

Including Children's Views in Divorce Mediation: A Comparative Analysis and Recommendations for Kenya

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Abstract

It is important that the views of children be considered during the process of their parents' divorce. Parental divorce mediation informed by the needs of children is more likely to produce better outcomes. The ways in which divorce mediators in South Africa, Australia and Kenya consider views of the children of marriages in the process of dissolution are compared. The extent to which these three countries have domesticated and implemented relevant international law and policies is compared. Recommendations are provided for Kenya, where empirical research was undertaken to establish the practices and attitudes of Kenyan divorce mediators. The outcome of this empirical research indicates that – prior to mediating between their parents – most of Kenya's divorce mediators fail to elicit the views and wishes of the children who will be affected by the divorce. Proposals are put forward on how this may be rectified. In formulating these proposals, practices in South Africa and Australia are examined for the purpose of comparative analysis. The recommendations for Kenya include the formulation of appropriate laws and policies; the establishment of cost-effective mechanisms for hearing the voices of children prior to their parents' divorce mediation; and the education of the general public on the importance of considering the views and wishes of children when their parents are divorcing.

Keywords

Divorce mediation; child participation; legal framework; hearing children's voices Advertising Regulatory Board; advertising; self-regulation; jurisdiction.

1 Introduction

Divorce arrangements almost always significantly affect the children of the divorcing parties. For this reason paragraph 52 of the 2009 United Nations (UN) General Comment 12 on the Right of the Child to Be Heard (hereafter General Comment 12) recommends that domestic legislation on divorce should include a right for children to be heard during parental mediation processes.¹ Paragraph 42 of General Comment 12 requires that mechanisms be put in place to ensure that relevant adults are "[w]illing to listen and seriously consider what the child has decided to communicate." And paragraph 36 requires that those who represent children's views must have sufficient knowledge of the process in which they are involved and sufficient experience in working with children in relation to that process. In the light of these provisions, this article examines and compares the requirements and methods for facilitating child participation when parents receive divorce mediation in Kenya, South Africa and Australia. Based on this examination and comparison, recommendations for improvement in Kenya are proposed.

South Africa and Australia were chosen for comparison with Kenya because they apply some well-tested methods. Kenya and South Africa have pluralistic legal systems that include customary dispute resolution by traditional authorities. Both countries have formal adversarial legal systems introduced during British colonial occupation. Australia, like Kenya, has a legal system based on English common law. All three countries are signatories to the 1989 *UN Convention on the Rights of the Child* (hereafter UNCRC). South Africa and Kenya have signed the 1990 *African Charter on the Rights and Welfare of the Child* (hereafter ACRWC). Both these instruments contain provisions requiring that the voices of children be heard

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¹ Paragraph 52 of UN Committee on the Rights of the Child *General Comment No 12: The Right of the Child to be Heard* UN Doc CRC/C/GC/12 (2009) (hereafter General Comment 12) provides that all legislation on divorce and separation must include the right of the child to be heard by decision-makers and in mediation processes. Paras 93 and 94 recommend that parents be educated on the importance of the involvement of children in decision-making.

in important matters affecting them.² Furthermore, South Africa and Australia are useful for the purpose of comparison because they provide continuous and significant government funding for ensuring that children's needs are optimally met when their parents get divorced. The data required for comparative analysis were sourced from the literature and from empirical research. While a literature review revealed much information on how South Africa and Australia consider the views of children when their parents engage in divorce mediation, the same was not true of Kenya. Thus, with Kenya much of the data was sourced from empirical research. This research was qualitative and designed to discover divorce mediators' methods for eliciting and incorporating the views of children.

It is important for parents to consider children's views during any mediation sessions.³ Like other catastrophes, divorce is likely to turn a child's world upside down emotionally, physically and psychologically. Often children are not even informed about their parents' divorce until it has happened.⁴ This is undesirable because exchanging information with children beforehand may help them adjust and reduce the trauma resulting from the disintegration of their family.⁵ Also, communicating with children and listening to their responses prior to parental divorce mediation may lead to better post-divorce outcomes. Mediation is more likely to result in an appropriate agreement if the mediators and parents are well informed about the children's wishes.⁶ There is also a rights argument. As noted earlier, there are international instruments supporting the idea that children able to express their views should be legally entitled to have these views considered during parental divorce mediation. As will be more fully explained below, modern sociocultural theories encourage a concept of children as citizens with rights to participate in important matters affecting them. These theories have discredited the view that children should not be significant participants in family affairs.⁷

² Article 7 of the *African Charter on the Rights and Welfare of the Child* (1990) (the ACRWC) provides a broad right of freedom of expression for children able to express views. Art 4(2) of the ACRWC provides for a child to be heard directly or indirectly in judicial or administrative proceedings. Art 12 of the *United Nations Convention on the Rights of the Child* (1989) (the UNCRC) contains wording very similar to that of these two articles.

³ Cassandra 2011 *U Dayton L Rev* 355, 362.

⁴ Cassandra 2011 *U Dayton L Rev* 357.

⁵ Cassandra 2011 *U Dayton L Rev* 358.

⁶ Cassandra 2011 *U Dayton L Rev* 358.

⁷ Ramsden 2013 *The Child, Youth and Family Work Journal* 18, 30.

2 The need for hearing the views of children and how this may be achieved

During the 1970s ethnographic research challenged traditional theories focussing purely on the socialisation of children and began a study of children both as people in their own right and as interactive and independent agents.⁸ There was greater focus on children's subjective experiences during childhood. The new research indicated that children are not merely passive recipients at the mercy of outside influences, but are social actors in their own right, and with their own views and thoughts. This was the case, despite the fact that a generally paternalistic society may be reluctant to afford them control of their own destiny. Researchers began to take the views of children seriously, regarding their voices as legitimate, articulate and insightful.⁹ They began to study details concerning children's needs, family experiences, coping abilities and acceptance in families.¹⁰ Research established that children are frequently actively involved in attempts to negotiate and re-negotiate familial relationships. This expanded view of childhood in turn enabled broader and deeper consideration of the feelings and thoughts of children on issues such as the transition which takes place upon divorce, how they will be affected by care arrangements, and the effects of divorce on their relationships with parents.¹¹ There was a general realisation that it is important to directly study children's experiences without the distortions caused by focussing solely on the parental interpretations of these.¹²

If the views and wishes of children are to carry an appropriate degree of weight it is essential that they be appropriately elicited. If children are intimidated, the information they provide may be inaccurate and even misleading. An inappropriate form of engagement with a child may also be harmful to that child. Who the appropriate person may be to elicit information from children whose parents are divorcing, as well as how this should be done, are factors requiring serious consideration. The two main methods involve direct or indirect child participation.¹³ Each method needs to be

⁸ Noppiari, Uusitalo and Kupiainen 2017 *Childhood* 68, 83.

⁹ Noppiari, Uusitalo and Kupiainen 2017 *Childhood* 68.

¹⁰ Noppiari, Uusitalo and Kupiainen 2017 *Childhood* 68.

¹¹ Noppiari, Uusitalo and Kupiainen 2017 *Childhood* 69.

¹² Bergman and Cummings 2018 *Family Court Review* 208.

¹³ British Columbia, Attorney General 2003 <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-services-branch/fjsd/mediation.pdf> paras 2.3.1 and 2.3.4. This is also recognised in para 35 of General Comment 12, which provides that a child can participate directly or indirectly.

managed in a way that is therapeutic and which allows for the collection of only appropriate information. These two methods are briefly discussed below.

In the indirect method a child shares his or her views through a representative who then relays these to the parents. Some commentators suggest that the representative and the mediator who work with the parents should not be the same person.¹⁴ This may make it easier for the mediator to remain neutral.¹⁵ The indirect method requires that a mediator interpret and appropriately convey the information received from the representative.¹⁶ It is crucial that mediators convey to parents only the information which the children have agreed may be imparted.¹⁷ A great advantage of the indirect method is that it helps distance children from the conflict and trauma that often accompanies parental divorce.

With the direct method for hearing children, it is important that they not be present during the mediation sessions of their parents. This helps avoid the psychological harm which may occur when children feel pressured to take sides in a divorce. Before the mediation sessions take place, however, children may – in the presence and under the guidance of an appropriately trained professional – directly communicate their wishes to one or both parents.¹⁸ This is referred to in the literature as direct child participation.¹⁹ Professionals involved in this process should have training in child therapy and family mediation.²⁰ Direct child participation is possible when the reflective capacity of the parents is moderately high and the child wants to communicate directly with them.²¹ A technique which may be helpful with younger children is to encourage them to bring a piece of art, a picture of a significant activity or something else of importance to a session, which may later be shared with the child's parents.²² Alternatively, the professional involved may show the art or object to the parents when the child is not present, as a way of communicating the feelings, views and emotions of the child.²³ The professional needs to be able to ascertain the most effective

¹⁴ Quigley and Cyr 2018 *Journal of Divorce and Remarriage* 501, 527.

¹⁵ On the importance of neutrality, see Thornblad and Strandbu "Involvement of Children" 183, 208.

¹⁶ Thornblad and Strandbu "Involvement of Children" 184.

¹⁷ On the functions of mediators, see further Bergman *et al* 2018 *Family Court Review* 269, 280.

¹⁸ Allen and Hawkins 2017 *Journal of Family Theory and Review* 51, 68.

¹⁹ Birnbaum 2017 *Social Inclusion* 149, 154.

²⁰ Birnbaum 2017 *Social Inclusion* 152.

²¹ Milojerich, Quas and Yano "Children's Participation in Legal Proceedings" 185, 216.

²² Milojerich, Quas and Yano "Children's Participation in Legal Proceedings" 187.

²³ Milojerich, Quas and Yano "Children's Participation in Legal Proceedings" 187.

and impactful way in which each child's views and wishes can be communicated to the parents.²⁴ Certain children may prefer to speak to each parent individually, while others may prefer to speak to one parent only, while yet others may wish to speak to both parents at the same time.²⁵

Professionals need to be trained in how to manage direct participation so that it is not harmful to children. The skills required include managing a multiparty family session without shifting into the role of child advocate, while maintaining a safe and receptive forum for the child, as well as accurately recording the main messages conveyed by the child.²⁶ Since the professionals involved in the direct method have less of a "messenger role" to play than in the case of indirect child participation, the former method may be less expensive.²⁷ This is particularly true if the same professional subsequently acts as a mediator between the parents. Considerable skill may be required to ensure that vulnerable, disadvantaged and often abused children are not psychologically harmed during pre-mediation engagement between children and parents who are about to divorce.²⁸

Another fundamental distinction is between therapeutic and forensic teleology. The difference between these lies in the purpose of child participation. A therapeutic approach aims to heal the child emotionally and to increase parental reflective capacity. A forensic approach requires the collection of evidential information from the children for submission to the parents, the lawyers or a divorce court.

3 Child participation in divorce mediation in South Africa

Section 28 of South Africa's Constitution provides fundamental children's rights.²⁹ As an amplification of these rights, statutes supporting the children's right to be heard and encouraging divorcing parents to engage in mediation have been enacted.³⁰ However, mediation is not a formal structured process in South Africa. No South African legislation specifically provides that the views of children must be considered when divorcing

²⁴ Fabricius 2015 *International Journal for Family Research and Policy* 21, 26.

²⁵ Fabricius 2015 *International Journal for Family Research and Policy* 22.

²⁶ Yassenik and Graham 2016 *Family Court Review* 186, 202.

²⁷ One of the challenges of indirect child participation in divorce mediation is its high cost, especially because of the time it takes and the expertise it requires of different professionals.

²⁸ Sheetal *Towards Being Heard* 88.

²⁹ *Constitution of the Republic of South Africa*, 1996 s 28(2) provides: "A child's best interests are of paramount importance in every matter concerning the child."

³⁰ Section 10 of the *Children's Act* 38 of 2005; s 6 of the *Divorce Act* 70 of 1979; and s 4 of the *Mediation in Certain Divorce Matters Act* 24 of 1987.

parents mediate. Despite this lacuna – and perhaps partly due to South Africa's international law obligations in this respect – the Office of the Family Advocate has devised ways of ensuring that this happens.³¹ This Office encourages children whose parents are undergoing divorce to express views and feelings, free of charge.³² As authority for doing so, the Office relies on section 4(1) of the *Mediation in Certain Divorce Matters Act* 24 of 1987 (hereafter the *Mediation Act*). This directs that in divorce cases a Family Advocate must:

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

As can be seen, this does not expressly require the solicitation of children's views concerning what should happen to them after their parents' divorce. Strictly speaking, section 4(1) of the Act merely directs Family Advocates to follow a forensic approach, with children being interviewed only if this seems necessary for drafting a parental agreement or advising the court on the best interests of the children. The inquiry is not described as involving the collection of information relevant to any mediation – even though the title of the Act implies that it is relevant to mediation. "Inquiry" in section 4(1) is also not characterised as offering children any therapy for the trauma associated with parental divorce. However, Family Advocates in South Africa interpret section 4(1) broadly. Family Counsellors employed at their offices routinely solicit children's views and feelings in a supportive manner and then record them as part of their section 4(1) enquiries.³³ They also collect information from other sources that may help during parental mediation and at divorce court hearings.³⁴ Sometimes professionals from other disciplines are also called in to assist.³⁵ Records of their engagement with the children can then be made available to the parents and mediators if pre-trial divorce mediation occurs. The parents may agree to their children being interviewed at the

³¹ De Bruin *Hearing the Voice of a Child* 43.

³² SALRC *Family Dispute Resolution* 12.

³³ Botha *Ascertaining the Voice of the Child* 334.

³⁴ Sheetal *Towards Being Heard* 88 indicates that children's educators are frequently consulted.

³⁵ The Office of the Family Advocate sometimes refers children to clinical psychologists for assessments using psychometric tests or projective drawing tests. Delays in obtaining psychological reports from state professionals motivate some parents to consult private experts. However, this is not possible for those who cannot afford private services. See Williams *Children's Participation and Procedures* 74.

Family Advocates' Offices and such an engagement may also be ordered by the court hearing the divorce.³⁶

The recording of children's wishes by Family Counsellors employed at the Offices of Family Advocates is an important milestone in protecting children's right to participation during parental divorce mediation in South Africa. However, the *Mediation Act* has limitations. Its name is misleading because staff at Family Advocates' offices are not expressly directed to try to mediate between divorcing parents. Thus, aside from its title, the so-called *Mediation in Certain Divorce Matters Act* is confusingly silent about mediation. It does not even require parents who reject the services of Family Counsellors to submit proof of attempted divorce mediation using another mediator from outside the Office of the Family Advocate. There has, however, been a recent amendment to the *Uniform Rules of the High Court of South Africa*.³⁷ Rule 41 A, which came into effect on 9 March 2020, makes it mandatory for parties to consider mediation before proceeding to litigation. This is a step in the right direction but unfortunately does not focus attention on the needs of children.

The adoption of an expansive interpretation of the duties of Family Counsellors acting in terms of the *Mediation Act* means that records of children's wishes will often be available if they are old enough to express a view.³⁸ Furthermore, rule 41A of the High Court Rules compels divorcing parents to prove that they have considered mediation before proceeding to court. Unfortunately, the *Mediation Act* does not require an affidavit from parents who have undergone mediation confirming that their children's wishes were considered during mediation. There is no guidance on techniques for eliciting information from children, such as when or how to use the direct or indirect methods. Another shortcoming is that there is no requirement for persons who record the views of children to possess specific qualifications. Such persons should in fact be professionally trained to elicit and record the views of children gently and accurately, and to screen children for signs of domestic violence or other abuse as required under international law.³⁹

Although the wording in the *Mediation Act* is limited, there are some important provisions in the *Children's Act* 38 of 2005. The *Children's Act* and

³⁶ De Jong 2010 *TSAR* 515.

³⁷ GN R48 in GG 999 of 12 January 1965, as amended (*Uniform Rules of the High Court of South Africa*).

³⁸ Robinson 2007 *THRHR* 263.

³⁹ General Comment 12 paras 21 and 134(h).

its regulations⁴⁰ make provision for mandatory family mediation. Section 33(2) read with section 33(5) provides that co-holders of parental responsibilities and rights in respect of a child, who are experiencing difficulties in exercising their responsibilities and rights, must seek to agree on a parenting plan by attending mediation through a social worker or other suitably qualified person. Furthermore, regulation 8(4) provides that where a child who has been informed of the contents of a parental responsibilities and rights agreement in terms of regulation 8(3)(b) is not in agreement with the contents of the agreement, this fact should be recorded on the agreement, and the matter referred for mediation by a family advocate, social worker, social service professional or other suitably qualified person. It is apparent from all these provisions that parties may not approach the court as a first resort for the resolution of their disputes. They must first attend mediation through a family advocate, social worker or other suitably qualified person, who may be a private mediator.

Aside from the provisions on mediation, children's participation is supported by section 10 of the *Children's Act*. Section 10 provides that every child who is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration. Regulation 10 under the *Children's Act* deals with the preparation of parenting plans. It prescribes that Form 10 needs to be completed by a mediator assisting with such preparation. Form 10 requires the mediator to confirm in writing on the Form that information about the contents of a parenting plan has been furnished to the children, bearing in mind their age, maturity and stage of development. It also requires a mediator to confirm that the children have been given an opportunity to express their views, and that their views have been given due consideration. Form 10 thus provides further support for hearing the voices of children.

The parenting plan provisions in the *Children's Act* and regulations help to some extent to overcome the very limited wording of the *Mediation Act*. A further improvement would be an additional provision expressly requiring post-mediation feedback to be given to the children, as stipulated in paragraph 45 of General Comment 12. South Africa should also meet the requirement of paragraph 46 of General Comment 12 by introducing a complaints mechanism for children who were ignored or had their views inappropriately solicited. Furthermore, a provision is needed indicating that even young children have a right to have their views recorded, should they

⁴⁰ GN R261 in GG 22076 of 1 April 2020.

be willing and able to have them recorded. This would accord with section 9(3) of the *Constitution of South Africa*, which provides that no person may be discriminated against because of his or her age. It would also align with paragraph 21 of General Comment 12, which supports participation by even young children in a parental divorce process.

Despite the shortcomings mentioned above, South Africa should be lauded for meeting some participation standards set by General Comment 12. Another example of this is that the Office of the Family Advocate provides sign language interpreters for deaf children and language interpreters for non-English speaking children who want their views and needs to be considered.⁴¹ In conclusion, it can be seen that the South African system is a partially developed one. On the one hand, the maintenance of a network of Family Advocates and Family Counsellors throughout the country has been a major undertaking over many years, for which the government should be commended. On the other hand, the supporting legal framework insufficiently describes and regulates both the processes and the training and functions of the professionals needed to properly hear and record the voices of children whose parents engage in divorce mediation.

4 Child participation in divorce mediation in Australia

Just as in South Africa, there is no specific legislation in Australia providing explicitly for the views and wishes of children to be considered when their parents engage in pre-divorce mediation. However, certain sections in Australian federal statutes are relevant. These include the *Family Law Act 53 of 1975* (hereafter FLA), the *Family Law Amendment (Shared Parental Responsibility) Act 46 of 2006*, and the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 189 of 2011*. As regards the *Family Law Act*, although section 60 CA states that the best interests of a child should be a paramount consideration, the Act does not specifically provide children with a right to have their views considered during any parental divorce mediation.⁴² Section 10F of the Act does usefully define family dispute resolution as a process in which an independent family dispute-resolution consultant helps those affected or likely to be affected. On 26 June 2003 the House of Representatives Standing Committee on

⁴¹ Williams *Children's Participation and Procedures* 74. General Comment 12 para 21 requires measures to overcome language differences and assist children with special needs.

⁴² However, if a divorce petition is being heard in court, s 68L of the *Family Law Act 53 of 1975* (the FLA) provides that the presiding officer may appoint a representative to consider the wishes of a child and advise on the best interests of the child.

Family and Community Affairs began an inquiry into child custody arrangements after family separation.⁴³ This led to the publication of *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation*.⁴⁴ This report proposed reforms concerning children affected by divorce. It provided impetus for the promulgation of the *Family Law Amendment (Shared Parental Responsibility) Act* of 2006. This Act changed the *Family Law Act* in two important respects. Section 60CC substituted the phrase "children's views" for the "child's wishes" in the earlier Act. It also replaced a fixed age criterion in the *Family Law Act* with the more flexible guide of a child's maturity.

In 2011 the *Australian Family Law Legislation Amendment (Family Violence and Other Measures) Act* was passed. Section 60D defines a family dispute resolution adviser as including a consultant, counsellor or family dispute-resolution consultant. The section goes on to provide that an adviser has an obligation to offer advice on matters concerning a child. The adviser must collect and provide information on the best interests of affected children and their protection from abuse. The Act envisages mediation but provides that families found unsuitable for mediation after screening due to family violence or abuse may be issued with certificates under section 60I of the *Family Law Act* that enables their dispute to be heard in a Family Court. Although Australia still had no legislation expressly providing for hearing the voices of children in divorce mediation, the establishment of the concept of family dispute-resolution consultants raised the question of a suitable environment for their work. The Australian government established a network of Family Relationship Centres (hereafter FRCs) to enable them to work effectively with children and families.⁴⁵

FRCs have proved very useful for supporting children when their parents undergo divorce. Prior to assisting parents with divorce mediation, family dispute resolution consultants at FRCs solicit and record the wishes and feelings of children who are able to express views.⁴⁶ They engage therapeutically with them. They also attempt to obtain records useable at a later stage to assist divorcing parents to reflect properly on the needs of their children.⁴⁷ The records are used during parental divorce mediation to

⁴³ See, further, Fehlberg, Smyth and Maclean 2011 *International Journal of Law, Policy and the Family* 337.

⁴⁴ Standing Committee on Family and Community Affairs *Every Picture Tells a Story*. See, further, Fehlberg, Smyth and Maclean 2011 *International Journal of Law, Policy and the Family* 320.

⁴⁵ Henry and Hamilton 2012 *Intl J Child Rts* 602.

⁴⁶ Henry and Hamilton 2012 *Intl J Child Rts* 584.

⁴⁷ Henry and Hamilton 2012 *Intl J Child Rts* 585.

encourage a shift in focus from the causes of marital conflict to the best interests of children. This may have long-term benefits because parents are encouraged to prioritise the needs of their children rather than points of dispute between them and their spouses.⁴⁸

Both child-focussed and child-inclusive approaches are employed at FRCs. The main goal of both is supporting the capacity of parents to reflect properly on the wishes of their children.⁴⁹ The child-focussed approach tends to be applied to very young children. It involves primarily observation by specially trained child consultants. This may be supplemented by interviews with parents to elicit anything of relevance they may have observed.⁵⁰ Beyond mere observation – particularly when it comes to older children – consultants can discover children's feelings and wishes by engaging them in conversation.⁵¹ This is termed the child-inclusive approach. When engaging verbally with children, consultants are trained to use physical aids. One example is cards with pictures of bears representing a family.⁵² Another example of such aids is separation story stems.⁵³

Significantly, the child-focussed and child-inclusive approaches are not merely employed to obtain records of children's wishes and feelings for their own sake. The information gained is also used to educate parents and screen children for signs of possible domestic violence. Such screening is assisted by a software programme called Family Law DOORS.⁵⁴ Once a consultant has had sufficient contact with children, the consultant – in conjunction with the parents and a trained mediator – is able to brainstorm how the needs of the children may best be integrated into a suitable parenting plan.⁵⁵ Prior to the finalisation of this plan, the mediator attempts

⁴⁸ Madigan, Plamondon and Jenkins 2017 *Journal of Marriage and Family* 450.

⁴⁹ McIntosh 2007 <https://childrenbeyonddispute.com/wp-content/uploads/2015/04/McIntosh-child-inclusion-AFRC-07.pdf> 8.

⁵⁰ McIntosh 2007 <https://childrenbeyonddispute.com/wp-content/uploads/2015/04/McIntosh-child-inclusion-AFRC-07.pdf> 7-8,18.

⁵¹ Fehlberg, Smyth and Maclean 2011 *International Journal of Law, Policy and the Family* 338.

⁵² The bears on the cards have different emotional expressions and body language. Using the cards, children can tell stories of the different feelings they experience in certain situations.

⁵³ This technique begins with a story about a young animal whose parents are separating. The children then go on to finish the story and express what they feel about their situation. See McIntosh 2017 <https://childrenbeyonddispute.com/practitionersycids>.

⁵⁴ See McIntosh, Wells and Lee 2016 *Psychological Assessment* 1516-1522. The Family DOORS application is an evidence-based tool for screening families for domestic violence or abuse. It assists professionals such as family law practitioners, counsellors and psychologists to detect and evaluate risks.

⁵⁵ McIntosh 2017 <https://childrenbeyonddispute.com/practitionersycids>.

to assist the parents to develop a communication plan and a statement of intent. The communication plan helps the parents avoid hostile interactions and the statement of intent records their shared commitment to offering their children a loving and caring environment after their divorce.⁵⁶

Aside from the processes described above, other factors have contributed to the effectiveness of Australian FRCs. These include sufficient government funding, the extensive use of technology, and specialised training for child consultants on the best techniques for observing and hearing children. In addition, Australia provides public education programmes for parents who are divorcing. These programmes are designed to encourage parental cooperation and readiness by parents to consider their children's feelings during and after divorce mediation.⁵⁷ In relation to financial support for the Centres, the Australian government also funds research on the best methods for ensuring that the views and wishes of children are heard and considered.⁵⁸ Significant government subsidisation of the work of child consultants enables them to work with children from all economic backgrounds.⁵⁹ The Australian government also funded the development of the Family DOORS software referred to above. Furthermore, FRCs have online advice centres and telephonic or Zoom services for families unable to visit the Centres.⁶⁰ So, Australia is substantially fulfilling its international law obligation to support the right of children to participate in matters that affect them.⁶¹

In relation to education, online programmes are available to educate parents about both the child-focussed and the child-inclusive approaches to child participation.⁶² These programmes aim to encourage divorcing parents to appreciate the importance of discovering their children's wishes and feelings, and to take these into account during pre-court mediation sessions.⁶³ The online education programmes render the work of child consultants and mediators more effective because parents who participate in such programmes are more likely to give adequate weight to their children's views.⁶⁴ The programmes are in line with children's general right to be heard, as expressed in article 12 of the UNCRC. They accord

⁵⁶ McIntosh 2017 <https://childrenbeyonddispute.com/practitionersycids>.

⁵⁷ Cashmore and Parkinson 2008 *Family Court Review* 19.

⁵⁸ Cashmore and Parkinson 2008 *Family Court Review* 13.

⁵⁹ Cashmore and Parkinson 2008 *Family Court Review* 14.

⁶⁰ Taylor *et al* 2012 *Intl J Child Rts* 645.

⁶¹ General Comment 12 para 135.

⁶² See McIntosh 2017 <https://childrenbeyonddispute.com/child-inclusive-mediation/>.

⁶³ Parkinson 2013 *Family Court Review* 211.

⁶⁴ Parkinson 2013 *Family Court Review* 211.

particularly with paragraphs 49(5) and 83 of General Comment 12, which encourage state parties to educate and inform their citizens about the importance of child participation in matters significantly affecting them. Paragraphs 93 and 94 of General Comment 12 specifically recommend parent education programmes concerning the "involvement of children in decision-making". The Australian government has invested heavily in advertising the FRCs.⁶⁵ Leaflets and posters portraying their functions have been placed in shopping centres, on buses, in doctors' consulting rooms, at after-school care facilities and at community health centres.⁶⁶

Another positive aspect of the Australian system is that child consultants are required to undergo training in how to observe and listen to children. The training equips them to hear the voices of children alone in straightforward matters.⁶⁷ Complicated mediation matters may require the addition of an expert professional. Mediators and child consultants are employed by non-governmental organisations (NGOs) which apply for tenders to offer their services to staff the FRCs.⁶⁸ Examples of such NGOs are Relationships Australia, Interrelate, and Burnside Australia.⁶⁹ Specialist organisations in Australia such as Children Beyond Dispute are responsible for such members of NGOs serving as child consultants.⁷⁰ This is in line with paragraph 36 of the General Comment 12, which recommends that those who represent children's views must possess appropriate knowledge and experience in working with children. Australian researchers have conducted ongoing reviews of data collected by child consultants. As Fitzgerald notes, these researchers have helped develop improved methods for hearing and recording the voices of children whose parents engage in divorce mediation.⁷¹ It is noteworthy that such mediation is detached from the acrimonious court system. FRCs where mediation may occur are generally located far away from the courts.⁷² This is to encourage parents to resolve family issues away from the litigious atmosphere that comes with the presence of lawyers and judges.⁷³ It is not compulsory for parental agreements reached as a result of divorce mediation to be submitted to the courts to make them binding.⁷⁴ Following divorce, parents

⁶⁵ Parkinson 2013 *Family Court Review* 211.

⁶⁶ Parkinson 2013 *Family Court Review* 211.

⁶⁷ Moloney, Qu and Weston 2013 *Family Court Review* 238.

⁶⁸ Moloney, Qu and Weston 2013 *Family Court Review* 235.

⁶⁹ Carson, Fehlberg and Millward 2013 *CFLQ* 409.

⁷⁰ McIntosh 2017 <https://childrenbeyonddispute.com/child-inclusive-mediation/>.

⁷¹ Fitzgerald *Children Having a Say* 324.

⁷² Moloney, Weston and Hayes 2013 *Journal of Family Studies* 25.

⁷³ Moloney, Weston and Hayes 2013 *Journal of Family Studies* 23.

⁷⁴ Moloney, Weston and Hayes 2013 *Journal of Family Studies* 24.

are encouraged to revisit the FRCs so that follow-up sessions can be conducted to review parental agreements as the children grow and their needs change.⁷⁵

Although many positive features of the Australian system have been noted there is still room for improvement. There is a need to improve public education programmes in relation to high-risk children and to develop the expertise of child counsellors.⁷⁶ Overall, however, the methods for ensuring that the views and needs of children are appreciated by parents during divorce mediation are impressive. They are well worth consideration by reformers in other countries. When comparing Australia and South Africa, it is clear that both countries have established national networks of specialist professionals – the Office of the Family Advocate in South Africa and the FRCs in Australia. It would appear, however, that the Australian network is able to rely on more extensive government funding than its South African counterpart. This is apparent in the compulsory state-subsidised specialised child-engagement training which is provided for child consultants in Australia, whereas South African staff have no such training. Furthermore, the distinction drawn in Australia between two distinct sets of skills – the skills of child consultants in interacting with children on the one hand, and the skills of mediators in interacting with parents on the other hand, does not exist in South Africa. There is greater emphasis on a therapeutic outcome for the children in Australia, as opposed to the more forensic and court-oriented approach outlined in the limited South African legislation. Whereas South Africa's regulatory framework is underpinned only by incompletely worded legislation, Australia has more detailed guidelines and procedures which are updated in response to ongoing research.⁷⁷

5 Hearing children in divorce mediation in Kenya

A deeply embedded cultural norm in Kenya is that children should be seen and not heard.⁷⁸ This negatively affects child participation in family life and its effects become particularly problematic when assessing the needs of children when their parents divorce.⁷⁹ In many cases the wishes of Kenyan children are not considered if divorce mediation occurs, because of a

⁷⁵ Moloney, Weston and Hayes 2013 *Journal of Family Studies* 24.

⁷⁶ Carson, Fehlberg and Millward 2013 *CFLQ* 409.

⁷⁷ The *Constitution of Australia* is just a legal framework for how the country is governed. Therefore, unlike the South African and Kenyan Constitutions, it makes no provision for children's rights.

⁷⁸ National Council for Children's Services 2015 <https://bettercarenetwork.org/sites/default/files/2020-10/National-Plan-of-Action-for-Children-in-Kenya-2015-2022.pdf>.

⁷⁹ Mangerere Interview 2017.

commonly accepted view that divorce is a private matter concerning only the husband and wife.⁸⁰ As with South Africa and Australia, there is no Kenyan national legislation expressly requiring that the views of children be considered during divorce mediation. A positive development is that some members of the judiciary would like this to be rectified.⁸¹

5.1 Legal provisions relevant to hearing children during divorce mediation in Kenya

To date, how best to elicit the views and wishes of children whose parents are divorcing has not been studied by Kenyan researchers. There are, however, some broadly relevant legal provisions. Kenya has ratified both the UNCRC and the ACRWC. As has been noted, Article 12 of the former and Article 7 of the latter give children a general right to be heard in significant matters affecting them. Article 2(6) of Kenya's Constitution provides that international treaties form part of the country's law. Thus, the rights to be heard contained in the UNCRC and ACRWC apply to children in Kenya. Also, Article 53 of the Kenyan Constitution provides for a child's best interests to be a primary consideration. It also enshrines children's rights to parental care and protection from abuse, neglect, harmful cultural practices, and violence. Although all of the above provisions support the general proposition that it is important to hear the voices of children in matters affecting them, as noted, Kenyan legislation does not specifically require that the voices of children be heard during parental divorce mediation.

Kenya has been slow to develop legislation interpreting and amplifying its broader general constitutional provisions concerning children's rights. The Children's Bill of 2017 is still under review by Kenya's parliament. This Bill is intended – eventually – to replace the *Children's Act* of 2001. Unfortunately, the Bill shares certain shortcomings with the *Children's Act*. Neither the Act nor the Bill makes provision for children's voices to be heard during parental divorce mediation. The closest the *Children's Act* of 2001 comes to requiring the views of children to be considered during divorce mediation is section 83(1). This provides that when child custody is considered in a court, a child's wishes should be considered. Clause 4 of the Children's Bill repeats this provision in exactly the same way.

One positive aspect is that Kenya does allow for parental divorce mediation prior to court hearings. As in South Africa, divorce mediation is state funded.

⁸⁰ Mangerere Interview 2017.

⁸¹ Muigua 2013 *Alternative Dispute Resolution* 78.

Unfortunately, Kenya's Mediation Rules of 2015, while providing for divorce mediation, fail to provide for children's views to be heard during such mediation.⁸² Rule 4 simply states that civil actions instituted in the Family Court must be screened by the deputy registrar and if found suitable be referred for mediation prior to being adjudicated. Rules 6 and 8 clarify the mediation procedure. Rule 6(2) indicates that the deputy registrar has authority to decide on mediation and to select mediators. Rule 8(3) makes parental attendance at mediation mandatory. Rule 13 provides that the mediator shall file a report with the deputy registrar within ten days after mediation. None of these rules makes any mention of input from children. In general terms, the mediation rules in Kenya create a process similar to that in the South African *Mediation Act*. They enable a forensic approach characterising parental divorce mediation as primarily an information-gathering exercise for the benefit of divorce courts. This is different from the primarily therapeutic approach in Australia. A more therapeutic approach would allow for more genuine mediation and is thus preferable to a predominantly forensic approach.

Aside from the fact that there are no provisions in Kenya requiring divorce mediators to hear children and consider their views, there are also no training requirements in this regard.⁸³ There are Kenyan Mediator Accreditation Standards, but these don't require divorce mediators to be skilled in listening to children.⁸⁴ This lacuna is contrary to the provisions of General Comment 12. As noted previously, this provides that adults tasked with hearing and considering the views of children should have the requisite capacity.⁸⁵ Unfortunately, even an official governmental guide on the website of the Kenyan judiciary on the functions of mediators does not include listening to children as one of their tasks.⁸⁶

In conclusion, there are no Kenyan statutes or other regulations expressly providing for children to be heard when parents engage in divorce mediation. But what still needs to be clarified is whether this nevertheless occurs unofficially. Section 5.2 presents the results of an empirical study in

⁸² Mediation as a formal way of resolving all types of disputes in Kenya officially began only in 2015 with the passing of the Mediation Rules of 2015. The preamble of the Mediation Rules states that the provisions apply to family and commercial disputes.

⁸³ Divorce mediators are often referred to as family mediators in Kenya. Thus these two terms are used interchangeably in this article.

⁸⁴ Kenya Mediator Accreditation Committee 2016 <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/05/MAC-Accreditation-Standards.pdf>.

⁸⁵ General Comment 12 para 134(g).

⁸⁶ Republic of Kenya date unknown <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya.pdf>.

Kenya. It was designed to determine whether accredited mediators in Kenya – on their own initiative and in their daily practice – attempt to discover the views and wishes of children for the purpose of informing parents engaged in divorce mediation.

5.2 Empirical research findings

Research was conducted using semi-structured interviews with Kenyan divorce mediators. A complete list of accredited mediators – both divorce mediators and mediators in other areas – was obtained by the first author from the Supreme Court of Kenya. Each of the 47 mediators on the list was contacted and those doing divorce mediation were identified. The divorce mediators were then requested to take part in the research. Seventeen accredited divorce mediators were interviewed, ten women and seven men. They worked in different parts of Kenya, although most were based in the capital city, Nairobi. The participants were free to select face-to-face, telephonic or email communication for the interview.⁸⁷

One finding from the interview data was that appreciation of the importance of listening to children prior to divorce mediation did not appear to increase with years of experience as a mediator. All participants recognised the importance of mediating parents considering the views and wishes of their children. They agreed that, wherever possible, these should be ascertained and presented to parents. Despite their general agreement in principle, however, the data indicated that this rarely happened in practice. And even when an effort was made to hear and convey the views and wishes of children, the manner in which this was done tended to be suboptimal. Thus, an important finding was that the engagement of Kenyan divorce mediators with children was generally limited. Only one of the seventeen participating mediators routinely interacted with children who could express views. Five others sometimes obtained views from such children, while eleven indicated

⁸⁷ Data were collected from mediators in Nairobi, Nakuru, Narok and Machakos. Nairobi and Nakuru are urban cities, while Narok and Machakos are rural towns. The participants' names and contact details were obtained from the Kenya Mediation Accreditation Committee which sits in the Supreme Court of Kenya. All 17 accredited family mediators in Kenya were approached for interviews but most opted to fill in an email questionnaire as they were not in their offices due to post-election tension in Kenya at the time of data collection. Three of the 17 participants were orally interviewed, while 14 opted to complete the electronic questionnaire. The questionnaire contained both closed- and open-ended questions, enabling the respondents to provide detailed answers and to clarify responses. The questionnaire was pre-tested on three randomly selected mediators practising in Nairobi to verify its suitability. This was an appropriate sample for the pilot test as it is above 1-10% of the sample size: see Cooper and Schindler *Business Research Methods* 467. The data were evaluated using thematic analysis.

that they had never done so. Those who engaged with children were asked to describe what criteria they applied when deciding whether to do so. All of them indicated that the age of the child was the criterion, but they applied widely differing age thresholds. One participant would try to elicit views only of children aged ten and over. A second participant presumed that eight was the youngest age at which children should be consulted. A third reported that she was sometimes able to engage meaningfully with children as young as two years old. In the absence of official guidelines in Kenya it is understandable that mediators employed widely varying age thresholds. Significantly, none of the participants indicated any other criteria for deciding whether or not to engage with children. So, criteria such as children's best interests, their safety, or their willingness and desire to participate were not employed. This is unfortunate since a simplistic reliance on age benchmarks alone is not supported by international law, which rather advocates a more individualistic approach.⁸⁸ As has been noted, in South Africa section 10 of the *Children's Act* enables any child who is sufficiently mature to participate. And in Australia the *Family Law Amendment (Shared Parental Responsibility) Act* of 2006 replaced a fixed age criterion with the more flexible guide of a child's maturity.

On the primary purpose of mediators interacting with children affected by divorce, one Kenyan participant saw this as therapeutic, whereas another viewed it as forensic. Some participants were confident about their ability to engage effectively with children, whereas others preferred seeking assistance. For example, two participants stated that they listened directly to children, while another said he did so only where family dynamics were "straightforward". He assigned another professional to do so if they were "complicated". Two participants indicated their preference for joint child engagement involving themselves and a child psychologist, therapist or probation officer. The involvement of additional professionals besides mediators results in a teamwork approach similar to that of Family Advocates and Counsellors in South Africa, and professionals attached to FRCs in Australia. Two of the Kenyan mediators stated that after engagement with children they relayed the children's views to the children's parents. Another indicated that he asked children to relay their views themselves. While limited in scope, the above findings suggest that when children's views are solicited a wide variety of direct and indirect methods is adopted. Given the absence of any authoritative guidance, this lack of uniformity is not surprising.

⁸⁸ General Comment 12 paras 21, 42 and 134.

The Kenyan participants also pointed out that there were barriers to effectively eliciting the views of children able and willing to express them. Five such barriers were identified as significant. Firstly, the existence of strong cultural norms stipulating that children should not be involved in marital decisions. Secondly, a general attitude in Kenyan society underestimating the importance of children's views. Thirdly, widespread uncertainty among Kenyan professionals about how best to engage with children. Fourthly, the lack of a regulatory framework providing specific direction. Fifthly, the lack of a relevant practice guide for family mediators. In relation to solutions, all of the participants considered that child engagement could be considerably improved with an appropriate handbook and training for mediators. Education for the public on the importance of hearing children was also recommended.

6 South Africa, Australia and Kenya compared

As has been noted, all three jurisdictions have been subject to some British influences and are signatories to international conventions supporting hearing children's voices. However, there are significant differences in their approaches to having children's views considered during parental divorce mediation. Of the three countries, Kenya does the least to encourage this. As has been pointed out, this is partly because Kenyan legislation is not sufficiently specific. The Kenyan Constitution, the Kenyan *Children's Act* of 2001 and the Kenyan Children's Bill of 2017 are all too vague to ensure that children's voices are heard and their wishes properly considered when their parents undergo divorce. In contrast, because of a strong reliance on ongoing research Australia is more advanced than South Africa or Kenya. Also, Australian FRCs offer services beyond those specified in the UNCRC and ACRWC. Significant among these are the education of parents and the screening of children for signs of abuse.

South Africa and Australia are fortunate in having government-funded institutions ensuring that – to some extent at least – the views of children are considered during divorce mediation. South Africa has the Office of the Family Advocate, while Australia has its FRCs. It is significant that both of these operate at a national scale with branches in every province/state. Both are substantially state funded and thus many services are free of charge. In Australia, for example, the first session at an FRC is entirely free and subsequent sessions are subsidised.

The situation in Kenya is very different. Engagement with children prior to divorce mediation is conducted by private mediators who charge for their

services and set their own fees.⁸⁹ The Mediation Accreditation Committee of Kenya does not direct how much mediators are permitted to charge.⁹⁰ This means that engagement with children prior to divorce mediation is likely to be dispensed with for financial reasons. Another difference is that South Africa and Australia routinely apply a team-work approach when listening to children. More than one professional collaborates, each with a specific set of skills. As noted, in South Africa a Family Advocate and a social worker combine their efforts as may be required to elicit and record the views and wishes of children. Likewise, mediators and child consultants work together in Australia. In Kenya, divorce mediators mainly work on their own.⁹¹ This is not surprising since the Kenyan government does not provide funding to cover engagement with children by mediators, much less for pairs or teams of professionals. This is unfortunate, because the South African and Australian experiences reveal the value of cross-disciplinary collaboration.

The likelihood of child engagement occurring differs in Kenya, South Africa and Australia. In South Africa, engagement could be relevant to private parental divorce mediation which is provided for by section 33 of the *Children's Act*. Alternatively, it may occur at the offices of the Family Advocate. Subsequent parental divorce mediation is likely to occur, because High Court Rule 41A requires divorcing parents to consider mediation prior to litigation. Similarly, in Australia professional engagement with children and subsequent pre-court parental mediation are both likely to occur. In contrast, the Mediation Rules in Kenya provide that mediation is instituted by the court registrar only after a divorce matter has commenced in court. Pre-mediation engagement with children is unlikely to occur and, even if it does, this usually does not take place in a neutral setting such as the office of a professional.⁹² Furthermore, parental mediation usually occurs only at a more adversarial stage after divorce litigation has commenced.⁹³ This is not in children's best interests.

Significantly, the rights and interests of children are protected in both South Africa and Australia because the law requires that their views be conveyed

⁸⁹ Rule 6(5) of Legal Notice 167 in Gazette Supp. No 179 of 9 October 2015 (Mediation (Pilot Project) Rules) provides that the mediation pilot project is free of charge to members of the public. The Deputy Mediation Registrar confirmed that this provision does not apply to child participation in divorce mediation.

⁹⁰ A mediation pilot programme currently offers free mediation to some divorcing couples in Kenya, but does not cover fees for professionals engaging with children prior to divorce mediation.

⁹¹ As shown in the field study notes above, only two of the seventeen Kenyan mediators interviewed used other professionals.

⁹² This is based on the Kenya field study described above.

⁹³ This is based on the Kenya field study described above.

to trained professionals in a separate process, and not directly to their parents during their divorce mediation sessions. Admittedly, the outcomes of the procedures adopted in South Africa and Australia are different because the focus in South Africa is primarily forensic, whereas the focus in Australia is primarily therapeutic. In Australia the information collected from children by child consultants is used by mediators rather than by courts, and research has shown that the therapeutic approach has long-term positive results, since it encourages divorcing parents to reflect more deeply on their children's needs.⁹⁴ In contrast, the forensic approach adopted in South Africa means that the responsibility for determining the best interests of the children rests primarily with the courts. This may disempower the parents, who might feel excluded from decision-making on what is to happen to their children. Were they to be included in the process, they would be more likely to support post-divorce child arrangements in the longer term.

Another difference between Kenya, South Africa and Australia is the stage at which meetings take place. In South Africa a representative of the Family Advocate and Family Counsellor will meet first with the parents and then with the children. The Family Counsellor elicits the views and wishes of the children and considers what is in their best interests by conducting home visits and interviewing other professionals such as their school teachers, family doctors and/or psychologists. The Family Advocate then writes a report for the court, advising on what arrangements would be in the children's best interests. In Australia the FRCs begin by educating parents about the process to be followed. As part of this interaction they assess the capacity of the parents to reflect adequately on the best interests of their children. Screening is conducted thereafter using Family DOORS software to assess potential risks to the safety of the children. If it is found that it is in the best interests of the children to express their views, a consultant then engages with them. This may involve the children and the consultant alone or – if the matter appears to be particularly complex – it may involve the children and the consultant in partnership with another specialist professional. In Kenya, in complete contrast, there are simply no directives governing the stages to be followed.

There are also differences in the three jurisdictions as to the ages at which the views of children tend to be elicited. In South Africa, as has been noted

⁹⁴ Hoffman and Wolman 2013 *Cardozo Journal of Conflict Resolution* 806; Kalmijn 2015 *Journal of Marriage and Family* 938; Madigan, Plamondon and Jenkins 2017 *Journal of Marriage and Family* 450.

above, section 10 of the *Children's Act* simply requires that a child be sufficiently mature. However, some family advocates assume that only a child of at least school-going age should be presumed capable of expressing views.⁹⁵ In Australia there is no presumption that children below a particular age are unable to express their views, which means that child consultants sometimes elicit the views and wishes of children below school-going age. In Kenya, as revealed by the field research cited earlier, there is either no engagement with children at all or, if the divorce mediator involved is open to such engagement, it will depend on the age threshold decided by that mediator.

The three countries examined in this article thus use very different techniques to determine whether children should be heard. In South Africa a "Child's Voice Tool Kit" is used at all offices of the Family Advocate. South Africa employs Family Counsellors and Family Advocates of different races and language familiarity who are able to relate to and communicate with children from different cultural groups. It also employs sign language interpreters to communicate with children with hearing impediments. In Australia the FRCs employ a variety of approaches. In the case of Kenya, information on techniques is scarce. Of the seventeen divorce mediators interviewed as part of the empirical research for this article, it is significant that only seven reported eliciting the views of children prior to divorce mediation, and only one reported a technique beyond oral questioning. That mediator used drawing and puppets. There is clearly scope for Kenyan divorce mediators to be trained in suitable techniques.

None of the three countries examined has a complaints procedure for children whose parents are in the process of divorcing and there is no official body to monitor and evaluate whether they were appropriately listened to. This falls short of the recommendation in paragraph 49(4) of General Comment 12 that state parties should regularly evaluate the effectiveness of their techniques for listening to children.⁹⁶ Despite this, it is clear that South Africa and Australia have made much progress, while Kenya lags behind.

Some recommendations are made in the following section for improving the situation in Kenya.

⁹⁵ Williams *Children's Participation and Procedures* 74.

⁹⁶ General Comment 12 para 49(4).

7 Recommendations for Kenya

The empirical research referred to earlier established that most accredited Kenyan mediators do not elicit the views of children prior to their parents' divorce mediation. It also identified the causes, including particularly the lack of a domestic legal framework and procedure, cultural beliefs that discriminate against children, and a general failure to appreciate the importance of hearing the voices of children. Some recommendations to improve the position are discussed in separate subsections below.

7.1 Amendment of domestic law to include child participation

With the Kenyan judiciary currently piloting Mediation Rules and parliament still considering the Children's Bill of 2017, it is an appropriate time to introduce provisions covering child participation prior to parental divorce mediation. It is recommended that both the Mediation Rules and the Children's Bill be amended accordingly before they come into effect, since, as noted above, they fail to provide for the views and wishes of children to be considered during the process of their parents' divorce.

7.2 Adoption of international law

Since article 2(6) of the Kenyan Constitution provides that international treaties ratified by Kenya automatically become local law, it is recommended that Kenya adopts the UNCRC General Comment 12 guidelines that promote child participation in mediation matters.

7.3 Establishment of family mediation centres in Kenya

Family Mediation Centres should be established in Kenya. This recommendation is supported by the positive impact of the Office of the Family Advocate in South Africa and the FRCs in Australia. The establishment of such Centres would enable Kenya to better adhere to international legal instruments such as the UNCRC and ACRWC. A suitable physical environment can be crucial in enabling children to express views. Therefore, it is vital that the proposed Kenyan Family Mediation Centres be established in places accessible to children and that they should provide a safe and welcoming environment. Since Kenya is financially constrained, government funding for the immediate construction of new buildings for Family Mediation Centres across the entire country is almost certainly not available. A more affordable option may be establishment of these Centres

in existing structures such as university buildings, legal aid offices and/or psychology clinics.⁹⁷

7.4 Recruitment and training of staff

Staff at the recommended Kenyan Family Mediation Centres should be appropriately recruited and trained. They should be friendly, supportive and accepting. They should dress casually so as not to appear intimidating and should be able to relate well to children. They should be trained on methods for child engagement. Training must also cover mediation and how to discern signs of abuse or family violence. It should be borne in mind that while studies have shown that a history of violence is common among divorcing parents, this does not rule out the possibility of successful mediation.⁹⁸

7.5 A written guide

A best practice guide should be produced for both staff at the proposed centres and private mediators. It should promote a predominantly therapeutic approach. It should indicate when interdisciplinary teamwork may be needed for eliciting the views of children and collecting other information required for parental mediation. Mediators should be encouraged to consult professionals from other disciplines and persons who know the children and the family. These might include children's caregivers, school teachers, medical doctors, psychologists, and psychiatrists.⁹⁹ Jones and Patel in particular emphasise the importance of considering the opinions of children's educators.¹⁰⁰ They recommend that mediators liaise with children's teachers, coaches and school principals.¹⁰¹ In Kenya the proposed guide should indicate that mediators and Family Mediation Centre

⁹⁷ Bamgbose noted that African legal aid clinics have proved to have potential for a variety of services, and especially in Kenya. See Bamgbose 2015 *AHRLJ* 12, 16. De Jong recommended very similarly that the existing network of primary health care clinics in South Africa be transformed into family health and relationship centres offering a variety of services. See generally De Jong 2017 *TSAR*.

⁹⁸ Hart 2009 *Conflict Resolution Quarterly* 3, 18.

⁹⁹ The guide should include direction on what information typically needs to be sought. It should indicate that teachers must be asked about children's behaviour and performance at school; the child's caregiver should be questioned on how the parents relate at home, and the family doctor should be asked to report on the child's health and well-being. Mediators should also be directed to engage with children and consult with other persons well before parental mediation sessions are scheduled to begin. They need to allow sufficient time to prepare a report for the parents to consider.

¹⁰⁰ Patel and Jones 2008 *Journal of Mental Health Counselling* 189, 191.

¹⁰¹ Patel and Jones 2008 *Journal of Mental Health Counselling* 190.

staff are legally entitled to conduct divorce-related investigations with any relevant informants in person, telephonically, or by electronic means such as Zoom or email. They must be expressly empowered to receive relevant written information such as school reports.¹⁰²

7.6 Public education

As has been done in Australia, the presence and purpose of the recommended Family Mediation Centres in Kenya, as well as the importance of listening to the wishes and views of children during the process of their parents' divorce, should be widely and consistently advertised. This may perhaps most easily be done via social media. To reach citizens not on social media, advertisements could be placed in local newspapers and magazines, as well as on flyers, posters and billboards. Local radio and television stations could also advertise the same. An advertising campaign would ensure that as many Kenyans as possible learn about the Family Mediation Centres. Members of the public should be encouraged during the campaign to ask questions or express concerns about listening to the views and wishes of children. This may help weaken negative cultural beliefs about children's right to speak out. In addition, experts could give addresses to the judiciary and at universities, churches, schools and other centres of learning across Kenya. Not only adults, but also all Kenyan children should be made aware of their right to have their views and wishes considered should their parents decide to divorce.

8 Conclusion

It is essential that children, as probably the most vulnerable and affected persons involved, have a say when their parents get divorced. They have as much interest as their parents in protecting family relationships and in working out post-divorce parenting plans and visitation schedules. Therefore the idea that the views and wishes of children must be considered as a factor influencing post-divorce arrangements needs to be promoted in Kenya. Such promotion at the crucial stage when parents engage in pre-divorce mediation would also help to bring Kenya in line with its obligations under the UNCRC and ACRWC. As has been shown, not affording Kenyan

¹⁰² As in South Africa, children in Kenya spend a considerable amount of time at school. Educators are therefore often in a position to provide insightful, valuable information about a child's past and current behaviour, including the child's performance in class and co-curricular activities. Educators can also comment on the child's state of mind, relationships with peers and teachers, degree of parent-teacher cooperation and whether there have been any changes in the child's behaviour.

children an effective means of expressing their views when their parents mediate falls short of the requirements of these instruments.

It is recommended that Kenya adopt an indirect therapeutic approach for soliciting children's views. As has been shown, this has been successful in Australia. It should also be made possible for professionals from different disciplines to work in tandem. Professional teamwork has proved useful for promoting the capacity of parents to reflect seriously on the views and needs of their children during divorce mediation in both Australia and South Africa. That is important, because it tends to shift parents' attention from points of dispute between them and limits children's exposure to parental conflict.¹⁰³ The proposed approach would encourage each parent to value the role of the other, to improve their problem-solving skills, and to strengthen their capacity to self-regulate and place their children's needs above their own.¹⁰⁴ It would also produce more sustainable long-term results, since the responsibility for promoting the best interests of children after divorce would be shifted more toward parents rather than the state. A feeling that parents have considered their children's needs and then created solutions themselves would help to promote functional, albeit separated, families after divorce. It would be essential for Kenya to produce a best practice guide to support the introduction of the proposed indirect therapeutic approach with scope for teamwork. The guide should include advice on appropriate engagement with special needs children.

Successful reform in Kenya would require addressing the political, legal, social, economic and cultural barriers currently impeding children's opportunities to be heard. Outdated assumptions about children's capacities need to be challenged and the development of environments in which they can safely express themselves should be encouraged. This would require commitment to resources and training on the part of the state. Although challenging for a developing economy, the proposals in this article should be attainable if there is sufficient support from the Kenyan authorities. And focussing on children whose parents are divorcing is a good place to start in more broadly developing a culture of respect for children and their views in Kenya.

¹⁰³ De Jong "Child Informed Mediation" 153.

¹⁰⁴ De Jong "Child Informed Mediation" 151.

Bibliography

Literature

Allen and Hawkins 2017 *Journal of Family Theory and Review*

Allen S and Hawkins A "Theorizing the Decision-Making Process for Divorce or Reconciliation" 2017 *Journal of Family Theory and Review* 51-73

Bamgbose 2015 *AHRLJ*

Bamgbose O "Access to Justice through Legal Education: A Way Forward for Good Governance and Development" 2015 *AHRLJ* 12-24

Bergman and Cummings 2018 *Family Court Review*

Bergman K and Cummings E "Innovations in Research on Conflict, Families, and Children" 2018 *Family Court Review* 207-221

Bergman *et al* 2018 *Family Court Review*

Bergman K *et al* "Depressive Symptomatology and Program Efficacy: Examining a Program to Improve Communication in Community Families" 2018 *Family Court Review* 269-283

Birnbaum 2017 *Social Inclusion*

Birnbaum R "Views of the Child Reports: Hearing Directly from Children Involved in Post-Separation Disputes" 2017 *Social Inclusion* 154-165

Botha *Ascertaining the Voice of the Child*

Botha K *Ascertaining the Voice of the Child in South African Divorce Law* (LLM-thesis University of South Africa 2015)

Carson, Fehlberg and Millward 2013 *CFLQ*

Carson R, Fehlberg B and Millward C "Parents' Experiences of Family Dispute Resolution and Family Law Services in Australia Following Shared Parenting Reform: Recent Qualitative Findings" 2013 *CFL!* 2013 406-418

Cashmore and Parkinson 2008 *Family Court Review*

Cashmore J and Parkinson P "Children's and Parents' Perceptions on Children's Participation in Decision Making After Parental Separation and Divorce" 2008 *Family Court Review* 12-22

Cassandra 2011 *U Dayton L Rev*

Cassandra A "Children's Interest – Lost in Translation: Making the Case for Involving Children in Mediation of Child Custody Cases" 2011 *U Dayton L Rev* 355-364

Cooper and Schindler *Business Research Methods*

Cooper D and Schindler P *Business Research Methods* 12th ed (McGraw-Hill New York 2013)

De Bruin *Hearing the Voice of a Child*

De Bruin W *Hearing the Voice of a Child and Representation in Legal Matters* (LLD-thesis University of Pretoria 2010)

De Jong 2010 *TSAR*

De Jong M "A Pragmatic Look at Mediation as an Alternative to Divorce Litigation" 2010 *TSAR* 515-531

De Jong 2017 *TSAR*

De Jong M "Australia's Family Relationship Centers: A Possible Solution to Creating an Accessible and Integrated Family Law System as Envisaged by the South African Law Reform Commission's Issue Paper 31 of 2015?" 2010 *TSAR* 298-319

De Jong "Child Informed Mediation"

De Jong M "Child Informed Mediation and Parenting Coordination" in Boezaart T (ed) *Child Law in South Africa* 2nd ed (Juta Cape Town 2017) 134-163

Fabricius 2015 *International Journal for Family Research and Policy*

Fabricius W "The Bad News about Divorce and Children is Worse than We Thought, but the Good News is Better than We Thought" 2015 *International Journal for Family Research and Policy* 21-32

Fehlberg, Smyth and Maclean 2011 *International Journal of Law, Policy and the Family*

Fehlberg B, Smyth B and Maclean M "Legislating for Shared Time Parenting after Separation: A Research Review" 2011 *International Journal of Law, Policy and the Family* 318-339

Fitzgerald *Children Having a Say*

Fitzgerald R *Children Having a Say: A Study on Children's Participation in Family Decision Making* (PhD-thesis Southern Cross University 2009)

Henry and Hamilton 2012 *Intl J Child Rts*

Henry P and Hamilton K "The Inclusion of Children in Family Dispute Resolution in Australia: Balancing Welfare versus Rights Principles" 2012 *Intl J Child Rts* 584-602

Hart 2009 *Conflict Resolution Quarterly*

Hart A "Child Inclusive Mediation in Cases of Domestic Violence in Australia" 2009 *Conflict Resolution Quarterly* 3-19

Hoffman and Wolman 2013 *Cardozo Journal of Conflict Resolution*

Hoffman D and Wolman R "The Psychology of Mediation" 2013 *Cardozo Journal of Conflict Resolution* 759-807

Kalmijn 2015 *Journal of Marriage and Family*

M Kalmijn "How Childhood Circumstances Moderate the Long-Term Impact of Divorce on Father–Child Relationships" 2015 *Journal of Marriage and Family* 921-938

Madigan Plamondon and Jenkins 2017 *Journal of Marriage and Family*

Madigan S, Plamondon A and Jenkins J "Marital Conflict Trajectories and Associations with Children's Disruptive Behavior" 2017 *Journal of Marriage and Family* 437-450

McIntosh, Wells and Lee 2017 *Psychological Assessment*

McIntosh J, Wells Y and Lee J "Development and Validation of the Family Law DOORS" 2016 *Psychological Assessment* 1516-1522

Milojerich, Quas and Yano "Children's Participation in Legal Proceedings"

Milojerich H, Quas J and Yano J "Children's Participation in Legal Proceedings: Stress, Coping and Consequences" in Miller MK and Bornstein BH *Advances in Psychology and Law Volume 1* (Springer Cham 2016) 185-216

Moloney, Qu and Weston 2013 *Family Court Review*

Moloney L, Qu L and Weston R "Evaluating the Work of Australia's Family Relationship Centers: Evidence from the First 5 Years" 2013 *Family Court Review* 234-239

Moloney, Weston and Hayes 2013 *Journal of Family Studies*

Moloney L, Weston R and Hayes A "Key Social Issues in the Development of Australian Family Law Research and Its Impact on Policy and Practice" 2013 *Journal of Family Studies* 18-25

Muigua 2013 *Alternative Dispute Resolution*

Muigua K "Heralding a New Dawn: Achieving Justice through Effective Application of Alternative Dispute Resolution Mechanisms in Kenya" 2013 *Alternative Dispute Resolution* 73-78

Noppiari, Uusitalo and Kupiainen 2017 *Childhood*

Noppiari E, Uusitalo N and Kupiainen R "Talk to Me: Possibilities of Constructing Children's Voices in the Domestic Research Context" 2017 *Childhood* 68-83

Parkinson 2013 *Family Court Review*

Parkinson P "The Idea of Family Relationship Centers in Australia" 2013 *Family Court Review* 195-214

Patel and Jones 2008 *Journal of Mental Health Counselling*

Patel S and Jones K "Assessment of Family Care Issues Using Mental Health Evaluations: Implications for Mental Health Counsellors" 2008 *Journal of Mental Health Counselling* 189-194

Quigley and Cyr 2018 *Journal of Divorce and Remarriage*

Quigley C and Cyr F "The Voice of the Child in Parenting Coordination: Views of Children, Parents, and Parenting Coordinators" 2018 *Journal of Divorce and Remarriage* 501-527

Ramsden 2013 *The Child, Youth and Family Work Journal*

Ramsden K "Children's Perspectives on their Wellbeing: 'I Don't Think They Can Hear Us'" 2013 *The Child, Youth and Family Work Journal* 8-30

Robinson 2007 *THRHR*

Robinson JA "The Right of Children to be Heard at the Divorce of their Parents: Reflections on the Legal Position in South Africa" 2007 *THRHR* 263-274

SALRC *Family Dispute Resolution*

South African Law Reform Commission *Issue Paper 31, Project 100D. Family Dispute Resolution: Care of and Contact with Children* (SALRC Pretoria 2015)

Sheetal *Towards Being Heard*

Sheetal V *Towards Being Heard: Representations of the Child's Voice in Care Evaluation Reports by the Office of the Family Advocate* (MA-thesis University of Cape Town 2009)

Standing Committee on Family and Community Affairs *Every Picture Tells a Story*

Standing Committee on Family and Community Affairs *Every Picture Tells a Story. Report on the Inquiry into Child Custody Arrangements in the Event*

of Family Separation (Parliament of the Commonwealth of Australia Canberra 2003)

Taylor *et al* 2012 *Intl J Child Rts*

Taylor N *et al* "International Models of Hearing the Voice of a Child in Family Law Proceedings Following Parental Separation/Divorce" 2012 *Intl J Child Rts* 645-653

Thornblad and Strandbu "Involvement of Children"

Thornblad R and Strandbu A "The Involvement of Children in the Process of Mandatory Family Mediation" in Nylund A and Ervasti K (eds) *Nordic Mediation Research* (Springer Cham 2018) 183-210

Williams *Children's Participation and Procedures*

Williams G *Children's Participation and Procedures at the Office of the Family Advocate* (LLM-thesis University of KwaZulu-Natal 2004)

Yasenik and Graham 2016 *Family Court Review*

Yasenik L and Graham J "The Continuum of Including Children in ADR Processes: A Child-Centered Continuum Model" 2016 *Family Court Review* 186-206

Legislation

Australia

Constitution of Australia, 1901

Family Law Act 53 of 1975

Family Law Act 53 of 1975

Family Law Amendment (Shared Parental Responsibility) Act 46 of 2006

Family Law Legislation Amendment (Family Violence and Other Measures) Act 189 of 2011

Kenya

Children's Act, 2001

Children's Bill, 2017

Constitution of Kenya, 2010

South Africa

Children's Act 38 of 2005

Constitution of the Republic of South Africa, 1996

Divorce Act 70 of 1979

Mediation in Certain Divorce Matters Act 24 of 1987

Government publications**Kenya**

Legal Notice 167 in Gazette Supp No 179 of 9 October 2015 (*Medication (Pilot Project) Rules*)

South Africa

GN R48 in GG 999 of 12 January 1965, as amended (*Uniform Rules of the High Court of South Africa, or Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa*)

GN R261 in GG 22076 of 1 April 2020 (*General Regulations Regarding Children*)

International instruments

African Charter on the Rights and Welfare of the Child (1990)

United Nations Convention on the Rights of the Child (1989)

UN Committee on the Rights of the Child *General Comment No 12: The Right of the Child to be Heard* UN Doc CRC/C/GC/12 (2009)

Internet sources

British Columbia, Attorney General 2003 <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-services-branch/fjsd/mediation.pdf>

British Columbia, Ministry of Attorney General, Justice Services Branch, Family Justice Services Division 2003 *The Involvement of Children in Divorce and Custody Mediation: A Literature Review*

<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-services-branch/fjsd/mediation.pdf> accessed 22 June 2023

Kenya Mediator Accreditation Committee 2016 <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/05/MAC-Accreditation-Standards.pdf>
Kenyan Mediation Accreditation Committee 2016 *Mediator Accreditation Standards* <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/05/MAC-Accreditation-Standards.pdf> accessed 18 September 2023

McIntosh 2007 <https://childrenbeyonddispute.com/wp-content/uploads/2015/04/McIntosh-child-inclusion-AFRC-07.pdf>

McIntosh J 2007 *Child Inclusion as a Principle and as Evidenced-based Practice: Applications to Family Law Services and Related Sectors. Australian Family Relationships Clearinghouse Issues No 1, 2007* <https://childrenbeyonddispute.com/wp-content/uploads/2015/04/McIntosh-child-inclusion-AFRC-07.pdf> accessed 26 September 2023

McIntosh 2017 <https://childrenbeyonddispute.com/child-inclusive-mediation/>

McIntosh J 2017 *Children Beyond Dispute – Child Inclusive Mediation, Online Training Programme* <https://childrenbeyonddispute.com/child-inclusive-mediation/> accessed 22 June 2023

McIntosh 2017 <https://childrenbeyonddispute.com/practitionersycids>

McIntosh J 2017 *Children Beyond Dispute – Young Children in Divorce and Separation, Online Training Programme* <https://childrenbeyonddispute.com/practitionersycids/> accessed 22 June 2023

National Council for Children's Services 2015 <https://bettercarenetwork.org/sites/default/files/2020-10/National-Plan-of-Action-for-Children-in-Kenya-2015-2022.pdf>

National Council for Children's Services 2015 *National Plan of Action for Children in Kenya, 2015-2022* <https://bettercarenetwork.org/sites/default/files/2020-10/National-Plan-of-Action-for-Children-in-Kenya-2015-2022.pdf> accessed 22 June 2023

Republic of Kenya date unknown <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf>

Republic of Kenya date unknown *Court Annexed Mediation* [http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-](http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf)

Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf accessed 18 September 2023

Interview

Mangerere Interview 2017

Interview by the first author with James Mangerere, Director of the East Africa Mediation Institute, on 13 January 2017

List of Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
CFLQ	Child and Family Law Quarterly
FLA	Family Law Act
FRC	Family Relationship Centre
Intl J Child Rts	International Journal of Children's Rights
MAC	Mediation Accreditation Committee
NGO	non-governmental organisation
SALRC	South African Law Reform Commission
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
U Dayton L Rev	University of Dayton Law Review
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child