

Enhancing child participation in family disputes through child inclusive mediation in Kenya

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Abstract

Despite the fact that children are directly affected by the outcome of family disputes, they are rarely given the opportunity to express their views. When an opportunity arises, children's voices are manipulated by parents due to the adversarial litigation system that turns parents against each other. Consequently, the child's best interests are not adequately considered during and post-divorce. In view of the increasing case backlog and promoting the best interests of the child, this paper advocates child inclusive mediation by demonstrating how it can be entrenched in the resolution of family disputes. The paper argues that this form of mediation enables children to participate in the decisions affecting their future. Secondly, involving children to voice their wishes helps in refocusing on the children's needs. Using the Office of Family Advocate in South Africa as a case study, the paper illustrates how Kenya can enhance child participation in family mediation through the newly created Office of Secretary of Children's Services under Section 37 and 38 of the Children Act of 2022.

Keywords: Child-inclusive mediation, family disputes, best interests of the child, Secretary of Children Services, Office of the Family Advocate, Children Act of 2022

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Introduction

Family disputes are one of the ways in which children come into contact with the law.¹ Such disputes usually concern property disputes, financial support, child maintenance, child custody, and child visitation disputes, among others.² Notably, litigation has been the dominant method of resolving family disputes. While litigation is the prevailing dispute resolution mechanism, it has more demerits than benefits where children are involved.³ For instance, children may find it difficult to communicate their views owing to the adversarial nature of litigation, which agitates tensions between parents.⁴ As a result, children may fear giving their views leading to emotional and psychological harm which impairs their growth and development.⁵

For parents, litigation worsens the psychological and mental stress of separating couples because of its winner-loser attribute.⁶ Likewise, divorce proceedings take a long time to conclude due to delays and case backlog.⁷ In most cases, the excessive emphasis on the individual interests of parents disregards the interests of children yet they are the most affected by the separation.⁸ To a child, the divorce is a dreadful

¹ African Child Policy Forum (ACPF), 'Spotlighting the invisible: Justice for children in Africa' 2018, 3.

² Vini Singh, 'Compulsory mediation for family disputes' 2(9) *Indian Institute of Arbitration and Mediation* (2010) 2.

³ Jawad Ahemd and Nissahant Carota, 'Mediating family disputes' in Gracious Timothy (ed), *Conciliation and mediation in India: Global trends in dispute resolution*, Kluwer Law International, 2021, 264.

⁴ Marli Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' Unpublished LLM thesis, Stellenbosch University, 2021, 12.

⁵ Janet Maleson Spencer and Joseph Zammit, 'Mediation-arbitration: A proposal for private resolution of disputes between divorced or separated parents' (5) *Duke Law Journal* (1976) 919.

⁶ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 8.

⁷ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 12.

⁸ Tara Black and others, 'The intersection of child custody disputes and child protection investigations: Secondary data analysis of the Canadian incidence study of reported child abuse and neglect (CIS-2008)' 4(1) *International Journal of Child and Adolescent Resilience* (2016) 144.

life-changing event which impacts various aspects of a child's life.⁹ For example, where the child will live, which parent will take custody, schooling, contact between the child and the non-custodial parent, and the choice of religious upbringing of the child.¹⁰ It follows that divorce has a life-long impact on children.¹¹

The drawbacks of litigation have provided opportunities for family mediation as a preferred avenue of resolving family disputes.¹² Family mediation involves an independent neutral third party who facilitates negotiations between separating parties to reach a mutually satisfactory settlement.¹³ It enables parties to have a broader perspective of the dispute including other people likely to be affected by their dispute, for instance, children.¹⁴ Family mediation has the potential to restore relationships between the separating parties.¹⁵ In addition, it is flexible and affords parties a greater autonomy in determining the outcomes of their divorce.¹⁶ Further, family mediation is confidential and private – this protects parties from public embarrassment arising from disclosure of their private intimate details as well as expressions of their emotions.¹⁷

⁹ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 3.

¹⁰ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 4.

¹¹ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 12.

¹² Thomas W Miller and Lane J Veltkamp, 'Disputed child custody: Strategies and issues in mediation' 15(1) *Journal of the American Academy of Psychiatry and the Law* (1998) 48.

¹³ Anita White, 'Mediation in child custody disputes and a look at Louisiana' 50(5) *Louisiana Law Review* (1990) 1124.

¹⁴ Razia Nordien-Lagardien, Blanche Pretorius and Susan Terblanche, 'Family mediation: The perceptions and experiences of unmarried parents and mediators' 57(2) *Social Work* (2021) 153.

¹⁵ Nordien-Lagardien and others, 'Family mediation: The perceptions and experiences of unmarried parents and mediators' 153.

¹⁶ Sharon Muller, 'The role of social work practice intervention in divorce mediation' Unpublished Master of Social Work Degree thesis, University of Western Cape, 2020, 1.

¹⁷ Adesina Bello, 'Arbitration as a template for resolving family disputes' 84 *International Journal of Arbitration, Mediation, and Dispute Management* (2018) 240.

In family mediation, there are opportunities to allow children to participate in the mediation process.¹⁸ To begin, they may be included at the end of the final session to be informed about what their parents have agreed.¹⁹ Alternatively, children may be consulted by the mediator and parents after agreements have been reached to give their views about the agreement.²⁰ In other circumstances, children may be interviewed by the mediator in the early stages of the mediation to gather their views, concerns, and feelings. Then, the mediator shares this information with the parents as they negotiate.²¹ Children may also occasionally attend the mediation sessions whenever an issue concerning them arises.²² Lastly, children, especially adolescents may be present throughout the mediation process and participate in decision making as an equal party to the proceedings.²³

Child participation is a crucial principle of children's rights outlined in the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC).²⁴ It is interrelated with the principle of the best interests of the child, which is also guaranteed under the Constitution of Kenya 2010. The Constitution recognises that in every matter concerning the child, a child's best interests should be of paramount importance.²⁵ To

¹⁸ Amanda E Boniface, 'Resolving disputes with regards to child participation in divorce mediation' 1 *Speculum Juris* (2013) 143.

¹⁹ Donald Saposnek, 'The voice of children in mediation: A cross-cultural perspective' 8(4) *Mediation Quarterly* (1991) 329.

²⁰ Saposnek, 'The voice of children in mediation: A cross-cultural perspective' 329.

²¹ Saposnek, 'The voice of children in mediation: A cross-cultural perspective' 330.

²² Saposnek, 'The voice of children in mediation: A cross-cultural perspective' 330.

²³ Saposnek, 'The voice of children in mediation: A cross-cultural perspective' 330.

²⁴ Convention on the Rights of the Child (CRC), 20 November 1989, 1577 UNTS 3, Article 12. See the African Charter on the Rights and Welfare of the Child (ACRWC), 1 July 1990, CAB/LEG/24.9/49 where Article 4 provides that 'in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration. In all proceedings affecting a child who is capable of communicating their own views, an opportunity shall be provided for the views of the child either directly or indirectly through a representative as a party to the proceedings. Those views shall be taken into consideration by the relevant authority'.

²⁵ Constitution of Kenya (2010) Article 53(2).

give effect to the Constitution, the Children Act of 2022 was enacted on 6 July 2022 and commenced on 27 July 2022.²⁶ It repealed the Children Act of 2001, which was deficient in promoting children's rights in conformity with the Constitution and international instruments.²⁷ The 2022 Act enshrines children's rights and makes provision for parental responsibility, care and protection, alternative care, and children in conflict with the law.²⁸ In addition, it establishes the office of the Secretary of Children Services whose roles include promoting family reconciliation and mediating family disputes involving children and parents with parental responsibility.

Following this introductory part, this paper is divided into six parts. Part Two conceptualises child participation highlighting the levels of participation, and the connection between child participation and the best interests of the child principle. In Part Three, the paper discusses child inclusive mediation and evaluates its advantages and disadvantages. In addition, it highlights instances where it may not be suitable for children to participate in family mediation. Part Four focuses on the functions of the Office of the Secretary of Children's Services (OSCS), specifically, promoting family reconciliation by mediating disputes where children and parents are involved. The paper argues that this function is vague and inadequate in promoting the best interests of the child in family mediations. Using a case study of the Office of Family Advocate (OFA) in South Africa in Part Five, the paper highlights how child-inclusive mediation can be promoted better by the OSCS. Part Six makes recommendations while Part Seven concludes the paper.

²⁶ Children Act (No 29 of 2022).

²⁷ Children Act (No 29 of 2022) Section 249.

²⁸ Children Act (No 29 of 2022).

Conceptualising child participation

Generally, the term participation is a process of sharing views and ideas on decisions which impact one's life.²⁹ In terms of children, participation can mean 'to speak, to participate, and to have the child's views taken into account'.³⁰ As a right, every child is free to take part, express their views, and be informed in matters concerning them.³¹ Child participation is one of the four core principles of the CRC.³²

According to the CRC, state parties are obligated to ensure that children who are capable of forming their own views are allowed to express them freely, and that such views are given due weight while considering the age and maturity of the child.³³ In this regard, free expression means that children have a choice to share their views or not. They should not be coerced or subjected to any manipulation.³⁴

In order for children to participate, they should be equipped with all the necessary information needed to give an informed view that aligns with their best interests.³⁵ Children also need to be informed about the conditions under which they will be asked to express their views.³⁶ Furthermore, child participation requires that where it is not possible to act in accordance with the child's wishes, the child must be

²⁹ Ruth Sinclair, 'Participation in practice: Making it meaningful, effective and sustainable' 18(2) *Children and Society* (2004) 111.

³⁰ Laura Lundy, 'Voice is not enough: Conceptualising Article 12 of the UNCRC' 33(6) *British Educational Research Journal* (2007) 927.

³¹ ACERWC, 'Child participation guidelines' 2022, 4.

³² Committee on the Rights of the Child (Committee), General Comment No 12 of 2009: The right of the child to be heard, 20 July 2009, CRC/C/GC/12, UNCRC, para 2.2. The other principles are non-discrimination, the right to life, development, and the primary consideration of the child's best interests.

³³ CRC, Article 12.

³⁴ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 21.

³⁵ Committee, General Comment No 12, para 15.

³⁶ Clare Feinstein and Clare O'Kane, 'Children's and adolescents' participation and protection from sexual abuse and exploitation' Innocenti Working Paper, UNICEF Innocenti Research Centre (2009) 6.

given an explanation as to the consideration given to their views and the justification for non-implantation.³⁷

In expounding on giving due weight to the views of the child considering the child's age and maturity, the Committee on the Rights of the Child (Committee) observed that this clause relates to the capacity of the child. This capacity must be assessed in order to give due account to children's views as well as explaining to them their view's influence on the outcome of the process. Remarkably, simply listening to the child is not enough; the children's views must be seriously considered especially when the child is capable of forming their views.

The Committee has also been categorical that biological age alone cannot be used to determine the significance of a child's views.³⁸ Instead, age should be considered alongside maturity of the child which refers to the ability to understand and assess the implications of a particular act.³⁹ In such considerations, non-verbal forms of communication such as play, facial expressions, gestures, mannerisms and drawing must be recognised and respected because very young children demonstrate understanding, choices, and preferences through such forms.⁴⁰ From the foregoing, children must be heard by decision-makers during the mediation process in family disputes.⁴¹

For child participation to be successful, it requires a form of partnership between children and adults in order to ensure that these views are considered.⁴² On the one hand, adults should be willing to listen and learn from the child, readjust their attitudes towards them, and consider solutions which address the child's concerns. On the other

³⁷ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 23.

³⁸ Committee, General Comment No 12, para 29.

³⁹ Committee, General Comment No 12, para 30.

⁴⁰ Committee, General Comment No 12, para 30.

⁴¹ Committee, General Comment No 12, para 52.

⁴² Feinstein and O'Kane, 'Children's and adolescents' participation and protection from sexual abuse and exploitation' 26.

hand, children should be willing to respect, listen, and learn from the adults to ensure effective engagement between the two parents.⁴³

Kenyan courts have recognised the importance of child participation. The High Court in *JO v SAO* held that the court must consider the wishes of the child while making custody orders.⁴⁴ While showing the connection between the child's best interests and child participation in custody disputes, the court in *BK v EJH* held that the test for the best interests of the child in custody disputes should be objective, rather than subjective to the selfish whims of the child. If a child's wishes to stay with a particular parent is not in their best interests in the long run, the court may disregard those wishes.⁴⁵

Recently, the Supreme Court has expounded on the parameters of promoting the best interests of the child against the parental rights and responsibilities. These considerations include: the existence of a parental responsibility agreement between the parties; past performance of each parent; each parent's presence and ability to guide the child and care for their wellbeing; the ascertainable wishes of the child who is capable of expressing their opinion; financial status of each parent; individual needs of each child; quality of the available home environment; the need to preserve personal relations and direct contact with the child by both parents unless it is not in the best interests of the child; ensuring children are not placed in alternative care unnecessarily; mental health of the parents and the totality of the circumstances.⁴⁶ In the apex court's view, the listed guidelines must be considered by courts while making a decision affecting a child.

⁴³ Centre for Human Rights, 'Study on child participation in development frameworks in Africa' Pretoria University Law Press (2022) 25.

⁴⁴ *JO v SAO*, Civil Appeal No 87 of 2015, Judgment of the Court of Appeal at Kisumu, 29 July 2016 (eKLR), para 14.

⁴⁵ *BK v EJH*, Civil Appeal No 13 of 2012, Ruling of the High Court at Nairobi, 23 July 2012 (eKLR). See also *AB and CB v Pridwin Preparatory School and others*, CCT294/18 [2020] ZACC 12, 17 June 2020, para 43, where the Supreme Court of Appeal of South Africa allowed an appeal on the basis that a private school had terminated a Parent Contract for their child's education without giving due consideration to the views of the affected children.

⁴⁶ *MAK v RMAA & 4 others*, Petition 2 (E003) of 2022, Judgment of the Supreme Court of Kenya, 24 February 2023 (eKLR), para 87.

Hart's ladder of child participation

Apart from the guidance by the CRC and General Comment No 12, Hart's Ladder of Child Participation has been the most influential model in shaping the discourse on child participation.⁴⁷ Hart presents eight steps of the ladder ranking from the lowest to the highest degree of measuring participation.⁴⁸ These are manipulation, decoration, tokenism, assigned but informed, consulted and informed, adult initiated-shared decisions with children, child initiated and directed, and child-initiated, shared decisions with adults.⁴⁹ According to him, the first three steps are collectively named levels of non-participation. They demonstrate how adults can easily manipulate children's participation for their own benefit.⁵⁰ Contrastingly, the last five steps constitute the genuine forms of participation.

Levels of non-participation

According to Hart, manipulation is the lowest form of participation. In this level, the child involved does not understand the matter at hand and therefore they do not understand their actions.⁵¹ Children are asked their views, some of which may be taken into account by adults. However, children are not told about the influence of their views on the final decision.⁵² In other instances, children share their views, but they are not listened to.

Manipulation can arise in divorce proceedings where the opinion of a child who is too immature or uninformed to form an opinion is

⁴⁷ Harry Shier, 'Pathways to participation: Openings, opportunities and obligations' 15(1) *Children and Society* (2001) 107.

⁴⁸ Roger Hart, 'The right to play and children's participation' in Harry Shier (ed) *Article 31 Action Pack children's rights and children's play: Resources for action to implement Article 31 of the United Nations Convention on the Rights of the Child*, PLAY-TRAIN, Birmingham, 1995, 25.

⁴⁹ Roger Hart, 'Children's participation from tokenism to citizenship' UNICEF, Florence, 1992.

⁵⁰ Shier, 'Pathways to participation' 108.

⁵¹ Hart, 'Children's participation from tokenism to citizenship' 9.

⁵² Shier, 'Pathways to participation' 109.

used in favour of a specific parent.⁵³ The second step is decoration where children are only used to further a cause in an indirect way. In the context of divorce, a parent informs the decision maker of the child's view, but only for the purpose of furthering their own interest in the matter.⁵⁴

The third step is tokenism where children are asked to say what they think about an issue but they have little or no choice about the way to express those views or the scope of the ideas they can express.⁵⁵ Tokenism is also apparent in instances where children are sometimes used on conference panels.⁵⁶ To illustrate, expressive and charming children may be selected by adults to sit on a panel with little or no substantive preparation on the subject and no consultation with their peers who, it is implied, they represent.⁵⁷

Genuine levels of participation

In the fourth rung of the ladder is assigned but informed, which is the first level of genuine participation. In this level of participation, there are four requirements to be considered for a project to be truly participatory. These are: first, the children understand the intentions of the project; second, they know who made the decisions concerning their involvement and why; third, they have a meaningful (rather than 'decorative') role and fourth, they volunteer for the project after the project was made clear to them.⁵⁸ In the context of divorce, children are assigned but informed when their parents ask them questions after they are provided with the necessary information to answer the questions.⁵⁹

⁵³ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 43.

⁵⁴ Hart, 'Children's participation from tokenism to citizenship' 9.

⁵⁵ Hart, 'Children's participation from tokenism to citizenship' 9.

⁵⁶ Hart, 'Children's participation from tokenism to citizenship' 10.

⁵⁷ Hart, 'Children's participation from tokenism to citizenship' 10.

⁵⁸ Hart, 'Children's participation from tokenism to citizenship' 11.

⁵⁹ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 43.

Under the fifth step, children are consulted and informed. Here, the project is designed and run by adults, but children understand the process and their opinions are treated seriously.⁶⁰ Principally, children's views are considered more critically than in the fourth step of the ladder, but they do not make any decisions.

The sixth step is adult-initiated, shared decisions with children. This level is regarded as true participation. At this level, the process is designed and run by adults, however, the views of children are considered, and they participate in the decision-making.⁶¹

Child-initiated and directed is the seventh step. Under this level, children have the initial idea and decide how the project is to be carried out; adults are available, but they do not take charge.⁶² Realistically, this level of participation would be difficult to reach in divorce proceedings since the process is ultimately directed by parents, advocates, judges, and professionals such as mental health providers notwithstanding cases where the children's views are completely considered and implemented.⁶³

The last step of the ladder is child-initiated, shared decisions with adults. The process is initiated by children and the decision-making is shared between adults and children.⁶⁴ Just like the previous step, this level of participation seems impossible to reach in divorce proceedings. This is because it is the adults who initiate divorce and come up with the ideas and process.⁶⁵

⁶⁰ Hart, 'Children's participation from tokenism to citizenship' 12.

⁶¹ Hart, 'Children's participation from tokenism to citizenship' 12.

⁶² Hart, 'Children's participation from tokenism to citizenship' 14.

⁶³ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 43.

⁶⁴ Hart, 'Children's participation from tokenism to citizenship' 14.

⁶⁵ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 43.

Factors limiting child participation

In most cases, adults fail to recognise children's abilities because they assess children from an adult perspective.⁶⁶ Their acceptance of generalised conceptions of children and what is in their best interests, fails to consider how important it is for the wellbeing of a child to have their views listened to and be taken seriously.⁶⁷ This is attributable to religious and cultural practices coupled with the strong parental control over children.⁶⁸

In many African settings, children are involved for the sake of being 'seen' as opposed to being 'heard'.⁶⁹ In addition, adults make assumptions about children's participation, such as: that it will make children disrespectful towards adults; and that it may burden children with responsibility.⁷⁰ As a result, parents fail to acknowledge the evolving capacities of children as capable of participating in the decision-making.⁷¹

Lack of access to information is another barrier to child participation. Being able to access appropriate information can reduce children's anxiety and fears.⁷² This in turn boosts their confidence to participate. Inversely, a lack of information can impede children's sense of control in mediations since they are unaware of their rights in relation to their participation.⁷³ It follows that children need to be informed about the possible changes in their living arrangements, school, and other

⁶⁶ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 23.

⁶⁷ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 23.

⁶⁸ Andrew Woolford and Robert Ratner, *Informal reckonings: Conflict resolution in mediation, restorative justice and reparations*, Routledge, 2008, 35.

⁶⁹ Centre for Human Rights, *Study on child participation in development frameworks in Africa*, 74.

⁷⁰ Prinsloo, 'Realising children's right to participation during the divorce proceedings of parents' 24.

⁷¹ Elvis Fokala, 'Gains and challenges in achieving child participation rights in Africa', Paper presented during the Pan-African Child-Rights Forum, Addis Ababa, 2020, 4.

⁷² Fern Gillon, *Children's views and experiences of their participation injustice*, Centre for Youth and Criminal Justice, June 2019, 6.

⁷³ Gillon, *Children's views and experiences of their participation injustice*, 6.

activities.⁷⁴ Notably, parents should take great care in how they disclose the cause of the divorce to the children.⁷⁵ They must consider the age and maturity of the child as well as the sensitivity of the case because an insensitive way of informing the child may change their perception of the either parent.⁷⁶

Link between the principle of best interests of the child and the child's right to be heard

The Committee has observed that the principle of best interests and child participation play a complementary role.⁷⁷ The child's best interests principle establishes the objective of achieving the best interests of the child. Child participation provides the methodology for reaching the goal of hearing the child or children.⁷⁸ In the Committee's view, there can be no correct application of the child's best interest principle where the components of child participation in Article 12 of the CRC are not respected.⁷⁹ Similarly, the best interest principle in Article 3 reinforces the functionality of Article 12 by facilitating the essential role of children in all decisions affecting their lives.⁸⁰

Child inclusive mediation

The child-inclusive approach to family mediation originated from two pilot studies conducted by Jennifer McIntosh in Darwin and Melbourne, Australia.⁸¹ In this approach, the main aim is to embrace

⁷⁴ Gillon, *Children's views and experiences of their participation injustice*, 6.

⁷⁵ Gillon, *Children's views and experiences of their participation injustice*, 6.

⁷⁶ Gillon, *Children's views and experiences of their participation injustice*, 6.

⁷⁷ Committee, General Comment No 12, para 74.

⁷⁸ Committee, General Comment No 12, para 74.

⁷⁹ Committee, General Comment No 12, para 74.

⁸⁰ Committee, General Comment No 12, para 74.

⁸¹ Brunilda Pali and Sandra Voet, *Family mediation in international family conflicts: The European context*, Institute of Criminology, Katholieke Universiteit Leuven, 2012, 40.

all aspects of children's concerns and interests.⁸² This is achieved by ensuring that the voice of the child is heard directly; children are consulted about their experiences of the family separation and dispute in a supportive way, taking into account their level of maturity.⁸³ As a result, children have more autonomy and direct input on the decision-making process.⁸⁴

The main objectives of child-inclusive mediation are: first, to learn about the child including something about their friends, hobbies, sports and interests; second, to afford the child an opportunity to talk about their feelings; third, to encourage the child to take an independent role, for example by giving ideas for a solution or a partial solution to the problem; fourth, to carefully support the child's chance to restore contact to the absent parent in circumstances where contact was interrupted for a long time; fifth, to validate children's experiences and provide basic information to assist their present and future coping.

Sixth, to form a strategic therapeutic conversation with the children's parents, supporting them to reflect on their children's experiences and needs. In turn, motivating the parents to reconsider their behaviour, attitudes, and the goals of the mediation in light of those needs; to ensure that the ongoing mediation agenda and the agreements reached reflect the psycho-developmental needs of each child; and lastly, to release the child from feeling co-responsible for what is going on between their parents – this is the sole responsibility of the parents.⁸⁵

The process of child-inclusive mediation

In child-inclusive mediation, a specialist in children matters (child consultant), mediator, parents, and children are involved. There are four

⁸² Pali and Voet, *Family mediation in international family conflicts*, 40.

⁸³ Hewlett Bill, 'Accessing the parental mind through the heart: a case study in child-inclusive mediation' 13(1) *Journal of Family Studies* (2007) 94.

⁸⁴ Pali and Voet, 'Family mediation in international family conflicts', 40.

⁸⁵ Pali and Voet, 'Family mediation in international family conflicts', 41.

stages of child-inclusive mediation.⁸⁶ The first stage is early focusing of parents on children's needs. In the first session, the mediator advises the parents to focus on and identify the needs of their children as well as the likely impact of decisions on them.⁸⁷ Where the parents and mediators appraise the situation as appropriate for consultation with the children, parents can be asked to discuss this possibility with their children.⁸⁸

The second stage is consulting directly with children, which occurs during the first or second session. Before the child consultant talks to the children, both parents must give consent, and at least one child should be of school-going age.⁸⁹ The content of the discussions will vary from child to child and family to family, but the objective of child-inclusive mediation is not solely to ascertain the 'wishes' of the children.⁹⁰ Rather, it is to explore broadly their perspectives and experiences of the current living and visiting arrangements, parental conflict, and their hopes for the future.⁹¹ Through play, drawings, and discussion, the child consultant then explores the child's response to the family's situation as well as their fears and wishes.⁹² During the discussion, the child consultant asks the child whether there is any specific information or questions that they may want to be conveyed to the parents.⁹³

The third stage is communicating the child's needs and views to the parents. In this stage, the child consultant meets with the mediator and parents to give them feedback from the children's session.⁹⁴ They

⁸⁶ Jennifer McIntosh, 'Child inclusive divorce mediation: Report on a qualitative research study' 18(1) *Mediation Quarterly* (2002) 55.

⁸⁷ McIntosh, 'Child inclusive divorce mediation' 57.

⁸⁸ Jennifer McIntosh, Caroline Long and Lawrie Moloney, 'Child-focused and child-inclusive mediation: A comparative study of outcomes' 10(1) *Journal of Family Studies* (2004) 88.

⁸⁹ Felicity Bell, Judy Cashmore, Patrick Parkinson and Judi Single, 'Outcomes of child-inclusive mediation' 27(1) *International Journal of Law, Policy and the Family* (2013) 117.

⁹⁰ Bell and others, 'Outcomes of child-inclusive mediation' 117.

⁹¹ McIntosh, 'Child inclusive divorce mediation' 57.

⁹² Bell and others, 'Outcomes of child-inclusive mediation' 117.

⁹³ McIntosh and others, 'Child-focused and child inclusive mediation' 88.

⁹⁴ Brianna Nelson, 'Divorce mediation and its impact on children' Unpublished Master's Degree of Social Work clinical research paper, St Catherine University, 2013, 13.

share their general assessment of the impact of the separation on the children.⁹⁵ This is coupled with any specific concerns or questions that the child had wanted to be raised.⁹⁶ At this stage, the child consultant is also readily available to support the parents' ability to provide a secure emotional base for their children.⁹⁷ They provide a supportive space for parents to reflect on their conflict through their child's eyes, and to consider how best the child's unique needs can be addressed in a parenting agreement.⁹⁸

The last stage is integrating the child's view and needs into the negotiations between the parents. In this part, the child consultant may excuse the parties and the mediator to continue with the mediation, incorporating the child's agenda into it.⁹⁹ Alternatively, the child consultant may stay on for the remainder of the sessions to advocate the best wishes of the child.¹⁰⁰ Where agreements are reached between the parents, the resulting plan should lay out the needs of the child and the manner in which the parents have agreed to address them.¹⁰¹

Distinguishing child-inclusive mediation from child-focused mediation

Another form of mediation that emerged in Australia alongside child-inclusive mediation is child-focused mediation. In child-focused mediation, the divorce mediation is modified to focus on the needs of children.¹⁰² The aim is to help parents reach agreements that reflect those needs, but the children are not directly involved. In essence, the

⁹⁵ Bell and others, 'Outcomes of child-inclusive mediation' 117.

⁹⁶ McIntosh, 'Child inclusive divorce mediation' 58.

⁹⁷ Amy Holtzworth-Munroe, Amy G Applegate, Brian D'Onofrio and John Bates, 'Child informed mediation study (CIMS): Incorporating the children's perspective into divorce mediation in an American pilot study' 16(2) *Journal of Family Studies* (2010) 118.

⁹⁸ McIntosh, 'Child inclusive divorce mediation' 58.

⁹⁹ McIntosh, 'Child-inclusive divorce mediation' 59.

¹⁰⁰ McIntosh and others, 'Child-focused and child-inclusive mediation' 88.

¹⁰¹ McIntosh, 'Child-inclusive divorce mediation' 59.

¹⁰² Holtzworth-Munroe and others, 'Child informed mediation study (CIMS)' 118.

child consultant does not meet with the children.¹⁰³ Instead during the mediation, parents are informed by the mediator about common concerns of children in divorcing families and the impact of parental conflict on children.¹⁰⁴ In this form of mediation, the mediator asks parents about the likes and dislikes of the child, requests them to bring in pictures of the child, or makes questionnaires touching on children matters for the parents to fill.¹⁰⁵ Whenever it is considered relevant, the mediators encourage the parents to take into account the children's needs and developmental stages when making parenting agreements.¹⁰⁶

In 2006, McIntosh and Long conducted a study involving 257 parents, 364 children, 193 of which were aged between 5-16 years. The study compared the effectiveness of child-inclusive mediation and child-focused mediation. In the child-focused process, the psychological and relational elements of parents' separation were prioritised. Parenting arrangements that would best support the developmental needs of the children were also made.¹⁰⁷ The children were not directly involved in the mediation. On average, the mediator spent about 5.1 hours with the parents.¹⁰⁸

Concerning the child-inclusive process, there was a direct assessment of children's wishes and their experiences about the separation as well as their relationships with each parent.¹⁰⁹ The children's details were meticulously formulated and considered by parents while incorporating their key concerns into the negotiations. The average duration of the

¹⁰³ Holtzworth-Munroe and others, 'Child informed mediation study (CIMS)' 118.

¹⁰⁴ Holtzworth-Munroe and others, 'Child informed mediation study (CIMS)' 118.

¹⁰⁵ Pali and Voet, 'Family mediation in international family conflicts' 40.

¹⁰⁶ Jennifer McIntosh, Yvonne Wells, Bruce Smyth and Caroline Long, 'Child-focused and child-inclusive divorce mediation: Comparative outcomes from a prospective study of post-separation adjustment' 46(1) *Family Court Review* (2008) 105.

¹⁰⁷ Jennifer McIntosh, 'Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors' 1 *Australian Family Relationships Clearinghouse* (2007), 11.

¹⁰⁸ McIntosh and others, 'Child focused child-focused and child-inclusive divorce mediation', 110.

¹⁰⁹ McIntosh, 'Child inclusion as a principle and as evidence-based practice' 11.

process with parents, including intake and feedback of the children's material, was 6.2 hours and an additional 1.5 hours with children.¹¹⁰

Both processes reduced interparental dissonance and child distress about parent strife.¹¹¹ Similarly, both processes improved the child's mental health. However, over the years, following the mediation, children that took part in child-inclusive mediation experienced better outcomes.¹¹² For instance: greater stability of care and contact patterns; greater child satisfaction with care and contact arrangements and less propensity desiring to change them; children's reports of improved emotional availability of their fathers and better intimacy with them; greater satisfaction of fathers with care and contact arrangements of their children; and significantly more durable and workable agreements over a year, as rated by mothers and fathers.¹¹³ However, child-focused mediation appeared to be more preferable for toddlers below 2 years of age as they may not have been able to express themselves in ways that would help adults consider their views.

Advantages of involving children in family mediation

Child-inclusive mediation provides a forum where children's needs are addressed formally rather than casually.¹¹⁴ This can be a source of empowerment for children and gives them a greater sense of control over their lives thus reducing anxiety.¹¹⁵ It also enhances their communication and negotiation skills with their family, especially adolescents.¹¹⁶

¹¹⁰ McIntosh and others, 'Child focused and child-inclusive divorce mediation' 111.

¹¹¹ Hewlett Bill, 'Accessing the parental mind through the heart: A case study in child-inclusive mediation' 13(1) *Journal of Family Studies* (2007) 94.

¹¹² Holtzworth-Munroe and others, 'Child informed mediation study (CIMS)' 118.

¹¹³ McIntosh, 'Child inclusion as a principle and as evidence-based practice' 12.

¹¹⁴ Ministry of Attorney General (Family Justice Services Division), *The involvement of children in divorce and custody mediation: A literature review*, March 2003, 7.

¹¹⁵ Woolford and Ratner, *Informal reckonings: Conflict resolution in mediation, restorative justice, and reparations*, 6.

¹¹⁶ Pali and Voet, 'Family mediation in international family conflicts' 38.

Second, where children are involved in the mediation process, it presents an opportunity for them to be referred to a therapist in appropriate situations. It is therapeutic for children to talk to someone about how they are feeling which improves their emotional wellbeing after parental separation.¹¹⁷

Third, involving children in family mediation improves their coping skills.¹¹⁸ This is because they are able to understand what their parents are going through. As a result, there is easier adaptation by the child to post-divorce conditions.¹¹⁹

Fourth, involving children can improve child-parent communication which often suffers during divorce and after separation. If children are present during their parents' mediation, it can help them appreciate that love and concern for the child are the primary motivations for their parents' participation in mediation. This opens up more channels of communication between children and their parents.¹²⁰ Besides, focusing on the needs of children early in the process of parental conflict can reduce both the intensity and duration of the conflict. This enhances conciliation between the parents to communicate more effectively on behalf of their children.¹²¹

Potential drawbacks of involving children in mediation

The first is loyalty conflicts, where each parent seeks to win the attention of the child in most cases. Children may therefore be exposed

¹¹⁷ Mariska Botha, '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 Family Advocate in divorce proceedings. Is it not time for an overhaul of this Act?' Unpublished Masters Degree in Family Law mini-dissertation, University of KwaZulu-Natal, 2021, 14. See also Bell and others, 'Outcomes of child-inclusive mediation' 137.

¹¹⁸ Botha, 'The voice of children in divorce proceedings' 14.

¹¹⁹ Botha, 'The voice of children in divorce proceedings' 14.

¹²⁰ Ministry of Attorney General, *The involvement of children in divorce and custody mediation*, 7.

¹²¹ Pali and Voet, 'Family mediation in international family conflicts' 38.

to continued volatile and negative dynamics between the parents.¹²² Consequently, children may not express their true feelings due to fear that their parents' may get angry at their disclosure causing loyalty conflicts.¹²³

Second, a child's view can sometimes be used as a 'trump card' by one or both parents which then marks the end of the consensual decision-making process.¹²⁴ To illustrate, either parent may claim that the child is being 'traumatised' in the mediation and use this as a tactic against the other parent. Such situations can arise because children often frankly express their feelings, and a mediator may lack the skills or willingness to respond to these emotions.¹²⁵ Furthermore, once a child has been asked to express their views, they may be disappointed when their views are not determinative of the outcome. This can lead to feelings of anger and hurt.¹²⁶

The third setback is parents' unwillingness to allow, accept, and respect children's views. Direct involvement of children is only possible where parents demonstrate some intent to consider their children's interests.¹²⁷ In addition, child-inclusive mediation can only thrive where the parents are able (at least in part and with support) to consider and respect the needs of children, as distinct from their own. Also, where the child has suffered abuse, child-inclusive mediation is unsuitable.¹²⁸ This is because of the already existing fear in the child to speak freely.¹²⁹

¹²² Ministry of Attorney General, *The involvement of children in divorce and custody mediation*, 8.

¹²³ Ministry of Attorney General, *The involvement of children in divorce and custody mediation*, 8.

¹²⁴ Ministry of Attorney General, *The involvement of children in divorce and custody mediation*, 8.

¹²⁵ Ministry of Attorney General, *The involvement of children in divorce and custody mediation*, 8.

¹²⁶ Pali and Voet, 'Family mediation in international family conflicts' 37.

¹²⁷ McIntosh and others, 'Child-focused and child inclusive mediation' 89.

¹²⁸ Robert E Emery, *Renegotiating family relationships divorce, child custody, and mediation*, Guilford Press, New York, 2012, 139.

¹²⁹ Pali and Voet, 'Family mediation in international family conflicts' 36.

Fourth, divorce involves high conflict levels which are likely to negatively affect children. This weakens their relationships with one or both parents and may force children to grow up too quickly which could impact their adjustment and resilience.¹³⁰ Also, delegating too much authority to children instead of helping them develop coping strategies during times of parental separation may burden them with too much power.¹³¹ Likewise, it is difficult and unfair to expect children, at a time of crisis, to make informed judgements about what is in their own best interests.¹³²

Lastly, there is uncertainty as to the appropriate age of participation. Generally, only children who are capable to form well-informed views about separation should be included.¹³³ This raises concerns about the suitable age for a child to participate in mediation proceedings. Some scholars opine that seven years is the most suitable age by which children should be able to formulate opinions about issues affecting their lives.¹³⁴ The rationale is that children under the age of seven generally comply with the joint decisions of their parents and seldom need to be included in the mediation process.¹³⁵ As for adolescents, there is consensus that they should be interviewed because of their cognitive ability to formulate abstract plans and the relative independence of their lives.¹³⁶ The downside of setting seven years as the minimum age of participation is that it may fail to recognise other forms of expression

¹³⁰ Siun Kearney, 'The voice of the child in mediation' 2(1) *Journal of Mediation and Applied Conflict Analysis* (2014) 154.

¹³¹ Pali and Voet, 'Family mediation in international family conflicts' 35.

¹³² Pali and Voet, 'Family mediation in international family conflicts' 35.

¹³³ See South Africa Children's Act (No. 38 of 2005) Section 10. See also Children Act (No 29 of 2022) Section 8(3).

¹³⁴ See Donald Saposbek, 'Working with children' in Jay Folberg, Ann Milne and Peter Salem (eds), *Divorce and family mediation: Models, techniques, and applications*, Guilford Press, 2004, 160. See also Ernest Sanchez and Sherrie Kibler-Sanchez, 'Empowering children in mediation: An intervention model' 42(3) *Family Court Review* (2004) 556.

¹³⁵ Allan Wolk, 'Divorce mediation: Today's rational alternative to litigation' 51(1) *Dispute Resolution Journal* (1995) 40.

¹³⁶ Madelene De Jong, 'Child focused mediation' in Trynie Boezaart (ed), *Child law in South Africa*, Juta, Cape Town, 2009, 112, 125.

by children below that age. Sometimes children express themselves through silence, drawings, emotions, and facial expressions.

While the drawbacks of involving children in mediation exist, they cannot be used as justifications for denying children opportunities to share their views and opinions. Instead, parents and mediators should aim at providing a conducive environment for children to express themselves and address the barriers that limit child participation.

The next section focuses on the function of the Office of the Secretary of Children's Services (OSCS) in Kenya, specifically, to promote family reconciliation by mediating disputes where children and parents are involved. The paper argues that this function is too vague and inadequate to achieve the demands of child-inclusive family mediations.

Office of the Secretary of Children's Services (OSCS)

The OSCS is a public office established by the Children Act of 2022.¹³⁷ For one to qualify for appointment as the Secretary of Children's Services (Secretary) by the Public Services Commission (PSC), they must possess the following qualities: they must be a citizen of Kenya; they must hold a relevant bachelor's or master's degree in social sciences; they must possess a minimum of ten years' experience in social work, education, administration, and management, public administration, and human resource or finance management; and they must meet the requirements of Chapter Six of the Constitution.¹³⁸

The Secretary is mandated with among other functions to inquire, investigate, assess, and prepare reports as may be directed by a court.¹³⁹ In addition, they are tasked with regulating, coordinating, managing,

¹³⁷ Children Act (No 29 of 2022) Section 37(1).

¹³⁸ Children Act (No 29 of 2022) Section 37(3).

¹³⁹ Children Act (No 29 of 2022) Section 38(g). See also Section 150, which provides that a court before which any child in need of care and protection can require an authorised officer to give a report or professional advice on any aspect relating to the manner in which the child should be dealt.

and supervising children officers in the delivery of the welfare and administration of children services.¹⁴⁰ Furthermore, the Secretary is obligated to provide assistance for a child during a proceeding in court.¹⁴¹ In fact, they can institute proceedings in respect of any contravention relating to child maintenance, child neglect, and abuse.¹⁴² Most relevant, the Secretary is required to promote family reconciliation by mediating disputes involving children, parents, guardians, or persons with parental responsibility.

In fulfilling the above duties, the Secretary is assisted by chief officers appointed by the PSC.¹⁴³ The Secretary is also a member of the National Council for Children Service, established by the 2022 Act.¹⁴⁴ Among other functions, the Council is mandated to facilitate, monitor, and evaluate the enforcement of international obligations on children's rights by Kenya.¹⁴⁵ It is also tasked with monitoring and evaluating the implementation of public education programmes on the rights and welfare of children.¹⁴⁶ Lastly, the Council is obligated to establish, regulate, and manage the activities of County Children Advisory Committees to advise on matters relating to the rights and welfare of children.¹⁴⁷

Comparison between the 2022 Act and repealed 2001 Act in relation to mediation

While the Children Act of 2022 has been commended for introducing new changes, the repealed Children Act of 2001 created the Office of Director of Children's Services, whose Director played similar roles to

¹⁴⁰ Children Act (No 29 of 2022) Section 38(a).

¹⁴¹ Children Act (No 29 of 2022) Section 38(p).

¹⁴² Children Act (No 29 of 2022) Section 39(2).

¹⁴³ Children Act (No 29 of 2022) Section 40.

¹⁴⁴ Children Act (No 29 of 2022) Section 43(g).

¹⁴⁵ Children Act (No 29 of 2022) Section 42(d).

¹⁴⁶ Children Act (No 29 of 2022) Section 42(f).

¹⁴⁷ Children Act (No 29 of 2022) Section 42(r).

those of the Secretary.¹⁴⁸ To highlight a few, the Director was generally obligated to safeguard the welfare of children by assisting in the establishment, promotion, and supervision of services designed to advance the wellbeing of children.¹⁴⁹ This was to be achieved through making as such enquiries, investigations, and assessments as may be required by court.¹⁵⁰ The Director was also obligated with safeguarding the welfare of any child or children placed under care.¹⁵¹

Second, the Director was in charge of supervising children's officers and regulating their work in the provision of children's welfare services.¹⁵² Similar to the Secretary, the Director was obligated to promote family reconciliation by mediating family disputes involving children and their parents, guardians or other persons with parental responsibility in respect of the children.¹⁵³ Therefore, despite the difference in name, both the Secretary in 2022 Act and Director in the repealed 2001 Act play a similar role in mediating family disputes involving children. Furthermore, they are all housed in the Department of Children's Services, a division in the Office of the Attorney General. The Department has offices in 47 counties and 283 sub counties.¹⁵⁴

Absence of child-inclusive mediation

While the repealed and 2022 Children Act call for mediating family disputes involving children and their parents, guardians, or persons with parental responsibilities, they both lack clear guidance on the nature of such mediation and how it can be conducted to cater for the best interests of children. In addition, there is no express provision requiring the Secretary to look out for the best interests of the child

¹⁴⁸ Children Act (Cap 141), Section 37(1).

¹⁴⁹ Children Act (Cap 141), Section 38(1). See also Department of Children's Services, *Child Protection Report*, 2016-2019.

¹⁵⁰ Children Act (Cap 141) Section 38(2)(g).

¹⁵¹ Children Act (Cap 141) Section 39(2)(i).

¹⁵² Children Act (Cap 141) Section 39(2)(a)

¹⁵³ Children Act (Cap 141) Section 39(m).

¹⁵⁴ State of the Judiciary and Administration of Justice, *Annual report, 2018/2019*, 317.

during such mediations. They are presented as a 'neutral' mediator to mediate disputes between parents or guardians involving children.

Be that as it may, it is implicit that in view of the best interest principle outlined in the 2022 Act, the Secretary would be obligated to hear the voices and opinions of children in such disputes.¹⁵⁵ Besides, in any matter affecting a child, the 2022 Act states that the child must be accorded an opportunity to express their opinion.¹⁵⁶ In addition, that opinion should be taken into account in appropriate cases having regard to the child's age and degree of maturity.¹⁵⁷ It follows that children must be given an opportunity to express their opinions in family mediations. The next section, using a case study of the Office of Family Advocate (OFA) in South Africa highlights how child-inclusive mediation can be promoted better by the OSCS.

The OFA in South Africa

The Mediation in Certain Divorce Matters Act 1987 established the OFA to protect the rights of children in situations where their parents could not be together.¹⁵⁸ In order to ensure a holistic and qualitative approach to serve the best interests of the child, the office provides family mediation through multidisciplinary teams comprising lawyers and social workers.¹⁵⁹ Family advocates are appointed for each division of the Supreme Court by the responsible Minister.¹⁶⁰

For one to qualify for appointment, they must possess experience in the adjudication and settlement of family matters.¹⁶¹ Family counsellors are appointed in accordance with Section 3 of the statute to assist family

¹⁵⁵ Children Act (No 29 of 2022) Section 8(3).

¹⁵⁶ Children Act (No 29 of 2022) Section 8(3).

¹⁵⁷ Children Act (No 29 of 2022) Section 8(3).

¹⁵⁸ South Africa Mediation in Certain Divorce Matters Act (No 24 of 1987), Section 4.

¹⁵⁹ Department of Justice and Constitutional Development, Annual report 2008/2009, 92.

¹⁶⁰ Mediation in Certain Divorce Matters Act (No 24 of 1987) Section 2.

¹⁶¹ Felicity Kaganas and Debbie Budlender, 'Family advocate', *Law, Race and Gender Research Unit*, University of Cape Town, 1996, 2.

advocates.¹⁶² Although the statute is ambiguous about the qualifications of family counsellors, in practice, only professionals with specialised knowledge and experience in children and family matters are qualified for appointment.¹⁶³

To assist in getting the child's perspective on what they envision before and after divorce, the family advocate and counsellors may hire additional professionals such as mental health specialists, retired ministers, and religious leaders on a part time basis as required by circumstances.¹⁶⁴ Additionally, Annexure A of the Regulations to the Act provides a template of the information the family advocate must obtain from the parties on the care of an contact of and contact with their child. This aims to ensure that the mediation is centred on the child's best interests rather than being parent centred.¹⁶⁵

The family advocate may institute an enquiry into divorce matters where welfare of children is at stake.¹⁶⁶ An enquiry may be instituted in any of the following ways: first, request by either party involved in the proceedings to institute proceedings; second, request by the judge or magistrate responsible for the case through a court order requesting the family advocate to intervene in the matter, and third, request by the family advocate that an enquiry be instituted if the arrangements made for the children of divorce do not seem to be in their best interests.¹⁶⁷ Furthermore, if there are any allegations of abuse or neglect of the children, the family advocate may request the court to institute an enquiry into the matter.

Once an enquiry is instituted, a written notice is placed on the court file. The parties cannot proceed with the divorce until the matter has been

¹⁶² Kaganas and Budlender, 'Family advocate', 2.

¹⁶³ Kaganas and Budlender, 'Family advocate' 2.

¹⁶⁴ Kaganas and Budlender, 'Family advocate' 2.

¹⁶⁵ Veerashnie Srikison, 'Mandatory child-inclusive mediation - a possibility in South Africa' Unpublished LLM dissertation, University of Pretoria, 2019, 54.

¹⁶⁶ Mediation in Certain Divorce Matters Act (No 24 of 1987) Section 4.

¹⁶⁷ Mediation in Certain Divorce Matters Act (No 24 of 1987) Section 4(1) - 4(3).

investigated and the office submits a written report.¹⁶⁸ All the parties are notified in writing of the date and details of the enquiry unless an urgent investigation is required. When an interested party, a judge or a family advocate has requested an enquiry at the OFA, the parents are requested to attend the enquiry together with their children.¹⁶⁹

On the day of the enquiry, the family advocate and the counsellor explain their role to the parties, which is to safeguard the best interest of the child.¹⁷⁰ Likewise, the purpose of the investigation and the roles played by each participant are disclosed to the participants. Then they are given the opportunity to express their views. The family advocate and counsellor interview the child to obtain their opinions and feelings.¹⁷¹

Initially, the work of the family advocate was based on divorce proceedings or applications to vary, rescind, or suspend orders made under the Divorce Act of 1979 that related to the custody, guardianship, or access to a child.¹⁷² In *Terblanche v Terblanche*, it was held that Section 4 of the Divorce Act should be interpreted to include applications pending trial for interdicts, for interim custody, access, or for payment of maintenance.

The services at the time of the establishment of the office were available to few privileged South Africans who could afford to litigate in the High Courts as prescribed in terms of the Divorce Act of 1979.¹⁷³ Only children born of parents who were parties in the divorce proceedings before the first four High Courts of the then Republic of South Africa were the beneficiaries of the services.¹⁷⁴

¹⁶⁸ Vivian Moraa, 'Situating children in divorce mediation in South Africa and Australia: A comparative study' (1) *Journal of Policy and Development Studies* (2020) 36.

¹⁶⁹ Botha, 'The voice of children in divorce proceedings' 9.

¹⁷⁰ Annelies Du Plessis, 'Disputed custody and the people involved: An exosystemic perspective' Unpublished Masters Degree in Clinic Psychology, University of South Africa, 1995, 57.

¹⁷¹ Du Plessis, 'Disputed custody and the people involved: An exosystemic perspective', 57.

¹⁷² Kaganas and Budlender, 'Family Advocate' 4.

¹⁷³ Department of Justice and Constitutional Development, 'Annual report 2020/2021' 72.

¹⁷⁴ Department of Justice and Constitutional Development, 'Annual report, 2021/2022' 77.

In 2008, the mandate of the office was expanded by the implementation of various legislations including the Children's Act, 2005.¹⁷⁵ These modifications resulted in entitling all children involved in judicial and administrative actions to the office's services regardless of their parents' marital status.¹⁷⁶ Importantly, Section 21 of the Children's Act, 2005 extends the role of the family advocate to mediations in disputes on parental rights of fathers of children born out of wedlock.¹⁷⁷ The introduction of Section 21 has also made the services of the family advocate more accessible, as the parents of children born out of wedlock are no longer compelled to undertake costly litigation to resolve their disputes.¹⁷⁸ In addition, the restriction of the services of the family advocates to children whose parents were married under Section 4 of the Mediation in Certain Divorce Matters Act was rendered unconstitutional as will be discussed later in the paper.¹⁷⁹

Furthermore, where parents, with shared custody in respect of a child, are experiencing conflicts, they must first agree on a parenting plan determining the exercise of the respective responsibilities before seeking the intervention of courts.¹⁸⁰ In preparing the contents of the parenting plan, the parties must seek the assistance of a family advocate, social worker, or psychologist through mediation.¹⁸¹ The mediator is required to submit a certificate of non-attendance where the parties refuse to participate in the mediation process or frustrate it.¹⁸²

The Children's Act also empowers the Children's Court to order a lay-forum hearing before deciding on a matter. A lay-forum hearing

¹⁷⁵ Department of Justice and Constitutional Development, *Annual report, 2021/2022*, 78. These legislations include the Maintenance Act (No 99 of 1998); Recognition of Customary Marriages Act (No 120 of 1998); Domestic Violence Act, 1998; Constitution of the Republic of South Africa (1996) Section 28(2); and the African Charter on the Rights and Welfare of the Child.

¹⁷⁶ Department of Justice and Constitutional Development, *Annual report 2020/2021*, 72.

¹⁷⁷ Children's Act (No 38 of 2005), Section 21.

¹⁷⁸ Department of Justice and Constitutional Development, *Annual report 2007/2008*, 44.

¹⁷⁹ *In the matter of ST and BN and others* [2022] 2 ALL SA 580 (GJ) (2 February 2022).

¹⁸⁰ Children's Act (No 38 of 2005), Section 33(2).

¹⁸¹ Children's Act (No 38 of 2005), Section 33(5).

¹⁸² Srikison, 'Mandatory child inclusive mediation' 30.

may include ‘mediation’ by a family advocate, social worker, social service professional, or mediation by an elder.¹⁸³ However, the use of mediation is subject to considerations like the vulnerability of the child, the ability of the child to participate in the proceedings, the power relations within the family, and the nature of any allegations made by the parties in that matter.¹⁸⁴ In addition, lay-forums may not be used for matters that involve abuse or sexual abuse of the child.¹⁸⁵

Recent developments and criticism about the functions of the OFA

As seen in the previous sections, only married couples in the process of divorcing or those previously divorced would benefit from the services of the OFA. They would sign Annexure B of the Regulations to the Act, and serve it on the other party, and OFA. On the other hand, unmarried parties were unable to use the services of the OFA without a court order directing the office to prepare a report about the best interests of the child involved.

The High Court of South Africa in *ST v BN & Others* declared Section 4(1)(a) and (b) unconstitutional for several reasons.¹⁸⁶ First of all, it unfairly discriminated between married and unmarried parents in accessing the services of the family advocate.¹⁸⁷ Second, the Court found that there was no rational connection to any legitimate purpose of placing an unfair burden on unmarried parents to obtain a court order.¹⁸⁸ Third, the distinction violated the children’s rights to have their best interests of paramount importance since it treated children of married and unmarried parents unfairly.¹⁸⁹

¹⁸³ Children’s Act (No 38 of 2005), Section 49(1).

¹⁸⁴ Children’s Act (No 38 of 2005), Section 49(2).

¹⁸⁵ Children’s Act (No 38 of 2005), Section 71(2).

¹⁸⁶ *In the matter of ST and BN and others.*

¹⁸⁷ *In the matter of ST and BN and others.*

¹⁸⁸ *In the matter of ST and BN and others.*

¹⁸⁹ *In the matter of ST and BN and others.*

The High Court referred the declaration of invalidity to the Constitutional Court of South Africa.¹⁹⁰ It also suspended the declaration of invalidity for a period of 24 months from the date of confirmation by the Constitutional Court to enable Parliament to take steps to cure the constitutional defects identified in the judgement.¹⁹¹ As a temporary measure and pending the decision of the Constitutional Court on the validity of the Act, the court rightly reworded Section 4 of the Mediation in Certain Divorce Matters Act to the effect that both married and unmarried parents can equally use the services of the family advocate.¹⁹² Consequently, children were subjected to less protracted court battles.

The OFA has been criticised for not being in line with the function of the traditional mediator.¹⁹³ To demonstrate, mediation by the family advocate is to some extent, not voluntarily submitted to by both parties.¹⁹⁴ In addition, in developing a report based on facts and information, parties may not be too open to reveal much information for fear that it will be recorded in the report and may be used against them in court.

Furthermore, it has been argued that since counsellors and advocates mediate a matter to determine and report on the child's best interests, this disqualifies them from being mediators and should be regarded as children advocates.¹⁹⁵ Notwithstanding the above valid criticisms, it is justified that family advocates look out for children's best because they merit special attention due to the child's dependency, vulnerability, and need assistance necessary for their positive growth and development.¹⁹⁶

¹⁹⁰ This is pursuant to Article 172 of the Constitution of South Africa, 1996, which provides that an order of constitutional invalidity has no force unless confirmed by the Constitutional Court.

¹⁹¹ *In the matter of ST and BN and others*, para 123(8).

¹⁹² *In the matter of ST and BN and others*, para 123 (9.1).

¹⁹³ Moraa, 'Situating children in divorce mediation in South Africa and Australia' 36.

¹⁹⁴ Botha, 'The voice of children in divorce proceedings' 9.

¹⁹⁵ Moraa, 'Situating children in divorce mediation in South Africa and Australia' 36.

¹⁹⁶ Mariam Adepeju Abdulraheem-Mustapha, *Child justice administration in Africa*, Springer Nature, 2020, 2.

Benefits of the OFA

There are some benefits that have been realised through the services provided by the OFA. The first one is promotion of access to justice. By providing all parents with free mediation services, the OFA's services benefit the underprivileged members of society thus relieving them of the financial burden of litigation costs.¹⁹⁷ In addition, using family advocates reduces case backlog in the courts and less time is spent in the resolution of family disputes involving children.¹⁹⁸

Second, the OFA preserves family relations and integrity through the provision of mediation services at an early stage of the dispute.¹⁹⁹ This can lead to settlement based on the family advocate's recommendations prior to the trial hearing in court.²⁰⁰ Therefore, by settling matters before trial, parties are spared the emotional turmoil of trials.²⁰¹

Third, assisting parents by drawing parenting plans. The family advocates facilitate negotiations between parents and assist them with drawing up of parental plans that stipulate parental rights and responsibilities.²⁰² As a result, parental plans create certainty as to what is expected of each parent in terms of fostering the children's best interests.

Lastly, the family advocate promotes the child's best interests and amplifies their voices. This is possible because the OFA approaches the participation of children in mediation and trials through a multidisciplinary angle.²⁰³ The family advocate in collaboration with the family counsellor conduct an enquiry into the best interests of the children.²⁰⁴ After conducting investigations into the psycho-

¹⁹⁷ Department of Justice and Constitutional Development, *Annual report 2012/2013*, 29.

¹⁹⁸ Department of Justice and Constitutional Development, *Annual report, 2012/2013*, 29.

¹⁹⁹ Department of Justice and Constitutional Development, *Annual report, 2018/2019*, 74.

²⁰⁰ Department of Justice and Constitutional Development, *Annual report, 2018/2019*, 75.

²⁰¹ Department of Justice and Constitutional Development, *Annual report 2019/2020*, 64.

²⁰² Department of Justice and Constitutional Development, *Annual report 2008/2009*, 94.

²⁰³ Department of Justice and Constitutional Development, *Annual report 2019/2020*, 63.

²⁰⁴ Department of Justice and Constitutional Development, *Annual report 2019/2020*, 63.

social functioning of families, they put together a report containing recommendations as to the best interests of children.²⁰⁵

Challenges faced by the OFA

Staff shortages are the most prominent challenge facing the family advocate.²⁰⁶ As of 2022, there were only 26 sub-offices of the OFA servicing over 700 courts including the Maintenance Courts, Divorce Courts and Domestic Violence Courts.²⁰⁷ In addition, there were about 96 family advocates, 46 family law assistants and 126 family counsellors who provide both the litigation and non-litigation services of the office.²⁰⁸ The shortage persists despite the growing demand for the services.²⁰⁹

Another main challenge facing the OFA is limited accessibility. People have to travel long distances to obtain the services. Additionally, increased court adjournments have also been a challenge leading to delays in obtaining reports or the availability of family advocates to appear in court. Such delays compromise the welfare of the child.

The family advocate is also affected by a significant workload. Since the establishment of the OFA, there has been a steady and increasing rate of workload coupled with increased urgency of the work since the lives of children are involved.²¹⁰ Moreover, in cases where an inquiry is pending, the parties cannot proceed with the matter without the family advocate's report.²¹¹ Thus, increasing the family advocates' workload.

²⁰⁵ Department of Justice and Constitutional Development, *Annual Report 2019/2020*, 64.

²⁰⁶ Department of Justice and Constitutional Development, *Annual Report 2008/2009*, 94.

²⁰⁷ Department of Justice and Constitutional Development, *Annual Report 2020/2021*, 28.

²⁰⁸ Department of Justice and Constitutional Development, *Annual Report 2020/2021*, 29.

²⁰⁹ Department of Justice and Constitutional Development, *Annual Report 2020/2021*, 28.

²¹⁰ Department of Justice and Constitutional Development, *Annual Report 2008/2009*, 63.

²¹¹ Department of Justice and Constitutional Development, *Annual Report 2008/2009*, 63.

Differences and similarities between the OFA and OSCS

The main similarity between the OFA and the Secretary of Children's Services is that both offices promote family reconciliation. This is achieved through mediating family disputes involving children, parents, and persons with parental responsibility. Below are some of the distinctions between the two offices.

First, there is a difference in qualifications of the two offices. Under the Mediation in Certain Divorce Matters Act, a family advocate must be a qualified practising lawyer. They must possess experience in the adjudication or settlement of family matters.²¹² Contrastingly, under the Kenyan Children's Act, the OSCS need not be an advocate. In fact, any person with a bachelors and master's degree in social sciences qualifies to be appointed for the office.²¹³ However, such persons must possess at least ten years' experience in either of the following fields: social work; education, administration, and management; public management; and human resource or finance management.²¹⁴ Closely related to the above, the family advocate is appointed by the South African Minister of Justice while the Secretary of Children Services is appointed by the Public Service Commission.²¹⁵

Second, the family advocate is assisted by the family counsellor in conducting mediations between divorcing parties to safeguard the interests of children and obtain their views.²¹⁶ On the other hand, the Secretary of Children's Services is assisted by children's officers throughout the 47 counties in conducting mediations. In practice, children's officers may seek support of mental health professionals and social workers in mediating family disputes involving children.

²¹² Mediation in Certain Divorce Matters Act (No 24 of 1987), Section 2.

²¹³ Children Act (No 29 of 2022), Section 37(2).

²¹⁴ Children Act (No 29 of 2022), Section 37(3).

²¹⁵ See Mediation in Certain Divorce Matters Act (No 24 of 1987), Section 2 and Children Act (No 29 of 2022), Section 37.

²¹⁶ Mediation in Certain Divorce Matters Act (No 24 of 1987), Section 3.

Third, there is also a difference in mediation approaches. It is arguable that the family mediation conducted by the family advocate mirrors the child-inclusive mediation as discussed in the previous section. This is because the child is directly involved in the process and their views and wishes are sought by the family counsellor. In Kenya, it appears that children are occasionally involved in the mediation process. While child participation is guaranteed under Section 8(3) of the Children Act, it is still not yet fully realised because of the cultural attitudes towards children as being incapable of properly sharing their views. As a result, the dominant model of family mediation seems to be child focused mediation where children are not directly involved, but parents are educated about the best interests of children and encouraged to make decisions that best reflect children's interests.

Recommendations

In light of the above discussions, the authors make the following recommendations that will help to enhance child-inclusive mediation in Kenya.

First, there is a need for robust campaigns through mass media such as televisions, radios, and newspapers about family mediation and the benefits of involving children in such processes. This is because there has been a low uptake of alternative dispute resolution mechanisms among Kenyans owing to ignorance about their existence. This is coupled with a widespread litigation mindset that pits parties against each other.

Notably, the awareness should also be extended to rigid cultural values that place limitations on the expression of opinions by children. People should be educated about child participation to distinguish between genuine forms of participation and manipulation. Consequently, children will be empowered to speak up in discussions that affect their welfare.

Second, awareness campaigns for children's self-expression should be developed. Children should be taught how to express themselves

with the help of psychologists and psychotherapists. This will give them courage to speak up and share their opinions in family mediation disputes affecting them. The sensitisation can be through poems, plays, and songs, and the Children's Assembly. The Judiciary and government should collaborate more closely with other stakeholders such as Mtoto News and Cradle to actualise the empowerment of children.

Closely related to the above recommendation, there is a need to train and retrain parents, social workers, lawyers, family mediators, and judges in child-inclusive mediation.²¹⁷ Parents should be sensitised about resolving their custody as well as childcare disputes through mediation. They can be trained in topics such as child participation, best interests of the child, and child-inclusive mediation principles.

Similarly, parents should be sensitised about dealing with grief and pain during divorce. In most mediations, mediators tend to discourage and downplay emotions such as grief experienced by parents who are often told to control their emotions.²¹⁸ Yet, effective mediation would require that the parents' emotions be recognised. Family mediators should therefore be trained in emotional and interpersonal issues to enable them to understand the dynamics of family conflicts.²¹⁹ Such training can focus on various aspects such as family and child development, impact of family conflict on parents and children, and interviewing skills with special focus on the unique language and thinking patterns of children.²²⁰ As a result, there is a need for the development of regulations and manuals on child-inclusive mediation.

Third, in order to address the challenge of inadequate staffing, the Secretary of Children Services and the PSC should recruit more children's officers on an *ad hoc* basis to facilitate child inclusive mediations. Such officers should be professionals trained in family law, children matters, and social sciences such as psychology. The Judiciary, the PSC, and the Secretary of Children's services should consider recruiting some

²¹⁷ Moraa, 'Situating children in divorce mediation in South Africa and Australia' 33.

²¹⁸ Robert, *Renegotiating family relationships divorce, child custody, and mediation*, 19.

²¹⁹ Ahemd and Carioia, 'Mediating family disputes' 270.

²²⁰ Madelene, 'Child focused mediation' 129.

of the qualified professionals accredited by the Mediation Accredited Committee under the court-annexed mediation. The ad hoc system would ensure that enough mediators and counsellors are appointed to assist the Secretary of Children Services in administering child-inclusive mediation across the country.

Fourth, the National Council of Children Services and the Secretary of Children's Services should be adequately funded. This will also facilitate the expansion of awareness programs about child-inclusive mediation. Additionally, it would ensure prompt payment of mediators, social workers, and counsellors. It would also facilitate the provision of support services such as child psychotherapy to children.

Fifth, to strengthen and implement child-inclusive mediation, there is a need for the Secretary of Children Services and National Council of Children Services to benchmark with offices in other countries about the institutionalisation of child-inclusive mediation. The Secretary can borrow lessons from the OFA in South Africa as their roles are similar in terms of looking out for the best interests of children in family disputes affecting them.

Conclusion

There is wisdom in the truism 'love is blind'. Love makes people see what they want to see and believe what they hope is true.²²¹ In a divorce and separation, the blinders of love are ripped off. This causes feelings of betrayal, disappointment, grief, hurt, jealousy, and anger, among others.²²² Divorce not only traumatises parents but also negatively impacts the innocent children who are caught in the middle of their parents' conflict. They are rarely given the chance to express their opinions, feelings, and wishes regarding their parents' separation.

²²¹ Robert, *Renegotiating family relationships divorce, child custody, and mediation*, 5.

²²² Robert, *Renegotiating family relationships divorce, child custody, and mediation*, 15.

When an opportunity for children to be heard presents itself, their participation is manipulated or suppressed as they are deemed too young to engage in 'adult stuff'. The paper has extensively discussed the levels of participation of children in family mediation. It recognises the enactment of the Children Act 2022 as a new dawn for children's rights. The OSCS is required to mediate family disputes involving children and parents. Although this function is welcome, it is vague and insufficient to protect the best interests of children in family mediations.

As a result, the authors have advocated child-inclusive mediation as a better approach for resolving family disputes while ensuring that children are positively and genuinely heard. The new, innovative, and promising approach of resolving family disputes involving children is already happening in South Africa. Similar to the OSCS, the OFA conducts family mediation in disputes involving children and parents. However, its primary duty is to protect the children's best interests in such disputes which is achieved by interviewing children to obtain their views, feelings, and wishes about their parental conflict. Consequently, the paper has offered some suggestions on enhancing child participation in the resolution of family disputes through mediation in Kenya.

