceedings with the parties' consent; no recording and transcript is normally kept; there is no external publicity on what transpired at the mediation; and any disclosure of the terms of settlement is a matter which can be negotiated".[44] This is an attractive feature for many. This is the reason why this process is chosen above litigation because it is out of the public eye. Moreover, the confidentiality principle has the effect that a court cannot review the conduct of the parties in the mediation process.[45] However, public policy and constitutional principles permit the courts to lift the veil of confidentiality where the legitimacy of the settlement agreement is contested on the basis of duress or fraud.[46] Since a settlement agreement is a type of contract, it should comply with the requirements for a valid contract.[47]

Finally, the parties determine the outcome,[48] that is, whether to settle and on what terms they would like to settle. The mediator merely creates an opportunity for the parties to create a mutually acceptable agreement. Therefore, the mediator has no decision-making authority.[49]

2.3 Types of mediation interventions within the context of family law

There are several models or schools of mediation.[50] Facilitative, evaluative, and therapeutic styles are often employed within the context of family mediation.[51] Considering the type of dispute (for example divorce, parental responsibilities and rights, domestic violence) and the objectives of the parties, the mediator will determine which model would be most suitable to use in the mediation process. These models can be used as a stand-alone or the mediator could use elements of the various models and create a hybrid mediation process.[52]

43 De Jong 2010:519, 520. The information disclosed and discussions cannot be used in any subsequent arbitration and judicial proceedings relating to the same dispute. Whatever offer, concession or admission that is made during mediation may not be used later in court or in another dispute-resolution process.
44 Boulle & Nesic 2001:41-42.
45 De Jong 2010:520.
46 Rycroft 2013:200-201.
47 Rycroft 2013:189-190.
48 De Jong 2010:519.
49 Boniface 2015:398.
50 Heaton 2014:591. Moore (2014:46-59) divides the schools into process-focused schools (facilitative mediation); relationship-focused schools (therapeutic, transformative, narrative, restorative, and victim-offender mediation); substantively focused schools (advisory, evaluative, customary or religious based mediation, and dispute resolution).
51 Heaton 2014:591.
52 Although Bush and Folger strictly aver that transformative mediation should not be merged with other mediation models.

First, facilitative mediation or the minimal intervention approach.[53] In this model, the mediator's role is to create an environment in which each party can educate the other about their interests and collaborate to develop an agreement that appropriately responds to their identified interests. The mediator does this by stimulating a two-way flow of information. A mediator, therefore, assumes that the parties are capable of developing their own solutions. This approach is commonly used when sophisticated parties understand the process and understand what they need or want.

Secondly, evaluative mediation or the directive intervention approach.[54] In this model, the parties require greater guidance or direction, as they lack an understanding of the reasons for the conflict, the process going forward, and the complexities due to minor children. The mediator's role is to obtain and assess information about the parties and the dispute; to identify and evaluate the options available; to provide parties with best practices, and to reality test those best practices against the parties' particular circumstances.[55]

Thirdly, therapeutic mediation or the therapeutic intervention approach.[56] This process focuses on helping parties move from emotional distress to emotional relief by discussing and resolving a given issue. The therapeutic mediator leverages his or her training in psychology or social work to help parties draft an agreement that fully responds to their concerns and develop a plan of action to implement the said agreement.

Besides the three aforementioned models, transformative mediation and the narrative model of mediation are also frequently adopted in family mediation.[57]

Bush and Folger are known for their writings on the transformative model of mediation.[58] Transformative mediation has the ability to generate transformative effects.[59] Examples of transformative effects are when people have the capacity to analyse their situation, make informed decisions, and understand the perspectives of the person with whom they are in conflict.[60] Transformative mediation is essentially about exploring solutions to their problems, parties' self-determination, and their responsiveness to other people.[61] Mediators can only achieve these effects when they encourage the parties to think differently about their situation through empowerment and recognition.[62]

53 Heaton 2014:593; De Jong 2010:520.
54 Heaton 2014:594; De Jong 2010:520.
55 O'Leary 2014:28. Reality testing in a family setting is aimed at whether an agreement involving children is likely to be approved by the Office of the Family Advocate, and the realistic execution and sustainability of that agreement.
56 Moore 2014:47-48.
57 Heaton 2014:594-596.
58 Bush & Folger 2004:1-6.
59 De Jong 2010:520; Bush & Folger 1996:264.
60 Bush & Folger 1996:264.
61 Bush & Folger 1996:264.
62 Gaynier 2005:398; Bush & Folger 1996:264.

On the one hand, empowerment is when the mediator enables the parties to define their own issues and resolve these issues on their own.[63] On the other, recognition is when the mediator enables the parties to perceive and understand the other parties' perspective in the hope of understanding how they define the problem and why they seek the solution that they do.[64] Essentially, the objective of transformative mediation is for mediators to empower parties (upskilling parties to make informed decisions) and to give recognition (displaying empathy for other people's problems), thus affording parties an opportunity to resolve their own problems, on their terms, without feeling pressurised by the mediator.[65] Transformation is more significant than merely solving a specific problem.[66] Thus, the ultimate goal is long-lasting change. Needless to say, transformative mediation is an appropriate model to use in family conflicts.[67]

Narrative mediation developed on the foundation of narrative family therapy.[68] It is based on the storytelling metaphor where conflicting parties enter into a dialogue to share their stories toward a mutual understanding.[69] The primary purpose is the relational needs of the parties,[70] and the mediator relies on the world views of the parties to assist in resolving the conflict.[71]

In this model, parties think in terms of themes, roles, and plots to give meaning to the events that have occurred.[72] One of the objectives of storytelling is to allow parties to move from a one-sided perspective (their story) to a more open understanding where they enter into a realm of new possibilities and thinking.[73] Conflicting parties are given power to create their own story and their own identities; as a result, they have more control over their lives.[74]

The narrative mediation model consists of three phases, namely engagement, deconstruction, and construction of a new story.[75] Once the parties have been allowed to express their stories, they work together with the mediator to "co-author" a new narrative.[76] It is commonly believed that parties move "from story to settlement"[77] via this new narrative. It is interesting to note that narrative mediation encompasses elements of therapeutic mediation.[78]

63 Spangler "Transformative mediation", https://www.beyondintractability.org/essay/transformative_mediation (accessed on 7 March 2023).
64 Spangler "Transformative mediation", https://www.beyondintractability.org/essay/transformative_mediation (accessed on 7 March 2023).
65 Bush & Folger 1996:277-278.
66 Spangler "Transformative mediation", https://www.beyondintractability.org/essay/transformative_mediation (accessed on 7 March 2023).
67 Spangler "Transformative mediation", https://www.beyondintractability.org/essay/transformative_mediation (accessed on 7 March 2023).
68 Hansen 2004:297-298.
69 Rosenbluth 2018:90; Hansen 2004:297-298.
70 Hansen 2004:300.
71 Hansen 2004:300.
72 Hansen 2004:297.
73 Hansen 2004:298.
74 Hansen 2004:299.
75 Rosenbluth 2018:90; Hansen 2004:302.
76 Hansen 2004:304.
77 Hansen 2004:297.
78 Hansen 2004:301.

3. DOES MEDIATION HAVE THE POTENTIAL OR POWER TO RESOLVE HIGH-CONFLICT SITUATIONS?

Mediation has the ability and propensity to resolve an array of disputes.[79] This article, however, focuses on family-related disputes.

Case law proves that the traditional adversarial methods of resolving disputes in matters of family law have not been successful and have not yielded positive outcomes. For example, in the renowned case of *MB v NB*, Brassey AJ had the following views on mediation:

> Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.[80]

The judge also remarked that "mediation was the better alternative and it should have been tried".[81] Brassey AJ's comments are similar to those of the English case of *Halsey v Milton Keynes General NHS Trust Steel v Joy*, where Dyson LJ expressed that members of the legal counsel ought to advise their clients whether their specific case is appropriate for mediation; moreover, they should encourage mediation as the value of mediation has been established.[82] This was also confirmed in *FS v JJ*, where the court held that family mediation

79 For example, in property law, the court discussed the use of mediation in eviction orders. In *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC):paras. 45 and 61, the court held that one of the relevant factors in deciding whether an eviction order would be just and equitable is if "all reasonable steps" have been attempted to resolve the dispute. The courts themselves may direct that mediation be used when necessary. In *Mangaung Local Municipality v Pudumo and Others* 2015 JOL 34227 (FB):par. 9, one of the material factors in determining if an eviction order is just and equitable is whether mediation has been attempted. The court further referred to a Constitutional Court judgement that accentuated the need for mediation to be ordered in these circumstances. In the English case of *Egan v Motor Services (Bath) Ltd*:par. 53, the parties spent £100,000 disputing over a claim that was worth approximately £6,000. Lord Justice Ward stated that "[t]his case cries out for mediation". The judge expressed how beneficial mediation could have been in this instance and that it ought to have been explored. Even though this was a commercial case, the judge encouraged mediation.

80 *MB v NB* 2010 3 SA 220 (GSJ):par. 50.

81 *MB v NB*:par. 59.

82 *Halsey v Milton Keynes General NHS Trust V Joy and Another* 2004 4 All ER 920:par. 11.

is beneficial, as it avoids lengthy and costly litigation.[83] In fact, litigation should not be the first resort. Thus, legal practitioners should take cognisance of sec. 6 of the *Children's Act* that relates to resolving family disputes by way of "conciliation and problem-solving".[84]

3.1 Legislation and case law providing for mediation in family law

Mediation no doubt has value, as can be displayed in several cases and legislation. The *Children's Act* is the most notable piece of legislation that encourages the use of mediation. One of the aims of this *Act* is "to promote the preservation and strengthening of families".[85] Mediation, as opposed to litigation, can assist in achieving this objective, as mediation allows for dialogue, healing, peace, and reconciliation,[86] thereby preserving and strengthening broken relationships.

Sec. 6(4) of the *Children's Act* states that, "[i]n any matter concerning a child an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and a delay in any action or decision to be taken must be avoided as far as possible".[87] Although the word 'mediation' is not expressly used in this section, it may be argued that conciliation and problem-solving embody what mediation desires to achieve. The mediation process, as previously defined, assists the disputing parties in enhancing their relationship and interactions and in reaching a mutually acceptable solution.[88] Sec. 21(3) of the *Act*, however, makes express provision for mediation where it involves unmarried parents. This section states that there is an obligation on the parties to mediate disputes concerning the fulfilment of the biological father's parental responsibilities and rights.[89]

Furthermore, in terms of sec. 9, the best interests of the child are of paramount importance and must be applied and considered in all matters concerning the care, protection, and well-being of the child.[90] Consequently, one could argue that mediating any matter in respect of a child is more sustainable than litigation. This was confirmed in the case of *S v J*, where the court dealt with the parental responsibilities and rights of an unmarried father.[91] The court averred that litigating the family dispute was not in the best interest of the parties involved and that litigation should not have been the first

83 *FS v JJ* 2011 3 SA 126 (SCA):par. 54.
84 *FS v JJ*:par. 54.
85 *Children's Act*:sec. 2(a).
86 Boniface 2012:121.
87 *Children's Act*:sec. 6(4)(a) and (b).
88 De Jong 2010:521.
89 *Children's Act*:sec. 21(3)(a).
90 Sec. 7 of the *Children's Act* lists the various factors that should be considered when applying the child's best interests standard, and sec. 28(2) of the *Constitution of the Republic of South Africa*, 1996.
91 *S v J and Another* 2011 2 All SA 299 (SCA):par. 10.

resort.[92] In this case, it was concluded that litigation (which is an adversarial procedure) is not the most acceptable process to use in resolving family-related matters. In *Al-Khatib v Masry*, the England and Wales Court of Appeal reiterated that, where the matter involves children, parties should move from litigation to alternative dispute-resolution mechanisms.[93] This alternative mechanism is the amicable process of mediation.[94] Furthermore, in *van den Berg v le Roux*, the court once again stressed that parties should first mediate before approaching the court to resolve their family-related dispute.[95] The court essentially subjected the parties to mandatory family mediation.[96] Finally, in *Townsend-Turner v Morrow*, the court stated that parties should first attend a number of co-mediated mediation sessions before litigating.[97]

As alluded to earlier, sec. 33 of the *Children's Act* provides for mandatory mediation where parents cannot agree on a parenting plan.[98] Therefore, parents, who are finding it challenging to exercise their parental responsibilities and rights as co-holders of parental responsibilities and rights in respect of a child, must first mediate before seeking the intervention of a court.[99] The word "must" in sec. 33(5) compels co-holders of parental responsibilities and rights to mediate.[100] This section deters co-holders of parental responsibilities and rights from approaching the court as a first resort, and makes mediation a precondition for being allowed to approach the court.[101] However, in the case of *M v V,* Cloete AJ stated that, where one of the co-holders refuses to engage in a discussion relating to a parenting plan, the court can be approached, even though one co-holder refused to engage in a discussion.[102] In such an instance, the court may order the unyielding co-holder to enter into a parenting plan with the other co-holder nonetheless.[103] Moreover, in *PD v MD,* the court held that it is permissible for a party to unilaterally approach a court under sec. 34(5).[104] However, this section is subject to the condition in sec. 33(2), which states that, when two individuals share parental responsibilities and rights, and face difficulties in exercising their duties, they must attempt to agree on a parenting plan before approaching a court.[105] Thus, parties should make a reasonable effort to reach an agreement prior to resorting to litigation.[106] Finally, in the case of *VN v MD*, Eksteen J averred that, although sec. 33(5) of the *Children's Act* does not specifically state that any changes

92 S v J and Another:par. 54.
93 *Al Khatib v Masry and Others* 2002 EWCA Civ 1045:par. 3.
94 *Al Khatib v Masry and Others* 2002 EWCA Civ 1045:par. 12.
95 *Van den Berg v Le Roux* 2003 3 All SA 599 (NC):614.
96 De Jong 2005(a):95.
97 *Townsend-Turner v Morrow* 2004 1 All SA 235 (C):243 and 256.
98 Sec. 18 of the *Children's Act* lists the various parental responsibilities and rights. It is important to know what parental responsibilities and rights are since a parenting plan seeks to regulate these rights.
99 *Children's Act:*sec. 33(2) and 33(5); De Jong 2008:632.
100 Van Heerden *et al*. 2021:318; De Jong 2008:632.
101 Van Heerden *et al*. 2021:318 and 319; Davel & Skelton 2007:40.
102 *M v V (Born N)* [2011] JOL 27045 (WCC):par. 35.
103 Davel & Skelton 2007:40.
104 *PD v MD* 2013 (1) SA 366 (ECP):paras. 25, 28.
105 *PD v MD*:paras. 25, 28.
106 *PD v MD*:paras. 25, 28.

to the parenting plan must be made with the help of a family advocate, social worker or psychologist, it is evident that, when trying to reach any agreement regarding the exercise of parental rights and responsibilities, the parties are expected to consult a qualified individual who can guide them on the best interests of the child before approaching a court.[107] Similarly, if the parties are experiencing difficulties in carrying out their rights and responsibilities or want to amend an existing parenting plan, they must again engage the services of a qualified person before seeking the intervention of a court to modify the parenting plan.[108]

In fulfilling sec. 33, the assistance of a family advocate, social worker, or psychologist may be sought,[109] or mediation may take place through a social worker or suitably qualified person.[110] A parenting plan consists of various aspects that relate to the child: where and with whom the child will live, maintenance of the child, contact between the child and other individuals, as well as the education and religious upbringing of the child.[111] It is important to note that all these aspects and all the supplementary aspects of the parenting plan must conform to the best interests of the child standard as per sec. 7 of the *Children's Act*.[112]

It may be argued that, if legal practitioners do not understand the mediation process, it is their duty to inform themselves about the process and its benefits. Since legal practitioners play a major role in informing their clients about alternative approaches and possible benefits of alternative resolution mechanisms, legal practitioners need to be aware of the process and not reject the process for a lack of understanding. If legal practitioners intentionally or negligently reject the mediation process, they could be held accountable for not placing the interests of their client at the forefront, as confirmed in *MB v NB*.[113] They should thus have the attitude of trying something better or new for the sake of the parties involved, especially the children.

The *Mediation in Certain Divorce Matters Act*[114] also promotes the use of mediation. The purpose of this *Act* is to afford separating parties an opportunity to mediate their divorce where minor children have been born of the marriage. This is to protect the interests of the children involved. In terms of this *Act*, mediation is conducted by the office of the family advocate,[115] although apart from mentioning mediation in the title of the *Act*, no provision is made for mediation in the *Act*. Furthermore, the objective of this *Act* is "to enable the parties to a divorce action to reflect on the provision to be made for

107 *VN v MD and Another* 2017 (2) SA 328 (ECG):par. 19.
108 *VN v MD and Another*:par. 19.
109 *Children's Act*:sec. 33(5)(a).
110 *Children's Act*:sec. 33(5)(b).
111 *Children's Act*:sec. 33(3)(a)-(d).
112 *Children's Act*:sec. 33(4).
113 *MB v NB* 2010 3 SA 220 (GSJ):par. 59.
114 Sec. 4 of the *Mediation in Certain Divorce Matters Act* 24/1987 was recently challenged in *ST v BN and another (Centre for Child Law as amicus curiae)* 2022 2 All SA 580 (GJ) and declared unconstitutional.
115 *Mediation in Certain Divorce Matters Act*:sec. 4(1)(b).

the minor or dependent children in a non-accusatorial atmosphere and with the professional help of a neutral third party".[116]

This being said, Mowatt critiques that "[w]hether the courts are the most appropriate body to provide rules for the organisation of parent-child relationships upon divorce is a difficult question, as is the question whether it is fair, or right, for society to expect the courts to make such decisions".[117] Mowatt's sentiments are supported, as parties, who are in a dispute, are best equipped to make decisions regarding their lives and family with the guidance of an independent third party, the mediator.[118] Thus, the *Mediation in Certain Divorce Matters Act* provides for a harmonious process when there is a divorce and a minor child is involved.

The use of mediation has thus become widespread in family law and developments are underway to enact a designated statute that primarily deals with dispute resolution in family matters, the draft Family Dispute Resolution Bill.[119] The Bill places children at the forefront of its objectives, as they are generally a vulnerable group in society.[120] Consequently, it may be argued that this ensuing statute seeks to provide greater access to justice for children.

The Family Dispute Resolution Bill provides information and education programmes,[121] and outlines a specific family mediation process.[122] It must be emphasised that "the court may impose a punitive order as to costs, or another appropriate order, if, during a subsequent hearing, it concludes that a party unreasonably refused to engage in mediation".[123] The introduction of adverse cost orders for not considering mediation to assist parties to settle their matter is welcomed, since the issue of adverse cost orders has not been settled in case law.[124] However, in the case of *MB v NB*, the court made an adverse cost order against the attorneys for failing to consider mediation as a process to settle the case.[125] In the case of *Koetsioe*, the court found that the costs of the application could have been avoided had the parties mediated their dispute.[126] It may, therefore, be argued that attaching a cost order to

116 Memorandum on the objects of the *Mediation in Certain Divorce Matters Bill,* 1986:par. 3.
117 Mowatt 1987:611.
118 De Jong 2010:517; De Jong 2005(a):97.
119 South African Law Reform Commission "Discussion Paper 148 (Project 100D) Alternative Dispute Resolution in Family Matters", https://www.justice.gov.za/salrc/dpapers/dp148-prj100D-ADR-FamilyMatters-Nov2019.pdf (accessed on 28 February 2023).
120 South African Law Reform Commission "Discussion Paper 148 (Project 100D) Alternative Dispute Resolution in Family Matters", page vi, https://www.justice.gov.za/salrc/dpapers/dp148-prj100D-ADR-FamilyMatters-Nov2019.pdf (accessed on 28 February 2023).
121 Draft Family Dispute Resolution Bill, 2020:chap. 3.
122 Draft Family Dispute Resolution Bill, 2020:chap. 4.
123 Draft Family Dispute Resolution Bill, 2020:sec. 19(3).
124 *Kalagadi Manganese (Pty) Ltd and Others v Industrial Development Corporation of South Africa Ltd and Others* 2021 JOL 50895 (GJ):par. 28.
125 *MB v NB*:par. 59.
126 *Koetsioe and Others v Minister of Defence and Military Veterans and Others* [2021] ZAGPPHC 203 (6 April 2021):paras. 6.5, 7.8.

a non-participating party is a mechanism that would assist in encouraging parties to heed and seriously consider engaging in the mediation process.[127]

The Family Dispute Resolution Bill also addresses the compulsory nature of mediation.[128] Mandatory mediation is vastly different from voluntary mediation, where the parties choose the mediation process on their own accord.[129] One could also argue that mediation in terms of Rule 41A is, to a certain degree, compulsory in nature since parties should first consider whether or not to resolve their dispute by way of mediation. However, in terms of Rule 41A(9)(b), the court may make a cost order against any party who did not opt for mediation for invalid reasons, as set out in the notice for which Rule 41A(1) and (2) makes provision.

The case of *Kalagadi* dealt with Rule 41A.[130] In explaining the significance of this rule, the court contended that mediation is a judicially sanctioned procedure that requires parties, who are already before the court, to genuinely attempt a non-adversarial resolution to a dispute.[131] This is refreshing, because Rule 41A requires that one rethink the manner in which one views the legal system, in that the courts should not be regarded as a place of first resort, but rather as the last alternative. Essentially, mandatory mediation represents a change in the direction of dispute resolution.

One can, therefore, argue that mediation should be mandatory, as ordered by law,[132] or it should be ordered by the court.[133] As a comparison, in Turkey, the success of voluntary mediation has led to the introduction of mandatory mediation for certain disputes such as labour and commercial (compensation and receivable claims) disputes.[134] Due to the success in these areas, plans exist to also introduce mandatory mediation in consumer and family law.[135] In Italy, England, and Wales, the respective governments implemented rules that introduced mandatory mediation in certain cases as a procedural step aiming to reduce costs and time delays and to relieve the overburdened court rolls.[136] This led to a reduction of settlement delays as well as decreased expenses and freeing up of resources.[137]

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127 De Jong 2008:636-637.

128 Sec. 18(1) of the Draft *Family Dispute Resolution Bill*, 2020 states that "a court may … refer a matter to … mediation … and may do so with or without the consent of the parties to the proceedings".

129 O'Leary 2014:3-4.

130 *Kalagadi Manganese (Pty) Ltd and Others v Industrial Development Corporation of South Africa Ltd and Others*.

131 *Kalagadi Manganese (Pty) Ltd and Others v Industrial Development Corporation of South Africa Ltd and Others*:par. 28.

132 Usluel 2020:445-466; De Jong 2017(b):307. This effectively takes away the voluntary nature of mediation, but it is mediation nonetheless.

133 *Mangaung Local Municipality v Pudumo and Others* 2015 JOL 34227 (FB):par. 9.

134 Usluel 2020:453, 455.

135 Usluel 2020:457.

136 Levy & Deale, 2015:50-54.

137 Levy & Deale, 2015:50-54.

3.2 Reasons why mediation wields power

There are several reasons why mediation is a powerful tool to resolve high-conflict situations. First, it allows the parties to focus on interests rather than positions.[138] In any conflict, interests are significant, because it goes to the heart of why that individual is in the dispute in the first place. In a court of law, it is about evidence and persuasive arguments, and parties' positions are heard, and the presiding officer decides who is right and who is wrong according to the law.[139] Whereas mediation is about hearing the parties' stories and getting to their interests.[140] Typically, when both parties' interests are identified, parties can reach a mutually acceptable outcome.[141]

Another significant notion of mediation is that it allows for dialogue.[142] Dialogue is the essence of mediation. Mediation cannot work if there is no interchange between the disputing parties.[143] This takes place by way of storytelling.[144] This is also a method of narrative therapy.[145] It is the task of the mediator to create an atmosphere where both parties feel listened to and heard by, affording each party an opportunity to share his or her story without any interruptions.[146] The opportunity to express opinions, feelings, and emotions makes people feel valued and worthy.[147] This is directly linked to human value or dignity. One can, therefore, argue that one's dignity has been taken from one, if one has not had an opportunity to be heard. Accordingly, mediation fundamentally rests on the parties' voices being heard. In turn, the parties' dignity is restored, because they have been heard and have had an opportunity to tell their story.[148] One can say that there is power in dialogue in itself, as parties are allowed to vent and express themselves in a manner that is not ordinarily allowed in arbitration or litigation.[149] Accordingly, because of these features, mediation has a human element that arbitrary processes do not possess. Mediation, therefore, acknowledges that people are human beings and that they have emotions and feelings.[150]

138 Fisher & Ury 2012:42-57; Heaton 2014:584. According to De Jong (2010:521), "mediation promotes the best interests of children".
139 Heaton 2014:578, 584.
140 De Jong 2005(a):97.
141 Heaton 2014:582.
142 Boniface 2012:121.
143 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 3 SA 208 (CC):paras. 21, 22, 53. The Constitutional Court exhorted the parties that they ought to have had a meaningful engagement with the parties with whom they had a dispute.
144 Boniface 2012:123.
145 On narrative mediation, see the discussion in 2.3.
146 Boniface 2012:121.
147 Boniface 2012:123; De Jong 2005(a):97. A court does not deal with parties' emotions, feelings or beliefs.
148 Boniface 2012:108.
149 Boniface 2012:107.
150 De Jong 2008:631.

Since there is a continuing relationship between unmarried parents or divorcees, where a child/children have been born from such a relationship, the dialogue assists in restructuring and/or restoring the relationship. This is pertinent, as parents need to maintain a relationship for the sake of their child/children as co-parents.

Mediation is not a process that attaches much importance to what happened in the past. Its central focus is about the way forward; hence, it looks to the future.[151] Parties are exhorted to look beyond the current situation and to move on from the past. Mediation also equips parties to resolve their own disputes in the future. This is essentially the idea of transformative mediation,[152] where parties' attitudes and behaviours are metamorphosed from fighting with one another to fighting the problem.[153]

Mediation allows for a custom-made solution that is mutually acceptable to all parties.[154] The bottom line is that the settlement agreement resulting from the mediation is not a directive or judgement from someone who has no relationship with the child/children. The solution that is arrived at is the creative ideas and invention of the parties and it does not have to be limited to legal remedies[155] that exist within the law. Mediation produces wise settlements that have not been imposed on them.

Mediation provides access to justice in terms of sec. 34 of the *Constitution*.[156] Justice is, therefore, one of those ambiguous and loaded terms, as justice has different connotations to different people. In mediation, justice could mean being heard, whereas to another, justice means receiving a just recompense. Therefore, mediation creates a space where parties can have access to their justice, whether it is an apology from the wrongdoer or receiving compensation.[157]

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151 De Jong 2010:521.

152 On transformative mediation, see the discussion in 2.3.

153 According to Fisher & Ury (2012:19-41), one of the four pillars of principled negotiation is separating the people from the problem.

154 For example, in *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2010 4 BCLR 354 (SCA):par. 10, the court contended that, had mediation been attempted to resolve the eviction dispute, it could have produced an equitable outcome.

155 Heaton 2014:584-585.

156 Ngcobo J states that, "[a]ccess to justice suffers when the costs of litigation are prohibitive; procedures and processes are unduly complicated or burdensome; and when delays are too long for the average person". Thus, access to justice includes the right of access to courts together with affordable, procedurally simple, and expedient methods of dispute resolution. Ngcobo "Enhancing access to justice: The search for better justice", https://constitutionallyspeaking.co.za/wp-content/uploads/2011/07/Speech-of-the-Chief-Justice-2011.pdf (accessed on 2 November 2022).

157 South African Law Reform Commission "Discussion Paper 148 (Project 100D) Alternative Dispute Resolution in Family Matters":par. 4.1. https://www.justice.gov.za/salrc/dpapers/dp148-prj100D-ADR-FamilyMatters-Nov2019.pdf (accessed on 28 February 2023).

It is interesting to note that, at the Access to Justice Conference in 2011, Ngcobo CJ stated that "[o]ur civil justice system is still characterised by cumbersome, complex and time-consuming pre-trial procedures, overloaded court rolls, which necessitate postponements, delays in matters coming to trial and, at times, compels litigants to conclude settlements not acceptable to them. It is expensive, slow, complex, fragmented, and overly adversarial".[158] Accordingly, one of the key issues that was discussed at the Access to Justice Conference in 2011 was the topic of alternative dispute-resolution mechanisms, which include the ideas of having a court-based mediation and restorative justice system.[159]

In *MB v NB*, Brassey AJ remarked that, "[i]f mediation is appropriate in commercial cases, how much more apposite is it in family disputes".[160] This confirms that mediation is not only suitable for resolving family disputes,[161] but it also has tremendous potential and wields power in resolving the majority of high-conflict situations within other spheres of the law.

4. A REFLECTION ON MEDIATING PARENTING PLANS IN TERMS OF SEC. 33 OF THE *CHILDREN'S ACT*

Considering the aforesaid, the following practical aspects should, however, be considered in terms of acting as a mediator in mediating parenting plans.[162] This discussion first focuses on the mediator, followed by a discussion of the parties.

4.1 The mediator

Family law mediation is generally a challenging area to work in, as one deals with problems or issues that are close to people's hearts, namely marriage/relationship and child/children. These aspects are profoundly personal. For

158 Ngcobo "Enhancing access to justice: The search for better justice", https://constitutionallyspeaking.co.za/wp-content/uploads/2011/07/Speech-of-the-Chief-Justice-2011.pdf (accessed on 2 November 2022).

159 South African Government. 2011. "Media statement: Access to justice conference", https://www.gov.za/media-statement-access-justice-conference (accessed on 2 November 2022).

160 *MB v NB*:par. 52.

161 De Jong 2008:631.

162 Davel & Skelton (2007:40) comment that sec. 1(1) of the *Children's Act* does not contain a definition of a "parenting plan", but that one can conclude from sec. 33(1) of the *Children's Act* that a parenting plan refers to an agreement in which co-holders of parental responsibilities and rights make arrangements on how they will exercise their respective responsibilities and rights. Moreover, in terms of sec. 18 of the *Children's Act*, such responsibilities and rights include care, contact, guardianship, and maintenance. See further in *PD v MD*:par. 24, where Goosen J defined a parenting plan as "a formal agreement concluded between the holders of parental responsibilities and rights, in which they mutually agree to the terms upon which such responsibilities and rights are to be exercised".

this reason, mediators require a level of maturity, emotional intelligence, and life experience to be able to effectively manage a family mediation process.[163] When parties enter the mediation room, they might be apprehensive at first, especially if it is their first time participating in such a process; hence, the need for an experienced mediator to build trust and rapport, in order to enable parties to relax and engage meaningfully in the process.[164]

A family law mediator also has to be competent and have the necessary training and skills that are imparted during such training.[165] Of course, these skills are developed by experience and work within this field. Family mediation can also become intense, due to the emotive nature of the process, thereby requiring experienced family law mediators who are skilled and equipped.

Generally, family law mediators would complete a forty-hour family mediation training programme, followed by either mental health or legal training,[166] depending on their background and education. The mediation process is taught during such training.[167] As the mediator, one has to trust the process and get parties to buy into the process as some may be unwilling to participate, requiring that a mediator use his or her skills to gain the party's buy-in[168] and commitment to the process.[169]

It may thus be argued that mediators develop an area of expertise, for example, in family mediation. One could specialise in the division of assets upon divorce, maintenance matters, parenting plans, domestic violence or harassment matters, to name a few. As a mediator, one must know what one is comfortable with so that one can give parties the best overall experience. A holistic approach to mediation of family disputes is, however, preferred.[170]

Co-mediation is also commonplace in family mediation.[171] Due to the dynamics and complexities in a family mediation, it is recommended that family disputes be mediated by one male and one female mediator,[172] ideally one individual should have a legal background and the other a mental health background.[173] This creates a balance in the mediation room, where

163 Heaton 2014:588-591.
164 Heaton 2014:590; De Jong 2005(b):38.
165 De Jong 2010:517-518; De Jong 2008:638-639.
166 For various accredited family mediation courses, see NABFAM's website https://nabfam.co.za. Heaton 2014:589-591; De Jong 2010:530; De Jong 2008:638-639.
167 De Jong 2010:530. Further to the process, conflict and mediation theory; children and mediation; divorce/separation; financial matters; drafting mediation summaries, and how theory and practice are integrated by way of simulated activities are also taught.
168 For a detailed discussion on language and communication skills, see Parkinson (1997:97-124).
169 Heaton 2014:598-600.
170 Heaton 2014: 585-586.
171 Heaton 2014:596-597.
172 Parkinson 1997:140-141.
173 De Jong 2017(b):307; De Jong 2010:528.

each gender is "represented". Moreover, co-mediators' legal and/or mental health background assists in the intricacies of a family mediation, since the fundamentals of psychology are often employed in mediation.[174]

It is imperative that mediators be self-aware. They need to be cognisant of their choice of words, body language,[175] paralanguage,[176] and attitude toward the parties and the process. Therefore, mediators should not impose their own view of an appropriate settlement.[177] There are conventional ways in which an unwilling party can be persuaded through reality testing and education, but there are also improper ways of compelling a settlement through threats or false deadlines. The mediator must, therefore, remain open to variations of the settlement agreement, as the agreement is ultimately the party's agreement.[178]

Secondly, a mediator should not side with one party over another.[179] Mediators can fall into the trap of accepting one person's version of events and thereafter act with doubt and hostility towards the other party. For example, the mediator might be persuaded that the allegations are completely false and thereafter direct his or her energy to get the complainant to withdraw the grievance. Alternatively, the mediator might, on accepting the complainant's version, aggressively support him or her. The mediator must, therefore, carefully balance empathy and neutrality, empowering the weaker party and upholding the value of non-discrimination.

Thirdly, a mediator should not give professional advice.[180] Even though mediators have an educative role such as informing the parties about conflict and settlement, as well as explaining the process, they must resist the temptation of giving professional or legal advice. It might be acceptable to give limited general legal information, but there comes a point when the legal information crosses over to legal advice. This occurs when the mediator expresses a view on the merits of the dispute and suggests a particular course of action. Discontent about the soundness of the advice undermines the legitimacy of the process. If the mediator provides professional or legal advice, it must only occur when the mediator is an expert in that specific field.

Finally, a mediator should not permit a power imbalance to persist.[181] However, circumstances may dictate that there may be a need for the mediator to go beyond an even-handed empowerment to a specific empowerment of one party.[182] This empowering can become illegitimate manipulation and threaten the mediation process. However, there are ways in which a mediator

174 De Jong 2010:528; De Jong 2008:638-639.
175 Boulle & Nesic 2001:209-210.
176 Boulle & Nesic 2001:209.
177 De Jong 2010:519.
178 De Jong 2010:519.
179 De Jong 2010:518.
180 De Jong 2010:518.
181 De Jong 2010:518; De Jong 2005(a):99.
182 De Jong 2005(a):99.

can justifiably limit a party's power by using process opportunities. For example, where the mediator keeps joint meetings to a minimum or where the mediator insists on equal talking time.

From practical experience, mediation is thus a process with which parties are largely satisfied; moreover, this process produces sustainable and wise settlements.

4.2 The parties to a parenting plan mediation process

In a parenting plan mediation, it is common for mediators to deal with unmarried parents. As a result, a host of issues arise within such mediations. It is important to bear in mind that a parenting plan mediation process centres around the child.[183] Therefore, it is necessary to remind the parties that the mediation is about the child/children and not about the parents' past romantic relationship, if such a relationship existed. For this reason, the introductory remarks of the mediator ought to be that, in the mediation process, the focus will be on the child/children and this is where the best interests of the child standard are introduced. "The best interests of a child are of paramount importance in every matter concerning the child"[184] should be a recurring theme in the mediation process, as parents often get distracted in their own acrimony and are inclined to forget about the needs and interests of the child/children involved.[185]

In parenting plan mediations, parents are typically at loggerheads about various issues concerning their child/children,[186] their relationship, and finances. It must be mentioned that mediating a parenting plan is a challenging task, as parents generally come to the mediation lacking communication or there is no communication between the parents regarding the child/children. In addition, discussions pertaining to substantial matters about the child/children are not easy discussions as parents have diverse world views and vary in parenting styles. The following is a discussion of selected issues that parties explore in a parenting plan mediation.

First, the issue of care.[187] Care entails who the main caregiver will be and where the child/children will primarily reside.[188] This is perhaps one of the biggest conflicts: with whom will the child/children live? I often hear mothers saying that they want "full custody" of the child because the father is absent or because of the father's lifestyle choices (for example, the father is in a relationship with several women). It is also common for a child/children to live and be reared by their maternal grandparent/grandparents, even though both

183 *Children's Act*:sec. 9; Constitution:sec. 28(2).
184 *Children's Act*:secs. 2(b)(iv), 7, 9.
185 De Jong 2017(b):299.
186 *Children's Act*:sec.18 sets out the various parental responsibilities and rights.
187 On the various forms of care, see the definition section of the *Children's Act* for "care"; Van Heerden *et al*. 2021:162-165; Heaton 2015:180-184.
188 *Children's Act*:sec.33(3)(a).

their biological father and mother are alive. Needless to say, both parents should make this decision, as the *Children's Act* stipulates that parents have equal parental responsibilities and rights.[189] In agreeing on this issue, the realities and practicalities of this are discussed in detail, as this is one of the fundamental issues on which the remaining parts of the parenting plan hinge.

Care also includes the issue of child maintenance.[190] In South Africa, the reality is that the vast majority of children primarily reside with their mothers (especially if the parents were never married or divorced). Child maintenance is another major concern for a mother who has been rearing their child/children without the financial support of the father. It is interesting to note that fathers often do not pay child maintenance, because they are of the view that the mother spends the money on herself and not on the caretaking of the child/children, although there is a duty on a father to financially support their child/children.[191] Some fathers prefer to "pay in kind", by purchasing groceries, toiletries, and clothes or by paying for education and/or medical expenses instead of paying a monthly monetary contribution. Then, depending on the age of the child, parents would open a bank account in the name of the child and the child would have access to the funds directly. Ideally, this issue should be dealt with in the maintenance court,[192] but the parenting plan makes provision for this to be discussed within the mediation process.

Secondly, the issue of contact.[193] Contact entails how frequently the parent, who does not primarily reside with the child/children, will have access to the child/children.[194] Aspects such as days and times for contact are discussed. For example, if the child/children primarily reside with their mother, would the father merely visit the child/children at the mother's home, or will the child/children visit the father's home? Of course, the specific days (weekday and/or weekend), frequency, and exact times are discussed in the mediation. Naturally, if the children are visiting the father, then pick-up and drop-off days and times and the person responsible for the pick-up and drop-off should also be discussed. In addition, any further conditions must be mentioned, for example, when parents pick up their five-year-old son, the child must sit in a car seat/booster seat in the rear seat. Depending on the age of the child and the pragmatisms, parents would also consider sleepovers with the parent with whom the child/children do not primarily reside.

I have also come across instances where, if the father or mother was never part of the child/children's life, then the parent with whom the child/children primarily reside will request that the father or mother be supervised

189 *Children's Act*:sec. 19, 22, 21.
190 *Children's Act*:secs. 33(3)(b) and 18, where maintenance is also a separate parental responsibility and right.
191 *Maintenance Act* 99/1998:sec.15.
192 Department of Justice and Constitutional Development. 2023. "Maintenance", https://www.justice.gov.za/vg/mnt.html (accessed on 28 March 2023).
193 *Children's Act*:sec.33(3)(c). See the definition section of the *Children's Act* for "contact". There are various forms of contact, see Heaton 2015:184-186.
194 Van Heerden *et al*. 2021:165, 292.

during such visitations.[195] This request is legitimate as a parent might be wary, especially when the child/children do/does not know the other parent or if the parent has abused substances previously.

It is frequently found in mediation that, when the child/children reside with the mother, she often requests that the father spend more time with the child/children, since the child/children live with her. In such cases, the mother wants more involvement from the father in the lives of the child/children and desires that the father establishes or re-establishes a relationship with his child/children. The mother would encourage the father to give their child/children more time and to show a genuine interest in all aspects of the child/children's life. Essentially, the contact time is about establishing a bond with the child/children and being a part of their child/children's life. The same is true when the child/children primarily reside with the father.

In contrast, there seems to be a misconception that, if a father does not pay child maintenance, he cannot contact his child/children. Consequently, the father has no relationship or limited contact with his child/children because of this misconception. Ultimately, this is a way for the mother to keep the child/children away from their father. This is futile, as the objective is for a child/children to have a relationship with both parents, regardless of the parents' former relationship or the state of their relationship. The aim of the *Children's Act* is also "to promote the preservation and strengthening of families".[196] The idea of having healthy and strong families can be realised if both parents are actively involved in the children's lives.[197]

There is also the issue of absent fathers. Surprisingly, there are instances where fathers intentionally want less contact with their child/children. Mothers would approach the court to urge the father to have a relationship with their child/children, but the court cannot assist in this matter, as no one can force a father to have a relationship with his child/children.[198] This is why mediation is most suitable, as the very nature of mediation is to talk through the reasons why the father does not desire such contact with his child/children and what the solutions are. Mediation has the ability to deal with these "matters of the heart" issues.[199]

It is not irregular for a child/children to ask about the parent with whom they are not primarily living. Therefore, parents should settle the issue of contact and create a structured and predictable routine for the sake of the children. Children need stability as they feel protected and know what to expect when there is consistency regarding contact. Furthermore, parents quickly forget

195 On the various forms of contact, for example, supervised care, joint care, and split care, see Heaton 2015:184-186.

196 *Children's Act*:sec. 2(a).

197 Van Heerden *et al*. 2021:165.

198 See *P v P* [2020] 2 All SA 587 (WCC):par. 58; *TSF v SCD* [2022] ZAGPJHC 758 (27 September 2022):par. 44.

199 This discussion is about contact with the child/children's parents, but contact with extended family and other individuals can also be discussed in the mediation.

that these arrangements can be stressful on the children, for instance, moving from one home to another can become taxing on the child/children, as it requires a significant amount of planning and preparation.

Directly relating to routine and stability is the aspect of safety. The safety of the child/children is a chief discussion point, especially where there is a tendency of violence or abuse from either parent or a third party (for example, a stepfather or stepmother).[200] Where there is physical, drug, or alcohol abuse, or if either of the parent's lifestyle choices endanger the life of the child/children, this ought to be discussed[201] or greater intervention would be required.[202]

Shifting to the issue of decision-making. Often parents do not understand what the mediation process entails. They have a misconception that the mediator is there to make decisions or to tell them what to do concerning their child/children. This misconception is clarified in the mediator's opening statement, in which the mediator explains the process, his or her role and functions, and sets the ground rules, *inter alia*.[203] Mediating parenting plans are notable, as this process gives decision-making regarding the child/children to the parents and is taken out of the purview of the courts. The contents of the parenting plan require parents to make decisions together. This is challenging, since parties ordinarily come to the mediation process not communicating with one another or significantly lacking communication. As the process unfolds, it becomes evident that there are many misunderstandings between the parents. This is one of the reasons why mediation is appropriate and beneficial in family disputes, because it creates a channel for communication, addresses miscommunication, and largely enhances communication between the disputing parties.[204]

Thus, decisions relating to the child/children's education, healthcare, cultural or religious activities, and general upbringing should be made.[205] Sec. 31 of the *Children's Act* specifically provides that parents must make important decisions in respect of the children jointly. However, in practice and reality, this does not necessarily occur. It has been my experience that parents would make decisions regarding the child/children logistically and

200 A mediator has a duty to report abuse or neglect in terms of the *Children's Act*:sec. 110, the *Criminal Law (Sexual Offences and related matters) Amendments Act* 32/2007:sec. 54(1)(a), and the *Domestic Violence Act* 116 of 1998. De Jong 2010:520.

201 Specific provision should be made for the safety of the parties in the mediation process where there are allegations of domestic violence.

202 De Jong 2008:635-636. Intervention such as reporting it to the local SAPS, social worker intervention or family counsellor intervention (at the Office of the Family Advocate). Social workers and family counsellors could possibly assess the living conditions of the child/children involved (home visits); they also complete assessments based on risk where they assess if the basic needs of the child are being met, safety, mental, physical and emotional condition of the person rearing the child.

203 Heaton 2014: 598.

204 Boezaart 2017:137, 140; De Jong 2010:519.

205 *Children's Act*:sec.33(3)(d).

practically. Therefore, most of the decisions are made by the parent with whom the child/children primarily reside, or by the parent who has a greater economic or financial standing, even though the *Children's Act* is clear that decisions should be made jointly by both parents. It is clear though that the issue of decision-making offers parties an opportunity to exercise control over decisions that affect their lives and the lives of their children.[206]

Decision-making is directly proportional to the issue of co-parenting. As part of the mediation process, parents are encouraged to think about the future and the realities of co-parenting, as life after giving birth to a child where the parents have never been in a relationship, separation or divorce is not an easy adjustment. It is almost always a complex matter. These circumstances call for a continued relationship as co-parents or shared parenting. Boundaries would have to be set and parties must think long term about the future of their child/children. An example of a boundary is where parents agree that they will only communicate with one another where it is a matter that concerns the child/children by way of email, SMS or a specific social media application (for example, WhatsApp). Where parents require greater intervention, they would agree to attend counselling sessions, training on how to co-parent, or attending workshops that provide general parenting advice.[207]

Even though parents are the adults and have decision-making responsibility, the voice of the child/children must also be heard in mediation.[208] Since the mediation centres on the child/children, it is right that their views, feelings, and opinions be heard.[209] In addition, hearing the voice of a child also assists the parents in the mediation process in coming to an agreement.[210] Therefore, the voice of the child/children should be heard in a mediation that concerns them. Sec. 10 of the *Children's Act* states that "[e]very child that is of 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".[211] This section thus creates an onus on the mediator to hear the voice of the child in some or another way. A designated section within the parenting plan makes provision for this.[212] Depending on the age, level of maturity, and development of the child/children, a social worker, child psychologist or other suitably qualified person will conduct a form of play therapy to extract the views of the child/children.[213] Another method is having a conversation with the child/children to consider their views.[214] It has been my experience that children's voices are seldom heard in parenting plan mediations.

206 Mowatt 1987:612.
207 Several organisations provide such services. For example: The Parent Centre, https://theparentcentre.org.za (accessed on 29 March 2023) and FAMSA, https://www.famsawc.org.za (accessed on 29 March 2023).
208 Boezaart 2017:150-157.
209 Boniface 2013:143.
210 Boezaart 2017:156; Boniface 2013:143.
211 *Children's Act*:sec. 10.
212 *Children's Act*:sec. 33.
213 Boniface 2013:141.
214 Boezaart 2017:153-156; Boniface 2013:146.

There are instances where other parties' involvement might be necessitated. The mediator thus needs to ascertain whether all the interested parties are in the mediation room. Interested parties are those individuals who have a vested interest in the child/children and the outcome of the mediation will impact on them significantly. For example, grandparents, stepparents, or new partners may possibly have an interest in the outcome of a parenting plan, as it could possibly directly affect them. These individuals should be permitted to attend the mediation process if the parents (who are the primary disputants) agree, as these stakeholders could contribute to a meaningful mediation engagement. By the same token, these stakeholders could also adversely affect the advancement of the mediation process. For example, if the new partner is in the room (that caused the parents to separate), then the father or mother might have hostility towards him or her. The mediator would have to manage this aspect.

Generally, when parents enter the mediation, their attitude and behaviour is typically one of waging war. They have a litigious mindset. They fight with one another about their past relationship, about finances, and about the child/children. They are so fixated on the hurt and current burdensome situation that they do not consider the impact that their conflict has on their child/children.[215] Sadly, in many cases, these children experience secondary trauma. There is a psychological and social impact (depression, confusion, not eating, not focused at school) by a separation, divorce or events that caused the biological father and mother not to be in an amicable relationship.[216] Therefore, the child/children's emotional needs and well-being must be considered. In a mediation, parents deal with the reality that their conflict negatively impacts on the child/children; thus they need to change their ways of communication and ways of dealing with the matter so that the child/children do not experience ongoing distress.

Furthermore, as the mediation progresses, parents tend to get fixated on the past and arguments ensue as a result of events that occurred in the past. Parents remind one another of the wrongdoings and mistakes that occurred.[217] Parents also have the propensity to manipulate the child/children by speaking negatively about the other parent, the history of their relationship, and/or their new partner. In these circumstances, it is important to remind the parents that they are not there to fight with one another, instead they are there to discuss what is in the best interests of their child/children. The mediator does this by reminding the parents about the "best interests of the child" standard. Overall, the mediator must bring the parties to the present from the past and encourage them to move forward.

215 In *WL V SH and Another* [2017] 1 All SA 652 (KZD):paras. 55-56, the court stated that "what is before this Court is nothing but a fight between the parties which does not take into consideration the interest of the minor child".

216 De Jong 2017(b):299.

217 De Jong 2010:516.

Notwithstanding these hurdles, mediation assists in limiting the conflict and equips the parents on how to deal with future disputes.[218] This is one of the hallmarks of transformative mediation that is also embedded in other types of mediation.[219] In sum, mediation is an empowering process. Through interchange, parties not only vent and communicate but ultimately also come to an agreement either in the mediation room or after the mediation sessions have ended. Thus, "[m]ediation possesses the power to change how people behave not only toward their adversary … but also in their day-to-day lives thereafter".[220]

5. CONCLUSION

Based on the above reflection, it is evident that mediation has the potential and power to resolve high-conflict disputes. Furthermore, it appears that family mediation is mainly beneficial to all the parties involved in a family-related dispute and it should be embraced and celebrated by legal practitioners and those involved in resolving disputes. Mediation, generally, is undervalued in South Africa, even though the mediation process produces remarkable and positive outcomes during and after the mediation process. It is a powerful process and with the introduction of the Family Dispute Resolution Bill, the Bill will undoubtedly assist in developing a culture of mediation in any high-conflict situation, specifically parenting plans and conflict relating to families and children. The Bill will also provide access to justice, as envisaged by the *Constitution*, as it is predicted that mediation will gain traction.

Finally, South Africa requires a family justice system that is pro-mediation and compulsory. This is what the Bill seeks to address, a mandatory family mediation process. If "[m]andatory mediation … is introduced, the present family law system will most definitely become more acceptable, applicable and accessible to the average South African".[221] I support the sentiments of De Jong as South Africa needs "a family law system that provides relationship-focused interventions away from the courts as the default option for most family dispute".[222]

With this reflection, I am persuaded of the value of mediation,[223] and with the introduction of the Family Dispute Resolution Bill mediation is evolving and it is hoped that its full potential will be realised.

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218 De Jong 2010:521. The parenting plan should also contain a section describing how future disputes pertaining to the parenting plan (and the costs thereof) will be resolved and the issue of non-compliance of the parenting plan.

219 On the various types of mediation interventions, see the discussion in 2.3.

220 Spangler "Transformative mediation", https://www.beyondintractability.org/essay/transformative_mediation (accessed on 7 March 2023).

221 De Jong 2005(b):46.

222 De Jong 2017(b):318.

223 De Jong 2010:531. In *MDN v SDN*:par. 10, Rogers J states: "I do not wish to be understood as under-estimating the value of mediation and the importance of compliance with the rule [41A]."

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