



# South African Law Reform Commission

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**MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION  
PROJECT 100A: CARE AND CONTACT WITH CHILDREN - ALTERNATIVE DISPUTE  
RESOLUTION IN FAMILY MATTERS**

On 13 December 2024, the South African Law Commission (SALRC) approved the Project 100A Report on Care and Contact with Children – Alternative Dispute Resolution in Family Matters for submission to the Minister of Justice and Constitutional Development. Following consideration by the Minister, the report is hereby published.

Employing an adversarial litigious approach to resolve disputes in families is increasingly recognised as having a deleterious emotional and economic effect on families, particularly on the children who are part of these families. Protracted litigation not only largely fails to accommodate and foster ongoing family relationships but also exacerbates existing fractures in relationships and causes additional unnecessary financial strain. The report aims to provide an integrated approach to family law dispute resolution, as one of the plinths of the overarching alternative dispute resolution (ADR) framework to facilitate access to justice in the arena of family law. In turn, the recommendations in the report aim to foster early resolution of disputes and intervention with a view to minimising family conflict particularly in respect of the dissolution of the relationship between parents which, particularly when adversarial or combative, is to the detriment of children. Providing services and processes for families to collaboratively resolve family law disputes rather than to further sever or strain familial relationships through multi-level legal challenges ties in with governments' goal of providing an effective, timely legal solution within a democratic, accessible, affordable and respected legal system.

The terms of reference of this investigation are as follows:

To develop recommendations for the further improvement of the family justice system that will –

- (a) be orientated to the needs of all children and families;

- (b) foster early resolution of disputes; and
- (c) minimise family conflict.

This report seeks to make recommendations to improve the family justice system by way of creating a pathway to foster early resolution of family law disputes through the use of ADR mechanisms. Preceding litigation with mandatory engagement in ADR mechanisms, subject to certain exceptions, is therefore aimed at minimising family conflict, empowering families to resolve their conflicts in so far as possible, providing access to appropriate supportive services, and ultimately avoiding lengthy and costly litigation. The proposal is to move from a court focused solution to the court as one of the options in reaching a solution and rarely as the first option.

**ISSUED BY THE SECRETARY, SA LAW REFORM COMMISSION, CENTURION**

**DATE: 10 November 2025**

A copy of the executive summary of the report and the draft Bill is included below. The contact person for enquiries in respect of the media statement is Dr Dellene Clark: email [dclark@justice.gov.za](mailto:dclark@justice.gov.za). The report is freely available at <https://www.justice.gov.za/salrc/>.

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**REPORT**  
**PROJECT 100A**  
**CARE AND CONTACT WITH CHILDREN -**  
**ALTERNATIVE DISPUTE RESOLUTION IN**  
**FAMILY MATTERS**

**13 December 2024**

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# EXECUTIVE SUMMARY

1. The object of this report is to provide an integrated approach to family dispute resolution, as one of the plinths of the overarching Alternative Dispute Resolution (ADR) framework to facilitate access to justice in the arena of family law. In turn, the report aims to foster early resolution of disputes and intervention with a view to minimising family conflict particularly in respect of the dissolution of the relationship between parents which, particularly when adversarial or combative, is to the detriment of children. This entails informing and developing policies, developing the law and processes to support such policies, and designing structures to accommodate the policies and laws. The provision of services and processes for families to collaboratively resolve disputes rather than to further sever or strain familial relationships through multi-level legal challenges ties in with governments' goal of providing an effective, timely legal solution within a democratic, accessible, affordable and respected legal system.<sup>1</sup>

2. In recognising the deleterious effect of using an adversarial court system to resolve disputes in families, the South African Law Reform Commission (SALRC) further recognises the vast and growing body of authoritative research on the benefits of engaging in alternative, and increasingly referred to as 'appropriate', dispute resolution mechanisms to resolve family law disputes.

3. The terms of reference of this investigation as set out in issue paper 31 and discussion paper 148, which are to be considered as incorporated into this report, are as follows:

To develop recommendations for the further improvement of the family justice system that will –

- (a) be orientated to the needs of all children and families;
- (b) foster early resolution of disputes; and
- (c) minimise family conflict.

4. This report seeks to make recommendations to improve the family justice system by way of creating a pathway to foster early resolution of family law disputes through the use of ADR mechanisms. Preceding litigation with mandatory engagement in ADR mechanisms, subject to certain exceptions, is therefore aimed at minimising family conflict, empowering families to resolve their conflicts in so far as possible, providing access to appropriate supportive services, and ultimately avoiding lengthy and costly litigation. The proposal is to move from a court focused solution to the court as one of the options in the solution and rarely the first option.

5. This report has six chapters. Chapter 1 provides an overview of the investigation. It

includes an exposition of the problem; and explains the purpose, objective and methodology of the report. Chapter 2 considers the chapters in the draft Family Dispute Resolution Bill (draft Bill) in this report dealing with the general principles; information, education and referral; and related matters. It recognises that the draft Bill contained in this report is underpinned by 5 foundational general principles; the presence or compliance of which will trigger the use of the processes included in the draft Family Dispute Resolution Bill or ensure that the parties are redirected to the relevant court. Chapter 3 primarily focuses on mediation as one of the vehicles of ADR. This chapter seeks to consider proposals made in respect of Chapter 4 of the draft Bill in this report which provides for mandatory mediation in family law disputes. This chapter confirms the SALRC's preliminary view that mandatory mediation should be provided for, subject to exceptions to the general rule, and as such would be constitutional. It further recommends that mediated matters should be expedited through the court process and that to this end consideration should be given to issuing court directives for a special roll for settlements and expedition. The SALRC further confirms that a party who unreasonably refuses to engage in mediation may be met with a punitive costs order by a court. Chapter 4 discusses the ADR mechanism of collaborative family practice found in Chapter 5 of the draft Bill. It was referred to as collaborative dispute resolution in the discussion paper but the SALRC has subsequently concluded that the term "collaborative family practice" more accurately describes this process and has elected to substitute the terminology in favour of the term "collaborative family practice". Chapter 5 focuses on the ADR mechanism of family arbitration found in Chapter 6 of the draft Bill and Chapter 6 discusses the mechanism of parenting coordination as it relates to the proposals contained in Chapter 7 of the draft Bill.

6. In this report the SALRC traverses across the four ADR mechanisms found in the discussion paper, namely family mediation, collaborative family practice, family arbitration, and parenting coordination. These mechanisms are underpinned by the identified germane general principles and the cross-cutting need for information and education. Where relevant, pertinent submissions received from respondents<sup>2</sup> to the discussion paper and contributions received during the subsequently held virtual workshops<sup>3</sup> and expert engagements will form part of the report and be referred to. The report includes draft legislative recommendations contained in the draft Family dispute Resolution Bill aimed at providing a procedure to resolve conflict in family matters in a manner which, while ensuring that the best interests of particularly children are

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1 SALRC Discussion Paper (2019) 21.

2 Annexure A contains a comprehensive list of all respondents to the SALRC ADR in Family Matters Discussion Paper (2019). 28 substantive submissions were received.

3 Annexure B contains information relevant to some of the workshops that were held on the SALRC Discussion Paper (2019).

paramount,<sup>4</sup> is effective, efficient and affordable. In summation, the draft Bill seeks to present the ideal of an integrated family justice system or therapeutic-justice model.

7. Following the sequence of the draft Bill the SALRC's recommendations are as follows:

### **Preamble**

8. The SALRC recognises that every person is vested with the right found in section 34 of the Constitution to have any dispute that the application of law can resolve decided in a fair public hearing before a court or, independent and impartial tribunal or forum. With a view to:

- alignment with a therapeutic justice system;
- preserving ongoing family relations;
- providing access to justice;
- providing appropriate resolution of family law disputes;
- allowing the voices of children and parents to be heard;
- reducing legal costs; and
- expediting the resolution of family law disputes,

the draft Bill provides four mechanisms of ADR, namely mediation, collaborative family practice, family arbitration, and parenting coordination. These mechanisms are found in Chapters 4 to 7 of the draft Bill.

### **Objects of the Bill**

9. Clause 2 contains the objects of the Bill, which are aimed at ensuring that parties to a family law dispute are provided with basic legal information regarding applicable legal services; are informed of processes available for them to resolve the dispute; are encouraged to resolve the dispute in the best interests of any child affected by the dispute; and to regulate ADR processes contained in the draft Bill.

### **General principles**

10. Chapter two of the draft Bill contains five general principles which underpin the ADR processes in the draft Bill. It firstly clarifies that the professional responsibility, obligations and standards applicable to legal practitioners or other licensed professionals are not circumvented by the provisions in the draft Bill; and that the obligation of a person to report abuse, neglect, abandonment or exploitation of a child or adult under the law remains intact (see clause 3).

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4 Section 28(2) of the Constitution and emphasized in *BMGS v MBS and others* High Court of South Africa Case No: 26675/2022 judgment delivered on 8 January 2024 (unreported) [4].

Secondly, it clarifies that parties may approach a court, at any time during an ADR process, for an urgent order to protect the health, safety, welfare or interest of a child or other family member (see clause 4). Thirdly, it provides that parties are required to make timely, full, candid and informal disclosure of information relevant to the family law dispute (see clause 5). Fourthly, it provides that a family dispute resolution professional, which is defined in the draft Bill, must at the outset and throughout the ADR process enquire as to whether any of the parties have been involved in a coercive or abusive relationship with any other party. Where such circumstances exist, a party to a family law dispute is exempted from engaging in mandatory mediation and may approach the court directly (see clause 17). If the party should wish to engage in an ADR process, it may not be commenced with unless the party has indicated that they choose to engage in an ADR process; the party has been informed of the relief available in terms of the Domestic Violence Act 116 of 1998; any obligation to report such act of coercion or abuse has been complied with; the party has been given the opportunity of applying for a protection order or has indicated that they do not wish to; a risk assessment has been done by the family dispute resolution professional; they believe that it will be safe for the party to engage in the process; and it is believed that the party will be in a position to negotiate a fair agreement (see clause 6). Fifthly clause 7 places the child at the centre of all family law disputes. The active facilitation of what is termed the “voice of the child” through a child expert (which is defined) is required during all ADR processes.

### **Information and education**

11. The mandatory information and education requirement for all parties to a family law dispute is triggered at the first point of access to the justice system. This is colloquially referred to as an entry or reception point (see clause 8). An “entry point” is broadly defined as ensuring that a party receives adequate information irrespective of the point they seek to access the justice system from. It provides for an open-ended list of points, which include various courts, lawyers, police stations, community advice centres, university law clinics, non-governmental organisations, schools, religious institutions, traditional leaders, and mental health care- or health practitioners. An information and education programme is provided to a party of a family law dispute at either the point of entry if the person is appointed as a programme provider, or the person at the point of entry is required to refer the person to a programme provider.

12. Clause 9 provides that the Minister of Social Development, in collaboration with the Minister of Justice and Constitutional Development, is responsible for developing minimum standards for the information and education programme. Once developed, but prior to implementation, they are required to consult with the Office of the Chief Justice. This would primarily include the effect of a family law dispute on both adults and children and how they may

resolve the dispute.

13. Clause 10 provides for the content of the information and education programme. It is broadly categorised into three parts, A, B and C. Part A provides for information on mandatory mediation applicable to those parties who do not have children; and Parts B and C provide for the same information augmented to apply to parties who do have children.

14. Clause 11 provides for a variety of ways in which the programme referred to in clause 10 may be presented, including that it should be provided for in the party's home language at prescribed locations.

15. Clause 12 provides that the MEC for social development is required to oversee the administration and implementation of the mandatory information programme at entry points other than the courts (see clause 12(1)). Entry points associated with courts must be overseen by the Office of the Chief Justice (see clause 12(2)). It is clarified that the person presenting the programme must at the very least be qualified as prescribed, and may not have any financial or other interest in the relevant family law dispute (see clause 12(3)). Sub-clause 12(4) provides that a 'dispute resolution professional' defined as persons ranging from a government employee to 'any other person designated by the Minister' (see definition section) may act as programme providers.

16. Clause 13 regulates the applicability of the programme to parties to the family law dispute. Where the rights and interests of a child are not affected, the parties must set out the programme as set out in Part A of the programme. Where the rights and interests of the child are affected the parties must attend Part A and B of the programme.

17. Clause 14 provides that the programme provider must after completion of the programme provide each party with a certificate of attendance and a list of available certified mediators.

18. Clause 15 stipulates that there are pertinent consequences for parties choosing not to comply with the required attendance of the mandatory information and education programme. Firstly, if both parties refuse to participate no further proceedings may take place, and secondly where only one-party refuses to participate a negative inference may be drawn coupled with a costs order in the event of future court proceedings (see clause 15(1)). Where the dispute resolution professional does not inform the parties about the mandatory and non-mandatory aspects and content of the information and education programme, and the consequences of

non-participation (see clause 8), a negative inference may be drawn in respect of the bona fides of the family dispute resolution professional or their intentions regarding the best interests of the child concerned; and a punitive order may be made against the person (see clause 15(3)(a) and (b)).

### **Family mediation**

19. The SALRC explains in the discussion paper that the regulation of the mediation process itself will be primarily addressed in the envisaged overarching draft Mediation Bill being developed by the SALRC Project 94 investigation. The aforementioned draft Bill aims to provide a generic framework for the mediation of all matters, to the exclusion of provisions provided for in the proposed draft Family Dispute Resolution Bill. The draft recommendations in the attached draft Family Dispute Resolution Bill and its intersection with the draft Mediation Bill have been developed pursuant to engagement with the advisory committee appointed to Project 94. As the Project 94 investigation is currently in the discussion paper phase, the SALRC has decided, in order to make the proposals in the draft Family Dispute Resolution Bill workable, to include the regulatory framework for mediation in this Bill as a transitional arrangement. Clauses 16 to 32 regulate the ADR mechanism of family mediation in the draft Bill. Clause 16 provides that the Chief Justice may, subject to specific criteria, recognise one or more organisations to register people as certified mediators. It further stipulates the minimum requirements necessary for certification as a mediator. As engaging in mediation is mandatory prior to litigation (see clause 17), to ensure that all parties irrespective of their financial standing have access to this process, this clause importantly provides that certification as a mediator is dependent on prescribed recurring annual community service. Clause 17 however lists six exceptions to the requirement of mandatory mediation. The exceptions to mandatory mediation are as follows:

- intention to apply for a court order based on a settlement agreement;
- a previous attempt to mediating the dispute was unsuccessful;
- the presence of domestic violence which may adversely affect the safety of the parties or to negotiate a fair agreement;
- reasonable grounds to believe that a child has been abused by one of the parties to the dispute or that a delay would result in abuse of a child;
- a signed collaborative family practice participation agreement; or
- a court determines that it is not in the best interest of the parties or the child, including urgency or potential hardship (see clause 17(4)).

20. Clause 18 delineates the jurisdiction of the court to hear family law disputes. Courts are generally precluded from hearing family law disputes if a certificate of outcome by a certified mediator is not submitted to the court (see clause 18(4)). Where a court is seized with a family law matter it may at any stage, in the best interests of any member of the concerned family, refer the matter to mediation with or without consent of the parties, or at the request of the parties (see clauses 18(1) and (2)).

21. Refusal by one or both of the parties to a family law dispute to continue engaging in mediation after attending at least one session is regulated by clause 19. Opting out of this ADR process is provided for where the dispute centres on a question of law only or there is good cause shown, including urgency and potential hardship (see clause 19(1)). The parties are required to provide their written refusal to continue to the mediator (see clause 19(2)). However, if the parties are subsequently found to have unreasonably refused to engage in mediation, the court may impose a punitive costs order (see clause 19(3)).

22. Clause 20 provides for the termination of the services of a certified mediator for a range of reasons. This provision is coupled with the ability to appoint another certified mediator or request that another mediator be appointed.

23. A written agreement to mediate is required before the mediation commences (see clause 21). After consultation with the parties, the procedure to be followed during mediation; the role of the mediator; and the rights and responsibilities of the parties will be determined by the mediator (see clause 22(1)). The parties are required to attend the proceedings themselves accompanied with or without their legal representative or a support person. The legal representative or support person may, however, be excluded from proceedings if the mediator deems this to be in the interests of justice (see clause 22(5)). The outcome of this process is aimed at assisting the parties to reach a satisfactory resolution of the family law dispute or to suggest options for the settlement thereof (see clause 22(11)).

24. Clause 23 provides that a certified mediator is immune from liability for anything done to discharge their functions where they have not been shown to have acted in bad faith.

25. The time frame for completion of the mediation is 90 days from the date of referral. The time frame may be extended on good cause shown (see clause 24(2)). The mediation process may however be terminated by a number of actions, such as a party opting out of the process, a party initiating litigation; or a mediator withdrawing from the process (see clause 24(4)).

26. Clause 25 provides that any communication made during the mediation process is confidential unless otherwise agreed.

27. Subject to a waiver and exclusion of privilege (see clause 27) or limitation of privilege (see clause 28) a communication made during the mediation process is privileged (see clause 26)). Clause 27 provides that a privilege may be waived in writing in a record or orally during proceedings, and clause 28 provides that there is no privilege where the communication is in the public domain, where there is a threat or statement to inflict bodily harm or commit a crime of violence; or where it is part of an agreement.

28. Clause 29 provides that a mediator is required to provide the parties with a certificate of outcome which sets out the agreement reached, or states that agreement could not be reached; or sets out why a party refused to participate in further mediation (see clause 29(1)).

29. Clause 30 provides that a written settlement agreement must be concluded once the parties have reached a mediated settlement to resolve all or part of the family law dispute. This settlement agreement is considered binding on the parties (see clause 30(3)), and may be made an order of the court (see clause 30(4)). However, any matter requiring enforcement e.g. where the interests of a child are affected or a financial commitment is agreed on, will require approval by a court (see clause 30(4)).

30. Clause 31 provides that the Chief Justice, and the Heads of Court may issue relevant practice directives, and the Rules Board for Courts of Law may make rules for family mediation.

31. Clause 32 regulates the costs of the mediation, and the extent of parties' liability for costs of the mediation.

### **Collaborative family practice**

32. Clauses 33 to 43 encapsulate the ADR process of collaborative family practice. Parties may opt to use this process instead of engaging in mediation. Clause 33 stipulates that a written collaborative family practice participation agreement is required and that it should identify the collaborative legal practitioners and neutral professionals who will be involved in the process. It further provides that such legal practitioners are disqualified from representing the parties in other proceedings (see clause 33(1)(h)).

33. Clause 34 regulates the commencement and conclusion of a collaborative family practice process; once the parties have a certificate indicating attendance of an information and

education programme and have elected to engage in a collaborative family practice process and have signed a participation agreement the process may commence. It is concluded by way of a signed settlement agreement; the termination of the process; or as agreed (see clause 34(4)). Although a court may not order parties to engage in such a process (see clause 34(3)), court proceedings may be stayed on application for a stay in proceedings to engage in this process (see clause 35). The signed record of the conclusion of the process must be filed with the court three days after the conclusion thereof (see clause 35(2)), where after the court may confirm such settlement agreement (see clause 36). The time limit set for concluding a collaborative family practice process is 90 days from the signature of the collaborative agreement (see clause 37). Clause 38 provides that as a general rule, a collaborative law practitioner is disqualified from representing a party in matters not related to the collaborative family practice process. With the exception of presenting an agreement to the court for approval; or seeking or defending an urgent application to protect the health, safety, welfare or interests of the party or family member, an associate legal practitioner may not represent the party in court or another process either (see clause 38(3)).

34. Clause 39 provides that communications in the collaborative family practice are confidential to the extent agreed upon. Similarly, subject to the waiver of exclusion of privilege (see clause 41) and the limits of privilege (see clause 42), a collaborative family practice communication is privileged (see clause 40). Clause 42, however, clearly provides that the existence of certain circumstances such as a threat or statement of intent to inflict bodily harm or to commit a crime of violence is not protected by privilege.

35. Clause 43 provides that if any part of the procedure relevant to the collaborative family law practice process is found to be invalid, this will not affect the remaining part of Chapter 5 of the draft Bill.

### **Family arbitration**

36. Clause 44 provides that parties to a family law dispute may after receiving a certificate of attendance of an information and education program refer the dispute to arbitration in terms of this Bill; or a court may with the consent of all of the parties to the proceedings refer the matter to arbitration in terms of clause 45.

37. The requirements for a family arbitration are contained in clause 46 in the alternative. The first option provides that the requirements will be prescribed by regulation. The second option also provides that the requirements will be prescribed by regulation but stipulates minimum requirements for legal experts and mental health experts and other bodies to act as a

family arbitration tribunal. The duties of the family arbitration tribunal are contained in clause 47 and provide particularly in respect of affected children that the child's voice must be heard, the family advocates report and recommendations must be considered; and that the nature, scope and methodology of the agreement must be set out (see clause 47(4)).

38. Clause 48 provides that rules may be prescribed to facilitate the resolution of family law disputes through arbitration.

39. Clause 49 provides that prior to an application for confirmation of an arbitration award the Office of the Family Advocate must be notified thereof and requested to consider and comment thereon. Similarly, clause 50 provides that no arbitration award affecting the rights of the child may come into effect unless it has been confirmed by the High Court, the Civil Regional Court or the Children's Court. Furthermore, an application to a court must be made within 30 days of delivery of the award (see clause 50(2)). The court may confirm, partially confirm, substitute, vary or remit the award to the arbitration tribunal with appropriate directions (see clause 50(3)). A court may not confirm the award where the point is raised that the award is not in the best interests of the child. It will then proceed to hear the matter (see clause 50(4)(b)). The court is obliged to enquire as to whether the award is in the best interests of the child (see clause 50(5)).

40. The jurisdiction of the court is not limited in so far as a family law dispute does not affect the rights or interests of a child (see clause 51). Additionally, the provisions of the Arbitration Act, 1965 are applicable with the necessary changes (see clause 52).

### **Parenting coordinator**

41. A mental health care professional, legal practitioner or other suitably qualified person may be appointed as a parenting coordinator (see clauses 53 and 54) where such person meets the minimum requirements to do so. To this end, they are appointed to act in this role only (see clauses 54(3) and (4)).

42. Clause 55 provides that a parenting coordinator may assist in resolving a family law dispute where a child is involved if an agreement is reached to do so; a court has ordered such and there is a parenting plan, settlement agreement or court order in place with respect to parenting arrangements or there is a short term, emerging and time-sensitive situation or dispute at hand (see clause 55(1)). The process is activated by the signing of a parenting coordination service agreement (see clause 56(1)). Said agreement must cover specific issues relating to procedures, fees etc (see clause 56(2)). The authority to act in terms of this

agreement terminates two years after the first dispute meeting unless the agreement or court order stipulates otherwise. The agreement may be extended for a further two years at a time (see clause 56(4)) or be terminated at any time by the parties by agreement, a court order, or the parenting coordinator. Where the parenting coordinator gives notice to the parties, they must facilitate the appointment of a replacement or the parties must do so (see clause 56(5)).

43. Clause 57 provides that the court retains exclusive jurisdiction in respect of guardianship, care, contact and maintenance, and the authority to exercise management and control over the case.

44. Clause 58 stipulates the areas in which a parenting coordinator may assist parties; provides for the matters on which they may issue directives; and clarifies the matters in which they may not make directives. In issuing directives clause 59 clearly states that in matters relating to parenting arrangements or contact with the child, the best interests of the child are of utmost importance. As a determination is time sensitive and urgent, while a directive must be reduced to writing, it may be issued orally and reduced to writing not later than 24 hours after the oral directive (see clause 59 (5)). Such directives are binding on the parties and enforceable under the Bill, from the date of being issued or as determined by the parenting coordinator, and if filed with the court (see clause 59(7)).

45. Clause 60 provides for the changing of or setting aside of directives.

46. Clause 61 provides for the parenting coordination process broadly, and clause 40 places an obligation on the parties to provide the parenting coordinator with the necessary information and authorisation to the parenting coordinator to request and receive information in respect of a child or party from a person who is not a party. It is relevant that the communication between the parties and the parenting coordinator may not be confidential (see clause 62(2)). Clause 63 provides that a parenting coordinator may be removed by the parties by agreement or the court depending on how the parenting coordinator was appointed. Notably, a parenting coordinator may not be appointed if the court is not satisfied that the parties have the means to pay for the parenting coordinator (see clause 64(1)).

### **General provisions**

47. Clauses 65 to 67 contain general provisions relevant to the issuing of regulations (see clause 65); the amendment of laws (see clause 66 and the attached schedule to the draft Bill); and the short title and commencement (see clause 67).

# DRAFT FAMILY DISPUTE RESOLUTION BILL, 2024

REPUBLIC OF SOUTH AFRICA

## FAMILY DISPUTE RESOLUTION BILL

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*(As introduced in the National Assembly (proposed section 75); explanatory  
summary of Bill published in Government Gazette No. .... of ..... 2024)*

*(The English text is the official text of the Bill)*

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**(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)**

**[B —2024]**

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## **GENERAL EXPLANATORY NOTE:**

[            ] Words in bold type in square brackets indicate omissions from existing enactments

\_\_\_\_\_ Words underlined with a solid line indicate insertions in existing enactments

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## **BILL**

**A Bill to provide for meaningful access to justice by providing for appropriate resolution of family law disputes; to regulate the process of family mediation, family arbitration, collaborative family practice and parenting coordination; to introduce a standardised, compulsory information and education program and mediation process before engaging the court process; to allow the voices of children and parents to be heard; to reduce legal costs; to expedite the resolution of family law disputes; and to provide for matters connected therewith.**

## **PREAMBLE**

### **RECOGNISING THAT –**

- everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, independent and impartial tribunal or forum as provided for in section 34 of the Constitution;

### **AND BEARING IN MIND THAT –**

- every child has the rights set out in section 28 of the Constitution;
- every person has an inherent right to dignity and to have that dignity respected and protected as provided for in section 10 of the Constitution;
- every person has the right to privacy as provided for in section 14 of the Constitution; and
- the state must respect, protect, promote and fulfil the rights set out in the Bill of Rights as provided for in section 7 of the Constitution;

### **AND IN ORDER TO –**

- align the family law system with a therapeutic justice system;
- preserve ongoing family relations;
- provide for access to justice;
- provide for appropriate resolution of family law disputes;
- allow the voice of the child and parents to be heard;
- reduce legal costs; and
- expedite the resolution of family law disputes.

**PARLIAMENT** of the Republic of South Africa enacts as follows: —

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## **CHAPTER 1**

## DEFINITIONS AND PURPOSE

### Definitions and purpose

1.(1) In this Act, unless the context indicates otherwise—

**“agreement to mediate”** means an agreement by two or more persons to refer for mediation the whole or part of a family law dispute which has arisen, or which may arise between them, and may include an agreement entered into between the disputing parties and a mediator before the mediation process commences which sets out the terms according to which the mediation will be conducted;

**“arbitration tribunal”** means the arbitrator or arbitrators acting as such in terms of an arbitration agreement;

**“certified mediator”** means a person who has been certified as a mediator in terms of clause 16 of the Act;

**“Chief Justice”** means the Chief Justice of South Africa appointed in terms of section 174(3) of the Constitution;

**“child”** means a person under the age of 18 years;

**“child expert”** for the purpose of clause 7 means a person who has the requisite knowledge and skillset including —

- (a) child-friendly interviewing skills;
- (b) an understanding of education and schooling in terms of the educational needs of a child;
- (c) a basic awareness of common psychiatric and psychological disorders that affect children and their learning;
- (d) knowledge and awareness of parental alienation, and the indicators thereof;
- (e) thorough knowledge of child development at a cognitive, linguistic and psychosocial level;
- (f) an understanding of the various contexts and systems within which the child develops; and
- (g) current knowledge of research and development in the areas of child participation in divorce, family mediation, parenting plans, and legal aspects relevant to divorce.

**“coercive or abusive relationship”** includes behaviour defined as ‘domestic violence’ in section 1 of the Domestic Violence Act 116 of 1998;

**“collaborative family practice participation agreement”** means an agreement in writing by persons to participate in a collaborative family practice process;

**“collaborative family practice process”** means a procedure intended to resolve a collaborative matter, without intervention by a court, in which persons—

- (a) sign a collaborative family practice participation agreement; and
- (b) are represented by collaborative law practitioners;

**“collaborative law practitioner”** means a legal practitioner who represents a party in a collaborative family practice process;

**“collaborative matter”** means a family law dispute which is described in a collaborative family practice participation agreement;

**“Constitution”** means the Constitution of the Republic of South Africa, 1996;

**“court”** means any court in the Republic as provided in section 166 of the Constitution;

**“dispute resolution process”** includes family mediation, family arbitration, collaborative family practice and parenting coordination;

**“entry point”** means the first point of access to the justice system for parties to a family law dispute, and includes—

- (a) courts, social workers, legal practitioners, the Office of the Family Advocate, police stations, Thusong Service Centres, Therisano Centres; Legal Aid South Africa, and community advice centres;
- (b) traditional courts;
- (c) community courts, university law clinics, non-governmental organisations and community-based organisations;
- (d) schools;

- (e) religious institutions;
- (f) traditional leaders;
- (g) mediators;
- (h) health practitioners;
- (i) mental health care practitioners;
- (j) social service practitioner; or
- (k) any other prescribed entry point;

**“family”** means a societal group that is or has been related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or life partnership;

**“family law dispute”** means a dispute, or alleged dispute, in which one party maintains a particular point of view or claim or contention regarding the parties’ respective responsibilities, interests and rights towards, or with respect to, any member of the family to which both parties belong, and the other party maintains a contrary or different view;

**“family dispute resolution professional”** means any of the following:

- (a) a government employee tasked with dealing with family law disputes and includes a family advocate, family counsellor, social service practitioner, court official, maintenance officer, and an employee of Legal Aid South Africa;
- (b) a legal practitioner advising a party in relation to a family law dispute;
- (c) mental health care practitioners or social workers in private practice dealing with family law disputes;
- (d) a mediator conducting a mediation in relation to a family law dispute;
- (e) a collaborative law practitioner;
- (f) a parenting coordinator;
- (g) an arbitrator conducting an arbitration in relation to a family law dispute;
- (h) a person providing family dispute resolution services within a class of prescribed persons; or
- (i) any other person designated by the Minister;

**“health practitioner”** means any person, including a student, registered with the Health Professions Council of South Africa in a profession registrable in terms of section 2 of the Health Professions Act, 1974;

**“information and education programme”** means a programme developed in accordance with this Act for the purpose of providing relevant information and education to the parties involved in a family dispute;

**“informed consent”** means that the decision parties reach must be sufficiently informed by information, disclosed,

**“law firm”** means legal practitioners who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company or association;

**“legal practitioner”** means an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30 of the Legal Practice Act, 2014 (Act No. 28 of 2014);

**“mediated settlement agreement”** means an agreement, by some or all of the parties to the mediation settling the whole, or part of, the family law dispute to which the mediation relates;

**“mediation”** means a process in which a mediator facilitates and encourages communication and negotiation between the mediating parties and seeks to assist the mediating parties in arriving at a voluntary agreement;

**“MEC for social development”** means the member of the Executive Council of a province who is responsible for social development in a province;

**“mental health care practitioner”** means a psychiatrist, psychologist or social worker who has been trained to provide prescribed mental health care, treatment and rehabilitation services in family law disputes;

**“Minister”** means the Cabinet member responsible for the administration of justice or, where the context indicates another Minister, that Minister;

**“non-party participant”** means a person, other than a party and the party’s collaborative law practitioner, that participates in a collaborative law process, including support persons, mental-health professionals, financial neutrals and potential parties;

**“parenting coordinator”** means a third party who is appointed to make directives on matters

incidental to the parents' parental responsibilities and rights;

**“parenting coordination”** is a child-focused alternative dispute resolution process in which a mental health care professional or legal professional with mediation training and experience assists high-conflict parties in implementing parenting plans, settlement agreements or court orders and resolving pre- and post-divorce parenting disputes in an immediate non-adversarial, court-sanctioned, private forum;

**“parenting coordination agreement”** means an agreement in writing between the parties to use a parenting coordinator and includes such an agreement that has been included as a parenting coordination clause in a parenting plan, settlement agreement or divorce order;

**“parenting coordination service agreement”** means an agreement in writing between the parties and the parenting coordinator, governing their working relationship and including information regarding fee payments, billing practices and retainers;

**“parenting plan”** means a plan that determines parental responsibilities and rights as contemplated in Chapter 3 of the Children’s Act, 2005 (Act No. 38 of 2005);

**“person”** means a natural person;

**“prescribed”** means prescribed by regulation;

**“proceedings”** means any court litigation, settlement or alternative dispute resolution processes and includes the furnishing of legal advice or intervention and or investigation by the Office of the Family Advocate;

**“Republic”** means the Republic of South Africa;

**“social service practitioner”** means a ‘social service practitioner’ as contemplated in the Social Service Professions Act, 1978 (Act No. 110 of 1978);

**“therapeutic justice system”** means a justice system that aims to foster strong, stable, and positive family relationships through a therapeutic application of the law focusing on achieving positive outcomes for families and children involved in family law disputes;

**“this Act”** includes any regulation made in terms of this Act;

### **Objects of this Act**

2.(1) The objects of this Act are to—

- (a) ensure that consistent, standardised and accurate basic legal information is provided to parties to a family law dispute in relation to all areas of applicable legal services;
- (b) ensure that parties to a family law dispute are informed of the various processes and procedures available to them to resolve the dispute;
- (c) encourage family members, parents, caregivers and guardians to resolve conflict in the best interests of the child, other than through court intervention; and
- (d) regulate alternative dispute resolution processes and procedures.

## **CHAPTER 2 GENERAL PRINCIPLES**

### **Standards of professional responsibility and mandatory reporting not affected**

3. This Act does not affect—

- (a) the professional responsibility, obligations and standards applicable to a legal practitioner or other licensed professional; or
- (b) the obligation of a person to report abuse, neglect, abandonment or exploitation of a child or adult under the law of the Republic.

### **Urgent orders**

4. During a dispute resolution process, a court may at any time issue an urgent order to protect the health, safety, welfare or interest of a child or other family member.

### **Disclosure of information**

5.(1) Except as provided by law other than this Act, a party must, during the dispute resolution process, at the request of another party, make timely, full, candid and informal disclosure of information related to the family law matter without formal discovery.

(2) A party must promptly update previously disclosed information that has materially

changed.

(3) Failure of a party to comply with subsection (1) has the effect that a negative inference may be drawn about that party's bona fides, and in the event of any subsequent court proceedings a punitive cost order may be made at the discretion of the court.

### **Coercive or abusive relationship**

6.(1) A family dispute resolution professional consulted by a party to a family law dispute must, as a first step, make reasonable enquiries whether any of the parties has been involved in a coercive or abusive relationship with any other party.

(2) Throughout a dispute resolution process, the relevant family dispute resolution professional must reasonably and continuously assess whether any of the parties to the dispute resolution has been involved in a coercive or abusive relationship with any other party.

(3) If a family dispute resolution professional reasonably believes that any of the parties to the family dispute has been involved in a coercive or abusive relationship with any other party, the family dispute resolution professional may not begin with or continue with the dispute resolution process unless—

- (a) the relevant party has been informed of the relief available in terms of the Domestic Violence Act, 1998 (Act No.116 of 1998);
- (b) where applicable, any obligation to report domestic violence in terms of sections 2A or 2B of the Domestic Violence Act, 1998 (Act No.116 of 1998) has been complied with;
- (c) the relevant party has been given the opportunity of applying for and obtaining an interim protection order in terms of the Domestic Violence Act, 1998 (Act No.116 of 1998) or has indicated that they do not elect to do so;
- (d) the potentially vulnerable prospective party requests the commencement or continuation of the process; and
- (e) a risk assessment has been done by the family dispute resolution professional; and
- (f) the family dispute resolution professional reasonably believes that the safety of the potentially vulnerable party can be adequately protected during the process.

(4) A family dispute resolution professional's failure to protect a party in terms of this section does not allow a private cause of action against the dispute resolution professional.

(5) A family dispute resolution professional who makes a report referred to in sub-clause (3)(b) in good faith, is not liable to civil, criminal or disciplinary action on the basis of the report, despite any law, policy or code of conduct prohibiting the disclosure of personal information.

### **Voice of the child**

7. During all dispute resolution processes, child participation in family law disputes involving children should be actively facilitated in accordance with the provisions of the Children's Act, 2005, through an independent and suitably qualified child expert.

## **CHAPTER 3 INFORMATION AND EDUCATION**

### **Reception at entry point**

8.(1) A person at an entry point or a family dispute resolution professional consulted by a party to a family law dispute must inform the parties about—

- (a) the mandatory and non-mandatory aspects and content of the family law information and education programme as set out in this Chapter; and
- (b) the consequences of non-participation.

(2) If the person at an entry point or the dispute resolution professional has not been appointed as a programme provider, he or she must refer the party to a programme provider appointed in terms of section 12(3) for purposes of participating in an information and education programme.

### **Information and education programme**

**9.(1)** The Minister, in collaboration with the Cabinet member responsible for social development, must develop—

- (a) minimum standards for an information and education programme for the purpose of educating family members about the effect of a family dispute on adults and children, and about the manner in which such a dispute may be resolved; and
  - (b) an information and education programme in accordance with the minimum standards contemplated in paragraph (a) and in accordance with this Act.
- (2) The minimum standards developed in terms of subsection (1)(a) must address—
- (a) the nature of the programme;
  - (b) the funding of the programme;
  - (c) the effect of cultural diversity on the nature of the programme;
  - (d) the importance of acknowledging the voice of the child;
  - (e) arrangements for disputes in which domestic violence or child abuse may be a factor;
  - (f) the qualifications of programme providers;
  - (g) the means of evaluating and maintaining the programme; and
  - (h) the support services available during and after the process.
- (3) Once the information and education programme has been developed, but prior to implementation, it must be submitted to the Office of the Chief Justice for consultation.

### **Content of information and education programme**

**10.(1)** The information and educational programme referred to in subsection 9(1)(b) must at a minimum include instruction about the following matters—

- (a) as set out in Part A of the programme:
  - (i) Ways in which family law disputes may be resolved other than by the court;
  - (ii) the suitability of mediation, or of any other way of resolving disputes, such as family arbitration or collaborative family practice, as a possible way of resolving the dispute to which the matter concerned relates;
  - (iii) the nature of mandatory mediation as set out in this Act;
  - (iv) the availability of independent legal advice and representation to a party;
  - (v) the conditions for obtaining legal aid and where the parties can get appropriate legal advice;
  - (vi) referral to other non-legal service providers or agencies;
  - (vii) the legal process and procedures of divorce or separation and the responsibilities and rights of parties in all circumstances;
  - (viii) the nature of financial issues that may arise as a result of divorce or separation, and services that are available to assist the parties; and
  - (ix) protective measures available in the case of violence and all forms of abuse and how to obtain support and assistance; and
- (b) as set out in Part B of the programme:
  - (i) The role of the Office of the Family Advocate;
  - (ii) the emotional, psychological, physical and other short-term and long-term effects of conflict on both children and adults;
  - (iii) the importance of recognising the welfare, wishes and feelings of a child;
  - (iv) how the parties may acquire a better understanding of the manner in which a child may be assisted to cope with the breakdown of a relationship or with any other family dispute;
  - (v) the importance of avoiding the placing of a child in the centre of conflict;
  - (vi) information for a child and their parents about separation and divorce, and their adjustment after the separation or divorce;
  - (vii) the parental responsibilities and rights of parents towards each other and towards their child and the advantages of parenting plans;

- (viii) the suitability of parenting coordination; and
  - (ix) the role of support systems.
- (2) Apart from the matters referred to in subsection (1), the information and education programme must also include instruction about the following matters set out in Part C of the programme:
- (a) The developmental and psychological needs and responses of a child;
  - (b) the positive parenting behaviour skills needed to build a cooperative parallel parenting relationship; and
  - (c) the importance of a parent taking care of themselves in order to be able to help their child adjust.

### **Format of the programme**

**11.(1)** The format of the programme must include any of the following communication tools as prescribed:

- (a) online resources;
- (b) audio-visual materials;
- (c) in-person lectures;
- (d) literature; and
- (e) group meetings and presentations.

(2) The communication tools referred to in subsection (1) above must be provided in a party's home language at prescribed locations.

### **Availability, administration and implementation of programme**

**12.(1)** The MEC for social development must oversee the administration, adoption and implementation of the programme at all entry points, other than the courts, for use by participants who are required to attend.

(2) The Office of the Chief Justice must oversee the administration, adoption and implementation of the programme in the courts, for use by participants who are required to attend.

(3) An information and education programme must be presented by a person who—

- (a) is qualified and was appointed as prescribed; and
- (b) has no financial or other interest in any aspect of the family dispute between the parties.

(4) Subject to subsection (3), nothing precludes a family dispute resolution professional from acting as a programme provider.

(5) The information and education programme must be available at the places and times prescribed.

(6) Information as prescribed must be provided to parties (other than during an information and education programme) in cases where mandatory participation in a programme does not apply.

### **Applicability of programme**

**13.(1)** The parties in any family law dispute that—

- (a) does not affect the rights or interests of a child, must participate in the information and education programme contemplated in section 10(1)(a), as set out in Part A of the programme;
- (b) affects the rights or interests of a child, must—
  - (i) participate in the information and education programme contemplated in section 10(1)(a) and (b), as set out in Parts A and B of the programme; and
  - (ii) ensure that a child involved in the family law dispute receives the information contemplated in section 10(1)(b)(vi),

before any proceedings may commence, unless—

- (aa) a court determines, for reasons that may include urgency and possible harm or prejudice, that participation is not in the best

- interests of the parties or the child;
- (bb) a party is or will be enrolled in an education programme that the court deems to be appropriate;
- (cc) a court determines that a party has previously completed an educational programme pursuant to this section, or an appropriate programme, and the court is of the opinion that the party need not attend the programme again;
- (dd) a family dispute resolution professional is of the opinion that the safety of the parties or of their children is at risk;
- (ee) a party lives in an area where the programme is not available; or
- (ff) the court determines that participation is unnecessary in the circumstances of the case concerned.

(2) Parties in any family law dispute that affects the rights or interests of a child may participate in the information and education programme contemplated in section 10(2), as set out in Part C of the programme, before any proceedings commence.

### **Certificate of attendance**

**14.** A programme provider appointed in terms of section 12(3) must furnish each party who attends with a—

- (a) certificate of attendance as prescribed; and
- (b) list of available certified mediators.

### **Compliance**

**15.(1)** Failure of a party to comply with section 13(1)(a) has the effect that—

- (a) when both parties refuse to participate, no further proceedings may take place; and
- (b) when one of the parties refuses to participate, a negative inference may be drawn regarding that party's bona fides and a punitive cost order, or any other appropriate order, may be made at the discretion of the court in the event of any subsequent court proceedings.

(2) Failure of a party to comply with section 13(1)(b) has the effect that—

- (a) when both parties refuse to participate, no further proceedings may take place; and
- (b) when one of the parties refuses to participate—
  - (i) a negative inference may be drawn as to that party's intentions regarding the best interests of the child concerned; and
  - (ii) a punitive cost order, or any other appropriate order, may be made at the discretion of the court in the event of any subsequent court proceedings.

(3) Failure of a dispute resolution professional to comply with section 8 will result in—

- (a) a negative inference being drawn with respect to the bona fides of the family dispute resolution professional, and when the rights or interests of a child are affected, to the professional's intentions regarding the best interests of the child concerned; and
- (b) a punitive cost order, or any other appropriate order, may be made, where applicable, at the discretion of the court in the event of any subsequent court proceedings.

## **CHAPTER 4 FAMILY MEDIATION**

### **Certification as a mediator**

**16. (1)** The Chief Justice must, after consultation with the Heads of Court, without delay and by way of notice in the Government Gazette, recognise one or more organisations to register persons as certified mediators.

(2) The Chief Justice may from time to time recognise additional organisations, by way of

notice in the Government Gazette, to register persons as certified mediators.

(3) When the Chief Justice has recognised an organisation in accordance with subsections (1) or (2), the persons certified as mediators of family law disputes by that organisation are deemed certified mediators, for purposes of this Act and any other law that requires family law mediation services to be rendered.

(4) Prior to recognising any organisation in terms of subsections (1) or (2), the Chief Justice must ascertain details of the –

- (a) qualification and certification standards used by the organisation, including any such standards that may be applicable to mediation in family law disputes;
- (b) manner in which the organisation requires persons to be assessed for certification against these standards;
- (c) codes of conduct that the organisation requires certified mediators to comply with, as well as the complaints and disciplinary procedures that apply to mediators certified by the organisation; and
- (d) manner in which the mediator standards, the codes of practice, the complaints and disciplinary procedures, and the register of mediators certified by the organisation, are published.

(5) The Chief Justice may when recognising an organisation in terms of subsection (1) or (2) stipulate that the organisation is only recognised to register persons as certified mediators for family law disputes.

(6) Subject to subsection (4), the decisions in accordance with subsections (1), (2) and (5) must be at the discretion of the Chief Justice, provided that the Chief Justice may consult with any relevant stakeholders prior to making any such decision.

(7) The Chief Justice may from time to time, after consultation with the body, at their discretion, withdraw the recognition of any organisation previously made in accordance with sections (1), (2) or (5).

(8) The minimum requirements for a person to be certified as a mediator include that such person must –

- (a) provide proof of having met the following training requirements:
  - (i) training in a family mediation training course accredited by an organisation recognised in terms of subclause (1), with assessment and certification of their attendance and competence; and
  - (ii) completion of additional training, which includes training in psychology, training in family law, or training in both.
- (b) provide proof of having met the minimum practice requirement of participation in at least three supervised mediations.
- (c) be a certified member of an organisation recognised in terms of subsection (1).

(9) A minimum period of recurring annual community service as prescribed is required from certified mediators upon which continued certification as a mediator is dependent.

(10) Any additional requirements for certification as a mediator may be imposed by the Chief Justice or prescribed by regulation.

### **Commencement of mediation before litigation**

**17.(1)** In order to attempt the resolution of a family law dispute, the parties to a dispute must, once they have complied with section 13, submit to mediation in terms of this Act before any other proceedings (including the issuing of summons, or a notice of motion) may commence.

(2) The mediation must be performed by a certified mediator agreed on by the parties or, if the parties are unable to agree, by a certified mediator appointed by an organisation recognised in terms of section 16(1) of the Act or by the Court.

(3) Subject to subsection (2), nothing precludes a programme provider from making their services available to the parties to facilitate the mediation as a certified mediator.

(4) The parties are not compelled to submit to mediation if—

- (a) they intend to file a settlement agreement and both parties consent to the agreement being made an order of court by incorporating it in the divorce order;
- (b) they have previously attempted to mediate the dispute concerned but that

- mediation was unsuccessful;
- (c) a mediator, after assessing, as prescribed, whether domestic violence as defined in section 1 of the Domestic Violence Act 116 of 1998 may be present, is of the opinion that domestic violence is present and that the domestic violence may adversely affect the safety of the party or a family member of that party or the ability of the party to negotiate a fair agreement;
  - (d) a court is satisfied that there are reasonable grounds to believe that abuse of a child by one of the parties has occurred or there would be a risk of abuse of the child if there were to be a delay in applying for protection of the child;
  - (e) they have signed a collaborative family practice participation agreement; or
  - (f) a court determines that participation is not in the best interests of the parties or the child, including urgency or potential hardship.

### **Jurisdiction of court**

**18.(1)** A court may at any stage of litigation, if it deems it in the best interests of any member of the family concerned, refer a matter to a certified mediator to facilitate mediation of the family law dispute between the parties, and may do so with or without the consent of the parties to the proceedings.

(2) A litigant may, at any stage of the litigation, apply to court for the referral of a dispute to mediation with such order as to costs as the court deems appropriate.

(3) Where a family law dispute is referred to mediation the time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party to the dispute from the date of signature of the agreement referred to in section 21 to the time of completion or termination of the mediation;

(4) Subject to section 17(4), a court exercising jurisdiction under this Act must not hear a family dispute unless a party files with the court a certificate of outcome furnished to that party by a certified mediator in terms of section 29.

### **Refusal to submit to mediation**

**19.(1)** Notwithstanding the provisions of sections 17 and 18, a party may, within five days after attending one session with a certified mediator to determine whether mediation appears to be appropriate for the resolution of the dispute, or the parties and the circumstances, opt out of further mediation contemplated in those sections, on the following grounds:

- (a) The issue constitutes a question of law only; or
- (b) any other good cause shown, including urgency and potential harm or prejudice.

(2) Parties who refuse to participate in further mediation must provide the mediator with written reasons for their refusal.

(3) The court may impose a punitive cost order, or another appropriate order, if, during a subsequent hearing, it concludes that a party unreasonably refused to engage in mediation.

### **Termination of appointment of a certified mediator**

**20.(1)** If a mediator appointed under this chapter is—

- (a) found to be non-compliant with the training or practice requirements as set out in section 16(8)(a) or (b);

- (b) found to no longer satisfy the requirement for certification as required under section 16(8)(c);
- (c) found to have financial or personal interest in the family law dispute;
- (d) found to have obtained their appointment by way of fraud or any other improper means; or
- (e) unable to serve as a mediator for the mediation,

the parties may terminate the appointment of the mediator and appoint another certified mediator for the mediation or request an organisation recognised in terms of clause 16(1) of the Act to appoint another certified mediator.

(2) Notwithstanding subsection (1), the parties may agree to terminate the appointment of a mediator, or agree to replace a mediator at any time, for any reason whatsoever.

### **Agreement to mediate**

**21.(1)** Before commencement of the mediation in terms of clauses 17 or 18, a certified mediator must enter into a written agreement to mediate with both or all parties.

- (2) The agreement to mediate must set out–
- (a) the role and functions of the certified mediator and their affiliation with an organisation recognised in terms of section 16(1) of the Act;
  - (b) the rights and obligations of the parties in respect of the mediation process, including the duty to disclose all relevant documentation and information voluntarily, openly and honestly;
  - (c) the fact that the mediation occurs without prejudice of rights;
  - (d) the professional fees payable to the mediator; and
  - (e) other matters the parties and the mediator deem appropriate.

### **Procedure to be followed during mediation and the role of mediator**

**22.(1)** A mediator may determine the manner in which the mediation is to be conducted after consultation with the parties, taking into account –

- (a) the circumstances of the case;
  - (b) any wishes that the parties may express; and
  - (c) the need for a speedy settlement of the dispute.
- (2) The parties to a family law dispute are required to attend mediation proceedings.
- (3) A mediation must be conducted in private unless otherwise agreed by the parties.
- (4) A party may have their legal representative or a support person attending the mediation process, but the mediation must take place between the parties to a family law dispute themselves.
- (5) The mediator may, if they deem it in the interests of justice, and subject to the application of sections 25 and 26, include or exclude any legal representative or support

person from the proceedings.

(6) Notwithstanding subsection (3) a non-party of a mediator's choice may participate in a mediation to assist the mediator during the mediation, subject to the consent of the parties.

(7) A mediator must act independently and impartially and seek to maintain fair treatment of the parties and, in so doing, must take into account the circumstances of the case including the best interest of any children.

(8) Prior to accepting the appointment, the prospective mediator must ensure their availability to conduct the mediation diligently and efficiently.

(9) At any stage of a mediation a mediator may meet or communicate with the parties together or with each of them separately.

(10) A mediator may not act as a representative or an advisor of a party in any arbitral, judicial or other dispute resolution proceedings in respect of the dispute that is related to the mediation.

(11) A mediator may assist the parties to reach a satisfactory resolution of the family law dispute and may suggest options for the settlement of the dispute.

### **Immunity of mediator**

**23.** A mediator is not liable for any act or omission in respect of anything done or omitted to be done in the discharge of their functions as a mediator unless the act or omission is shown to have been in bad faith.

### **Commencement and completion of the mediation**

**24.(1)** The mediation process commences when the parties and a certified mediator sign an agreement to mediate.

(2) The time limit for completion of the mediation is 90 days from the date of referral, and on expiry of this date the parties may institute legal proceedings even if the mediation has not been completed, unless the certified mediator, in writing, extends such time period for completion of the mediation process on good cause shown.

(3) The mediation process is concluded by —

- (a) the resolution of the matter as reflected in a signed mediated settlement agreement, on the date of such signature;
- (b) the resolution of a part of the matter as reflected in a signed mediated settlement agreement in which the parties agree that any remaining parts of the matter must not be included in the process; or
- (c) the termination of the process.

(4) The mediation process terminates when —

- (a) a party opts out of the mediation process or refuses further mediation in terms of clause 19;
- (b) a party initiates a proceeding in connection with the matter without the agreement of all the parties;
- (c) in pending proceedings in connection with the matter a party —
  - (i) initiates an action, motion, or application;
  - (ii) requests that the proceeding be put on the court's active roll; or
  - (iii) takes similar action that requires a notice to be delivered to the parties; or
- (d) a mediator withdraws from the process.

### **Confidentiality of any communication made during the mediation process**

**25. (1)** Any communication made during the mediation process is confidential unless the parties agree otherwise, or any other law provides otherwise.

- (2) A communication made during the mediation process includes -
- (a) an invitation by a party to engage in mediation or the fact that a party was willing to participate in mediation;
  - (b) views expressed, or suggestions made by a party during the mediation in respect of a possible settlement of the family law dispute;
  - (c) statements or admissions made by a party in the course of the mediation;
  - (d) proposals made by the mediator or the parties;
  - (e) the fact that a party had indicated their willingness to accept a proposal (or parts thereof) for settlement made by the mediator or the parties; and
  - (f) a document prepared primarily for purposes of the mediation.

### **Privilege, admissibility and discovery**

**26.(1)** Subject to sections 27 and 28, any communication made during the mediation process is privileged in terms of subsection (2), is not subject to discovery, and is not admissible in evidence.

- (2) In court or arbitration proceedings, the following privileges apply:
- (a) a party may refuse to disclose, and may prevent any other person from disclosing, any communication made during the mediation process; and
  - (b) a non-party participant may refuse to disclose, and may prevent any other person from disclosing, any communication made during the mediation process made by the non-party participant.
- (3) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely on account of its disclosure or use in the mediation process.

### **Waiver and exclusion of privilege**

**27. (1)** A privilege in terms of section 26 may be waived in writing in a record or orally during proceedings if it is expressly waived by all parties and, in the case of the privilege of a non-party participant, if it is also expressly waived by the non-party participant.

(2) A person who makes a disclosure or representation about any mediation communication which prejudices another person in legal proceedings may not claim privilege in terms of section 26, but this limitation only applies to the extent necessary for the person prejudiced to respond to the disclosure or representation.

### **Limits of privilege**

**28.(1)** There is no privilege in terms of section 26 for any communication made during the mediation process that is—

- (a) available to the public in terms of any law or made during a session of the mediation process that is open, or is required by law to be open, to the public;
  - (b) a threat or statement of intention to inflict bodily harm or commit a crime of violence;
  - (c) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity;
  - (d) part of an agreement resulting from the mediation process, reflected in a document signed by all parties to the agreement; or
  - (e) not subject to the privilege in accordance with the terms of an agreement to mediate between the parties and the mediator.
- (2) Privileges in terms of section 26 do not apply to the extent that a communication is—
- (a) sought or presented to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or relating to the mediation process; or
  - (b) sought or presented to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the child protection services agency or adult protection services agency is a party to or otherwise participates in the process.
- (3) There is no privilege in terms of section 26 if a court, tribunal or forum finds, after a

hearing *in camera*, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, the need for the evidence substantially outweighs the importance of protecting confidentiality, and the communication made during the mediation process is sought or presented in—

- (a) court proceedings involving an offence; or
- (b) proceedings seeking rescission of a contract arising out of the mediation process or in which a defence to avoid liability under the contract is raised.

(4) If any communication made during the mediation process is subject to an exception in terms of subsection (2) or (3), only that part of the communication necessary for the application of the exception may be disclosed or admitted.

(5) Disclosure or admission of evidence excluded from privilege in terms of subsection (2) or (3) does not render the evidence or any other communication made during the mediation process discoverable or admissible for any other purpose.

(6) The privileges under section 26 do not apply if the parties in a signed document agree in advance, or if a record of proceedings reflects that the parties agree, that all or part of the mediation process is not privileged.

### **Certificate of outcome**

**29.(1)** A mediator must provide the parties with a certificate of outcome—

- (a) setting out the agreement reached between the parties; or
- (b) stating that an agreement between the parties could not be reached; and
- (c) if applicable, setting out the reasons why a party refused to participate in further mediation as provided for in subclauses 19(1) and (2).

(2) Except as required in subsection (1) a mediator may not make a report, evaluation, recommendation, finding, or other communication regarding a mediation to a court, arbitrator, or other authority that may make a ruling on the family law dispute that is the subject of the mediation.

(3) A communication made in violation of subsection (2) may not be considered by a court, arbitrator, or other authority.

### **Mediated settlement agreement and enforcement thereof**

**30.(1)** Once the parties agree on the terms of a settlement to resolve all or part of the family law dispute, they must prepare and sign a written settlement agreement.

(2) The mediator must provide support to the parties in preparing and accurately recording the settlement agreement.

(3) A mediated settlement agreement is binding on the parties.

(4) Where a mediated settlement agreement is reached it may be made an order of court; provided that where the interests of a child is affected or a financial or any other commitment is agreed upon which would require enforcement, such agreement must be ratified by a court.

### **Issuing of Directives and Rules**

**31.(1)** The Chief Justice, and the Heads of Court under the Superiors Courts Act, may issue relevant practice directives among others, on the following –

- (a) mediation under this Act;
- (b) screening guidelines for referring matters to mandatory mediation;
- (c) expedited processes for the enforcement of mediated settlement agreements.

(2) The Chief Justice and the Heads of Court must consult with the Legal Practice Council and members of organisations recognised in terms of section 16 before issuing any practice directive in terms of sub-section (1).

(3) The Rules Board for Courts of Law established under the Rules Board for Courts of Law Act,

1985 (Act No, 107 of 1985) may make rules for family mediation in the superior courts and the magistrates' courts under this Act.

### **Costs, funding and fees**

**32.**(1) The parties participating in the mediation process must pay the costs of the mediation in full, except when the services of the mediator are provided free of charge or when a sliding scale, as prescribed, applies owing to the indigence of a party or the parties.

(2) Liability for the costs of the mediation must be borne proportionally between the opposing parties participating in the mediation process: Provided that the parties may agree otherwise.

(3) The phrase "costs of the mediation" includes only:

(a) the fees of a mediator;

(b) the travel and other expenses of a mediator;

(c) the cost of any expert advice requested by a mediator with the agreement of the parties;

(d) the cost of any assistance of a selecting authority for appointing a mediator provided pursuant to sections 17 and 18; and

(e) the costs of the venue of the mediation.

## **CHAPTER 5 COLLABORATIVE FAMILY PRACTICE**

### **Requirements for a collaborative family practice participation agreement**

**33.**(1) A collaborative family practice participation agreement must—

(a) be in writing;

(b) be signed by the parties;

(c) state the intention of the parties to resolve a matter through a collaborative family practice process in terms of this Act;

(d) describe the nature and scope of the matter;

(e) identify the collaborative law practitioner who represents each party in the process, and the role of the collaborative law practitioner in the collaborative family practice process should be explained;

(f) identify the neutral professionals involved in the collaborative family practice process, and their role therein;

(g) contain a statement by each collaborative law practitioner confirming the legal practitioner's representation of a party in the process; and

(h) include a statement that the representation of each collaborative law practitioner is limited to the collaborative family practice process and that the collaborative law practitioners are disqualified from representing any party or non-party participant in proceedings other than a collaborative family practice in connection with a collaborative matter consistent with this Chapter.

(2) Parties may agree to include additional provisions not inconsistent with this Act in a collaborative family practice participation agreement, including, but not limited to—

(a) an agreement concerning confidentiality of communications made during the collaborative process;

(b) an agreement that a part or the whole of the collaborative family practice process

- must not be privileged in any proceeding;
- (c) the scope of voluntary disclosure;
- (d) the role of non-party participants; and
- (e) the retention and role of non-party experts.

**Commencement and conclusion of a collaborative family practice process**

**34.(1)** Parties may engage in the collaborative family practice process only once they have obtained a certificate in accordance with section 13.

(2) Participation in a collaborative family practice process is voluntary and the process commences when the parties sign a collaborative family practice participation agreement.

(3) A court may not order a party to participate in a collaborative family practice process in the face of that party's objection to participation.

(4) A collaborative family practice process is concluded by —

- (a) the resolution of a collaborative matter as reflected in a signed settlement;
- (b) the resolution of a part of the collaborative matter as reflected in a signed settlement in which the parties agree that any remaining parts of the matter must not be included in the process;
- (c) the termination of the process; or
- (d) a method specified in the collaborative family practice participation agreement.

(5) A collaborative family practice process terminates when a party—

- (a) gives notice in writing to other parties that the process has ended;
- (b) initiates a proceeding other than a collaborative family practice process in connection with a collaborative matter without the agreement of all the parties;
- (c) in pending proceedings other than a collaborative family practice process in connection with the matter—
  - (i) initiates an action, motion, or application to show cause;
  - (ii) requests that the proceeding be put on the court's active roll;
  - (iii) takes similar action that requires a notice to be delivered to the parties; or
- (d) except as otherwise provided in subsection (7), discharges a collaborative law practitioner or when a collaborative law practitioner withdraws from further representation of a party.

(6) A party's collaborative law practitioner must give prompt notice in writing to all other parties of a discharge or withdrawal.

(7) A party may terminate a collaborative family practice process with or without cause.

(8) Notwithstanding the discharge or withdrawal of a collaborative law practitioner, the

collaborative family practice process concerned continues if, not later than 30 days after the date on which the notice of the discharge or withdrawal in terms of subsection (6) was delivered to the parties—

- (a) the unrepresented party engages a new collaborative law practitioner; and
- (b) in a signed notice—
  - (i) the parties consent to continue the process by reaffirming the collaborative family practice participation agreement;
  - (ii) the agreement is amended in order to identify the new collaborative law practitioner; and
  - (iii) the new collaborative law practitioner confirms their representation of the party concerned in the collaborative process.

(9) The provisions of subsection (4) notwithstanding, a collaborative family practice process does not conclude until a party, with all the consent of the parties, requests a court to approve the resolution of the collaborative matter or any part thereof as recorded in a signed document.

(10) A collaborative family practice participation agreement may provide additional methods of concluding a collaborative family practice process.

#### **Proceedings pending before court**

**35.(1)** Persons in proceedings pending before a court may enter into a collaborative family practice participation agreement seeking to resolve a collaborative matter related to the proceedings.

(2) The parties must, within three days of the conclusion of the agreement, file a duly signed record of the agreement with the court.

(3) Subject to subsection (6), the filing operates as an application for a stay of the proceedings.

(4) The parties must, within three days of the conclusion of the collaborative family practice process, file a duly signed record of the conclusion with the court, which filing will have the effect of lifting the stay of the proceedings in terms of subsection (3).

(5) The notice may not specify any reason for termination of the process.

(6) A court in which proceedings have been stayed in terms of subsection (3) may require the parties and collaborative law practitioners to furnish a status report on the collaborative family practice process and the proceedings, which—

- (a) may include only information on whether the process is ongoing or concluded; and
- (b) may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative family practice process or collaborative family practice matter.

#### **Confirmation of agreement by court**

**36.** A court may confirm a settlement agreement resulting from a collaborative family practice process.

### **Time limit for completion of collaborative family practice process**

**37.** The time limit for completion of the collaborative family practice process, after the collaborative agreement has been signed, is 90 days, and on expiry of that date the parties may institute legal proceedings, even if the collaborative family practice process has not been completed, unless the collaborative law practitioner provides the parties with a reasonable explanation, in writing, for the delay.

### **Disqualification of collaborative law practitioner and legal practitioners in associated law firm**

**38.(1)** Except as otherwise provided in subsection (3), a collaborative law practitioner is disqualified from appearing before a court or in arbitration proceedings to represent a party in a matter relating to the collaborative matter.

(2) Except as otherwise provided in subsection (3), a legal practitioner in a law firm with which the collaborative law practitioner is associated is disqualified from appearing before a court to represent a party in proceedings relating to the collaborative matter if the collaborative law practitioner is disqualified from doing so in terms of subsection (1).

(3) A collaborative law practitioner or a legal practitioner in a law firm with which the collaborative law practitioner is associated may represent a party—

- (a) to request a court to approve an agreement resulting from the collaborative family practice process; or
- (b) to seek or defend an urgent application to protect the health, safety, welfare or interests of a party, or family member of a party, if a new legal practitioner is not immediately available to represent that person.

(4) If subsection (3)(b) applies, a collaborative law practitioner, or a legal practitioner in a law firm with which the collaborative law practitioner is associated, may represent a party or a family member of a party only until the person is represented by a new legal practitioner or reasonable measures are taken to protect the health, safety, welfare, or interests of the person.

### **Confidentiality of collaborative family practice communication**

**39.** A collaborative family practice communication is confidential to the extent agreed on by the parties in a signed document or as provided by law of the Republic other than this Act.

### **Privilege, admissibility and discovery**

**40.(1)** Subject to sections 41 and 42, a collaborative family practice-communication is privileged in terms of subsection (2), is not subject to discovery, and is not admissible in evidence.

(2) In court or arbitration proceedings, the following privileges apply:

- (a) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative family practice communication; and
- (b) a non-party participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative family practice communication made by the non-party participant.

(3) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely on account of its disclosure or use in a collaborative family practice process.

### **Waiver and exclusion of privilege**

**41.(1)** A privilege in terms of section 40 may be waived in writing in a record or orally during proceedings if it is expressly waived by all parties and, in the case of the privilege of a non-party participant, if it is also expressly waived by the non-party participant.

(2) A person who makes a disclosure or representation about a collaborative family practice communication which prejudices another person in legal proceedings may not claim privilege in terms of section 40, but this limitation only applies to the extent that it is necessary for the person prejudiced to respond to the disclosure or representation.

### **Limits of privilege**

**42.(1)** There is no privilege in terms of section 40 for a collaborative family practice communication that is—

- (a) available to the public in terms of any law or made during a session of a collaborative family practice process that is open to, or is required by law to be open, to the public;
- (b) a threat or statement of intention to inflict bodily harm or commit a crime of violence;
- (c) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity;
- (d) part of an agreement resulting from the collaborative family practice process, reflected in a document signed by all parties to the agreement; or
- (e) not subject to the privilege in accordance with the terms of a collaborative family practice participation agreement between the parties.

(2) Privileges in terms of section 40 do not apply to the extent that a communication is—

- (a) sought or presented to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or relating to a collaborative family practice process; or
- (b) sought or presented to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the child protection services agency or adult protection services agency is a party to or otherwise participates in the process.

(3) There is no privilege in terms of section 40 if a tribunal finds, after a hearing *in camera*, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, the need for the evidence substantially outweighs the importance of protecting confidentiality, and the collaborative family practice communication is sought or presented in—

- (a) court proceedings involving an offence; or
- (b) proceedings seeking rescission of a contract arising out of the collaborative family practice process or in which a defence to avoid liability under the contract is raised.

(4) If a collaborative family practice communication is subject to an exception in terms of subsection (2) or (3), only that part of the communication necessary for the application of the exception may be disclosed or admitted.

(5) Disclosure or admission of evidence excluded from privilege in terms of subsection (2) or (3) does not render the evidence or any other collaborative family practice communication discoverable or admissible for any other purpose.

(6) The privileges under section 40 do not apply if the parties in a signed document agree in advance, or if a record of proceedings reflects that the parties agree, that all or part of a collaborative family practice process is not privileged.

### **Severability**

**43.** If any provision of this Chapter or its application to any person or circumstance is held to be invalid, the invalidity does not affect other provisions or applications of this Act, which can be given effect to without the invalid provision or application, and to this extent the provisions of this Act are severable.

## **CHAPTER 6**

### **FAMILY ARBITRATION**

#### **Parties may refer family law disputes to arbitration**

**44.** The parties to a family law dispute may, subject to sections 13 and 17 above, agree, as prescribed, to refer the dispute to an arbitration tribunal to be resolved through arbitration in terms of this Act.

#### **Court may refer matter**

**45.(1)** A court presiding over a family law dispute may, with the consent of all the parties to the proceedings, make an order referring the proceedings, or any part thereof, or any matter arising therefrom, to an arbitration tribunal for arbitration in terms of this Act.

(2) If the court makes an order in terms of subsection (1), it may, if necessary, adjourn the proceedings and may make any additional order as it deems appropriate to facilitate the effective conduct of the arbitration.

#### **Requirements for a family arbitration tribunal**

**46.** An arbitration tribunal which conducts a family arbitration in terms of this Chapter must comply with the prescribed requirements.

Alternatively:

**46.(1)** The requirements for appointment as an arbitration tribunal in terms of this Chapter must be prescribed by regulation.

(2) An arbitration tribunal which conducts a family arbitration in terms of this Chapter must comply with the following minimum requirements:

- (a) If the arbitration tribunal consists of a legal expert, such expert must have experience in dealing with family law disputes of at least 10 years and undergo ongoing training as prescribed;

- (b) If the arbitration tribunal consists of a mental health expert, such expert must have experience in dealing with family law disputes of at least 10 years and undergo ongoing training as prescribed;

If the arbitration tribunal consists of a religious body, such body must be one that is formally recognised by its observant followers and undergo ongoing training as prescribed.

#### **Additional duties of a family arbitration tribunal**

**47.(1)** The arbitration tribunal presiding over a family law dispute must ensure—

- (a) compliance with sections 13 and 17 of this Act;
- (b) that the consent of the parties to have the dispute resolved through arbitration constitutes informed consent;
- (c) the principles of good faith and therapeutic justice are followed in the arbitration proceedings;
- (d) that any other parties who may have an interest in the outcome of the arbitration are notified of that outcome; and
- (e) that an arbitration agreement setting out amongst others the nature, scope and procedure must be followed.

(2) In addition, the arbitration tribunal presiding over a family law dispute affecting the rights or interests of a child must ensure that —

- (a) the child's voice is heard, and that legal representation is available if required; and
- (b) the report and recommendations contemplated in section 4(1) of the Mediation in Certain Divorce Matters Act, 1987, is considered, where an enquiry has been instituted by the family advocate.

(3) The arbitration tribunal is precluded from making their services available to the parties in terms of subsection (1)(a) to facilitate the mediation as a certified mediator.

#### **Rules applicable to a family arbitration**

**48.** Rules may be prescribed by regulation to facilitate the resolution of family law disputes through arbitration.

#### **Notification of the Office of the Family Advocate**

**49.** Prior to an application being made in terms of section 50 for confirmation by the High Court, the Civil Regional Court or the Children's Court of any arbitration award that affects the rights and interests of a child, a completed form, duly sworn or affirmed, corresponding substantially with Annexure A of the regulations published in terms of the Mediation in Certain Divorce Matters Act, 1987, must be filed with the Office of the Family Advocate for consideration and comment.

#### **Confirmation of the family arbitration award that affects the rights and interests of a child**

**50.(1)** No arbitration award affecting the rights or interests of a child may come into effect unless it has been confirmed by the High Court, the Civil Regional Court or the Children's Court on application to that court and on notice to all parties who have an interest in the outcome of the arbitration.

(2) An application to the relevant court in terms of this section must be made within 30 days after delivery of the award to the applicant, or such further period as the Court may allow on good cause shown.

(3) A court may—

- (a) confirm the award;
- (b) declare the whole or any part of the award to be void;
- (c) substitute another award the court deems appropriate for the award;
- (d) vary the award on appropriate terms; or
- (e) remit the matter to the arbitration tribunal with appropriate directions.

(4) In considering an application contemplated in sub-section (1) for the confirmation of an arbitration award, the court must be satisfied that the award is in the best interests of all children concerned and to this end the court —

- (a) may refer the matter for an enquiry;
- (b) may, in such circumstances as prescribed in terms of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), cause an enquiry as contemplated in that Act to be instituted by a family advocate in whose area of jurisdiction that court is with regard to the welfare of any minor or dependent child affected by the proceedings in question, whereupon the provisions of that Act, with the amendments required by the context will apply;
- (c) must, if an enquiry is instituted by the family advocate in terms of section 4 of the Mediation in Certain Divorce Matters Act, 1987, consider the report and recommendations contemplated in section 4(1) of that Act;
- (d) must, if a report or recommendations by a family advocate, a social worker or other suitably qualified person have been ordered in terms of section 29(5) of the Children's Act, 2005, consider the report and recommendations.

(5) The court must, on application by a party, confirm the award unless—

- (a) the application is opposed on one or more of the grounds set out in section 33(1) of the Arbitration Act, 1965 (Act No. 42 of 1965); or
- (b) the court is not satisfied that the award is not in the best interests of all children concerned, in which case the court must proceed to hear and determine all relevant issues.

### **Setting aside of family arbitration award that does not affect the rights and interests of a child**

**51.** Nothing in section 50 must be construed as limiting the court's jurisdiction in terms of any law to review an arbitration award in so far as it relates to a family law dispute that does not affect the rights or interests of a child.

### **Application of Arbitration Act to special laws**

**52.** The provisions of the Arbitration Act, 1965, with the amendments required by the context, must apply to an arbitration conducted in terms of this Chapter in accordance with

section 39 of that Act.

## CHAPTER 7

### PARENTING COORDINATION

#### **Parenting coordinator**

**53.** A person meeting the requirements set out in section 54 who assists parents in resolving family law disputes pursuant to section 55 may act as a parenting coordinator.

#### **Requirements**

**54.(1)** The requirements for appointment as a parenting coordinator must be prescribed by regulation.

(2) The minimum requirements for a person to be appointed as a parenting coordinator include that such person must —

- (a) be a mental health care professional or legal practitioner or suitably qualified person as determined by the regulations from time to time;
- (b) who has a minimum of five years' experience in working with children and families in the context of disputed residence and contact; and
- (c) has training and experience in family mediation and be a certified mediator; and
- (d) has completed a parenting coordination training course.

(3) The parenting coordinator is not appointed as a psychotherapist, counsellor or attorney for a child or the parents. No psychotherapist- patient, or attorney- client -relationship is created by this appointment or otherwise exists between the parenting coordinator and any of the parents, nor will the parenting coordinator be considered to be engaging in the unauthorised practice of law.

(4) A person serving as a parenting coordinator with respect to a family dispute in terms of this Act may not create a professional conflict by serving in sequential or multiple roles with respect to the same parties.

#### **When parenting coordinators may assist**

**55.(1)** A parenting coordinator may assist parties in resolving a family dispute where a child is involved

- (a) in accordance with a parenting coordination agreement based on informed consent and where it is in the best interests of the child; or
- (b) in terms of a court order on a finding that there is conflict between the parties and that the appointment of a parenting coordinator is in the best interests of the child; and

- (c) if there is a parenting plan, a settlement agreement or court order in place with respect to parenting arrangements, contact with a child or other prescribed matters for the purpose of implementing the parenting plan, settlement agreement or the court order; or
- (d) if a short-term, emerging and time-sensitive situation or dispute arises or there is a need to phase in contact and care.

(2) A parenting coordination agreement may be entered into in anticipation of, or as a result of, the need to appoint a parenting coordinator.

(3) If a parenting coordinator is appointed upon agreement between the parties, and the parties cannot agree on a specific parenting coordinator, an organisation recognised in terms of section 16(1) or the Office of the Family Advocate will be empowered to appoint a parenting coordinator for the parties.

(4) If a parenting coordinator is appointed in terms of a court order, a specific parenting coordinator must be nominated by the court and provisions for the replacement or change of the said parenting coordinator and their powers must be made part of the court order.

### **Parenting coordination service agreement**

**56.(1)** The parenting coordinator can only assume their duties once a parenting coordination service agreement has been signed.

(2) The parenting coordination service agreement must detail specific issues not contained in the agreement between the parties to appoint a parenting coordinator or the court order making provision for the appointment of a parenting coordinator, including

- (a) the procedures to be followed;
- (b) the fees of the parenting coordinator;
- (c) billing practices to be followed;
- (d) services to be provided; and
- (e) that professional peer consultation by the parenting coordinator will be permitted.

(3) A parenting coordinator's authority to act terminates two years after the first dispute meeting, unless the parenting coordination service agreement or a court order specifies that the parenting coordinator's authority must terminate at an earlier or later date or on the occurrence of a specified earlier event.

(4) Despite subsection (3), a parenting coordination service agreement may be extended for a further two years at a time by a further parenting coordination service agreement provided the parties and the parenting coordinator agree, or by a court order.

(5) Despite subsection (3), a parenting coordination service agreement may be terminated at any time by —

- (a) agreement between the parties or by a court order made on application by either of the parties;

- (b) the parenting coordinator, on giving notice to the parties and, if the parenting coordinator has been appointed in terms of an order, to the court; provided that the parenting coordinator facilitated the appointment of a replacement parenting coordinator or the parties themselves have appointed a new parenting coordinator in compliance with the relevant requirements.

### **Exclusive jurisdiction of the court**

**57.** The appointment of a parenting coordinator does not divest the court of its exclusive jurisdiction to determine fundamental issues of guardianship, care, contact and maintenance, and the authority to exercise management and control of the case.

### **Assistance from parenting coordinators**

**58.(1)** A parenting coordinator may assist the parties by—

- (a) reducing harmful conflict and in promoting the best interests of the children;
- (b) educating the parties by giving information about
  - (i) child development;
  - (ii) separation or divorce research;
  - (iii) the effects of conflict and impact of parties' behaviour on the children;
  - (iv) parenting skills, communication, and conflict resolution skills;
- (c) providing information about resources available to the parties for purposes of improving communication or parenting skills;
- (d) assisting the parties to resolve conflict;
- (e) clarifying disputed issues;
- (f) by issuing directives in accordance with subsection (2) with respect to —
  - (i) parenting arrangements;
  - (ii) contact with a child.

(2) For the purposes of subsection (1)(f), a parenting coordinator, in order to implement the terms of a parenting plan, settlement agreement or court order—

- (a) may issue directives in respect of—
  - (i) The implementation of a child's schedule in respect of parenting time and contact with the child;
  - (ii) the education of a child, including in relation to the child's special needs;
  - (iii) the participation of a child in extracurricular activities and special events;
  - (iv) the temporary care of a child by a person other than -
    - (aa) the child's guardian; or
    - (bb) a person who has contact with the child in terms of an agreement or order of court;

- (v) the provision of routine medical, dental, mental health or other health care to a child;
  - (vi) the discipline of a child;
  - (vii) the transport and exchange of a child for purposes of exercising parenting time or contact with the child;
  - (viii) parenting time or contact with a child during holidays and on special occasions; and
  - (ix) any other matters, other than matters referred to in paragraph (b), that are agreed on by the parties with the parenting coordinator or directed by the parenting coordinator; and
- (b) may not make directives in respect of—
- (i) a change to the guardianship of a child;
  - (ii) a change to the allocation of parental responsibilities and rights;
  - (iii) the giving of parenting time or contact with a child to a person who is not entitled to parenting time or contact with the child, unless-;
    - (aa) a rights and responsibilities agreement have been made an order of the court in respect of the person or was registered with the Office of the Family Advocate;
    - (bb) or a person have been specifically excluded in the parenting plan or rights and responsibilities agreement from having contact with the child;
    - (cc) or an allegation is made that the proposed person may pose a danger to the child;
  - (iv) a substantial change to the parenting time or contact with a child;
  - (v) the relocation of a child;
  - (vi) the need for supervised visitation by either parent; or
  - (vii) the need for psychological or psychiatric treatment for either parent.
- (c) A parenting coordinator may make non-binding recommendations or proposals in respect of any issue referred to in (b)(i)-(vii) as well as:
- (i) minor financial disputes;
  - (ii) variations in care and contact;
  - (iii) supervised contact and level of supervision;
  - (iv) any issue which would be deemed to be in the best interests of the child.

### **Directives by parenting coordinators**

#### **59.(1) A parenting coordinator—**

- (a) may issue directives with respect to matters referred to in section 58 only, subject to any limitation or conditions set out in the regulations;

- (b) may not issue a directive in respect of any matter excluded by the parenting coordination agreement or court order, even if the matter is included in section 58;
- (c) may not issue a directive that would affect the division or possession of property, or the apportionment of debts;
- (d) must consider the child's views as ascertained by an independent and suitably qualified child expert if the child has reached such an age and level of maturity and development as to be able to participate in terms of section 10 of the Children's Act; and
- (e) may not modify the parenting plan or court order other than minor, temporary or interim departures from the parenting plan or court order.

(2) In issuing a directive with respect to parenting arrangements or contact with a child, a parenting coordinator must consider the best interests of the child only, as set out in section 7 of the Children's Act.

(3) A parenting coordinator may issue a directive at any time.

(4) A parenting coordinator must provide reasons in writing for the directive.

(5) A parenting coordinator may issue an oral directive, but must reduce the directive to writing and sign it as soon as practicable, but not later than 24 hours, after the oral directive was issued.

(6) A parenting coordinator must make a directive available to both parties simultaneously.

(7) Subject to section 60, a directive issued in accordance with the provisions of this Chapter—

- (a) is binding on the parties, effective from the date the directive is issued or from such later date as may be specified by the parenting coordinator, and
- (b) if filed with the court as prescribed, is enforceable under this Act as if it were an order of the court.

### **Changing or setting aside directives**

**60.(1)** Any party to a directive issued by a parenting coordinator may, within 10 days after the parenting coordinator issued the directive or within such other period of time as the court may direct, file with the court, and serve on the parenting coordinator and all other parties, an objection to the parenting coordinator's directive and subject to the court rules and practise directives launch an application for condonation for late submission.

(2) Responses to the objections must be filed with the court and served on the parenting coordinator and all other parties within 10 days after the objection was served.

(3) The court must review any objections to the directive and any responses submitted to the objections to the directive and, after so reviewing the objections and responses, may amend or set aside the directive, if it is satisfied that the parenting coordinator—

- (a) acted outside the ambit of their powers, or
- (b) committed an error of law or of an error of both law and fact; or

- (c) on any other reasonable grounds for review.
- (4) The directive of the parenting coordinator must remain in effect until the court gives an order.
- (5) If the court sets aside a directive, it may make any order to resolve a dispute between the parties in relation to the subject matter of the directive.
- (6) If the court confirms a directive, it may issue any order to enforce compliance with the directive.

### **Parenting coordination process and procedure**

**61.** The prescribed parenting co-ordination process and procedures, must include the following:

- (a) An impartial parenting coordinator;
- (b) meetings between the parenting coordinator and the parties, which need not follow any specific procedure and may be informal;
- (c) an opportunity for each party to state their case;
- (d) an opportunity for the parenting coordinator to challenge or question a party's statements or views and ask for proof or supporting information; and
- (e) a transparent process and
- (f) the opportunity for the parenting coordinator to obtain information from collateral sources and third parties.

### **Information sharing in parenting coordination**

**62.(1)** A party must, for purposes of facilitating parenting coordination, provide the parenting coordinator with—

- (a) such relevant information as the parenting coordinator may request in accordance with section 5, and
- (b) authorisation to request and receive information in respect of a child or a party from a person who is not a party.

(2) Communication between the parties and the parenting coordinator may not be confidential. No information may be taken into consideration by the parenting coordinator unless made available to both parties.

### **Removal of parenting coordinator**

**63.(1)** Where the appointment of the parenting coordinator was made in accordance with an agreement to appoint a parenting coordinator which has not been made an order of court, the parties may agree to remove the parenting coordinator.

(2) Where the appointment of the parenting coordinator was made by the court with or without the consent of the parties, the court may remove the parenting coordinator on application by either of the parties and on good cause.

### **Fees**

**64.(1)** No parenting coordinator may be appointed unless the court is satisfied that the parties have the means to pay the fees of the parenting coordinator.

(2) The state is barred from assuming any financial responsibility for payment of fees to the parenting coordinator, except that, in cases of hardship, the court may appoint, if it is feasible, a parenting coordinator to serve on a voluntary or a reduced fee basis.

(3) The fees of the parenting coordinator must be shared between the parties proportionally in accordance with their means, provided that the court may allocate the fees between the parties differently.

(4) The fees of the parenting coordinator may also be allocated in a different proportion in accordance with the provisions of the parenting coordination service agreement.

**CHAPTER 8**  
**GENERAL PROVISIONS**

**Regulations**

**65.**(1) The Minister may make any regulations necessary for the proper implementation and administration of this Act.

(2) Before making any regulations, the Minister must consult such organisations recognised in terms of section 16 and any other persons deemed appropriate.

**Amendment of laws**

**66.** The laws referred to in the first and second columns of the Schedule to this Act are amended to the extent indicated in the third column of the Schedule.

**Short title and commencement**

**67.** This Act is called the Family Dispute Resolution Act, 20xx, and comes into operation on a date fixed by the President by proclamation in the Gazette.

## SCHEDULE

### LAWS AMENDED BY SECTION 66

No. and year	Short title	Extent of repeal or amendment
Act 42 of 1965	Arbitration Act	<p>The following section is hereby substituted for section 2 of the Act:</p> <p><b><u>Matters not subject to arbitration</u></b></p> <p><u>2. (1) Arbitration is not permissible in terms of this Act in respect of any family law dispute, or any matter incidental to any such dispute.</u></p> <p><u>(2) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter the parties are entitled to dispose of by agreement may be determined by arbitration unless—</u></p> <p style="padding-left: 40px;"><u>(a) such a dispute is not capable of determination by arbitration under any other law of the Republic; or</u></p> <p style="padding-left: 40px;"><u>(b) the arbitration agreement is contrary to public policy of the Republic.</u></p> <p><u>(3) Arbitration may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement.</u></p> <p><u>(4) For the purposes of this section—</u></p> <p><u>“family law dispute” means a dispute, or alleged dispute, in which one party maintains a particular point of view or claim or contention regarding the parties’ respective responsibilities, interests and rights towards, or with respect to, any member of the family to which both parties belong, and the other party maintains a contrary or different view.</u></p>

<p><u>Act 24 of 1987</u></p>	<p><u>Mediation in Certain Divorce Matters</u></p>	<p>The following new subsection (c) must be inserted in section 4(1) and 4(2):</p> <p>(c) after the referral of a family law dispute, which deals with the care or guardianship of, or contact with, a child, to arbitration in terms of relevant legislation;</p> <p>Note: the intention is to make section 4(1) and (2) of the Mediation in Certain Divorce Matter Act applicable to a family law arbitration which deals with the care or guardianship of, or contact with, a child.</p>
<p>Act 68 of 1969</p>	<p>Prescription Act</p>	<p>The following heading is hereby substituted for section 13 of the Act</p> <p><b><u>13. Suspension of prescription in certain circumstances</u></b></p> <p>The following sub-section is hereby substituted for section 13(1) of the Act</p> <p>(1) <b><u>[If]</u></b> The period of prescription shall be suspended if—</p> <p>(a) the creditor is a minor or is <b><u>[insane]</u></b> a person with a mental or intellectual disability, disorder or incapacity or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); or</p> <p>(b) the debtor is outside the Republic; or</p> <p>(c) the creditor and debtor are married to each other; or</p> <p>(d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or</p> <p>(e) the creditor is a juristic person and the debtor is a member of the governing body of such</p>

		juristic person; or  <u>(f) the debt is the object of a dispute [subjected] referred to an Ombud with jurisdiction or arbitration or mediation or other process providing for the alternative resolution of a dispute other than negotiation; or</u>
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