

Developing guidelines for professionals to facilitate the best interests of the child during the divorce mediation process

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SOLEMN DECLARATION

I, Karin Meyer, hereby declare that this thesis, *Developing guidelines for professionals to facilitate the best interests of the child during the divorce mediation process*, which I hereby submit to the North-West University, Potchefstroom campus in compliance with the requirements set for the PhD Psychology qualification, is my own work and has been language edited and has not been submitted to any other university.

I understand and accept that the copies submitted for examination are the property of the North-West University.

Student signature

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ABSTRACT

Title: Developing guidelines for professionals to facilitate the best interests of the child during divorce mediation process

Key words: Best interests of the child, *Children's Act, 38 of 2005*, effects of divorce on children, guidelines, legal aspects of divorce, mediation, parenting plans

The purpose of the study was to contribute to the improvement of the mediation process and in the process facilitate a better dispensation for children in divorce and a more child-orientated practice. The main aim of this study was to develop substantive guidelines for professionals involved in the divorce mediation process to enable them to apply the best interests of the child principle during the divorce mediation process, as well as the development of parenting plans.

The study was conducted within an interpretivist paradigm and a qualitative, descriptive and interpretive design was applied in the study. Data was collected in two consecutive phases. In phase 1, a content analysis of 20 documents, including reports, parenting plans and court orders was conducted. In phase 2, individual interviews were conducted with 12 participants, including lawyers, psychologists and social workers with extensive experience in the field of divorce mediation. The findings from each of these phases were integrated to develop guidelines from a psychological perspective to assist professionals involved in the divorce mediation process in the South African context to adhere to the specifications and ethical standards for parenting plans and to ensure that the best interests of the children involved are served at all times.

OPSOMMING

Titel: Die ontwikkeling van riglyne vir professionele praktisys om die beste belang van die kind gedurende die egskeidingsmediasieproses te fasiliteer.

Sleutelterme: Beste belang van die kind; *Kinderwet, 38 van 2005*; gevolge van egskeiding op die kind; regaspekte van egskeiding; mediasie; ouerskapplanne.

Die studie is onderneem met die oog daarop om 'n bydra te maak tot die verfyning van egskeidingsmediasie as 'n proses en 'n meer kind-gesentreerde praktyk daar te stel. Die hoofdoel van die studie was om grondige riglyne vir professionele praktisys te ontwikkel om die beginsel van die beste belang van die kind gedurende die egskeidings-mediasie proses daar te stel.

Die studie is binne die raamwerk van die interpretiewe paradigma en 'n kwalitatiewe, beskrywings- en ondersoekende ontwerp is gebruik in die studie. Data is in twee opeenvolgende fases ingesamel: 'n Inhoudsanalise van 20 dokumente (verslae, ouerskapplanne en hofbevele) is in die eerste fase gedoen en in die tweede fase is 12 in-diepte individuele onderhoude (met ervare regsgelerdes, maatskaplike werkers en sielkundiges), tematies ontleed. Resultate duï daarop dat duidelike en omvattende riglyne nodig is vir professionele praktisys om 'n kindervriendelike ouerskapsplan op te stel, met riglyne en etiese standarde wat professionele praktisys moet volg. Ouerskapplanne moet goed georganiseerd wees, prakties, kind-gesentreerd wees en die kind se ouderdom en fase van ontwikkeling moet in ag geneem word. Dit moet ook verteenwoordigend van die gesin wees om die kind sover moontlik van die ouers se konflik te beskerm.

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CHAPTER 1

ORIENTATION TO THE STUDY

Other than birth itself, divorce may be the most significant event that a child can experience. It is a knife that slashes not only his family, but also his entire world, to pieces. Divorce has the capacity to affect nearly every emotional aspect of a child's life, particularly his confidence, self-esteem, problem-solving skills, and ability to form strong, lasting relationships (Boyan & Termini, p. 7, 2009).

1.1 INTRODUCTION

Divorce is a reality in South Africa. Statistics South Africa (2012) indicates an average of 34 145 divorces per annum during the past decade and by the end of September 2014, 21 998 divorce forms had been received affecting 29 173 children. In 2009 one in every three marriages was dissolved because of divorce, affecting 28 295 children (Statistics South Africa, 2012). These figures do not take into account parents who were not legally married and simply terminated the relationship.

Research from an extensive list of authors indicates that divorce and the separation of parents who are not legally married pose serious threats to the wellbeing of parents as primary caregivers and their children¹. Further, that the numerous challenges associated with divorce usually upsets the balance of the family negatively (Association of Family and Conciliation Courts, 2006, 2011, 2012; Austen, Pruett, Kirkpatrick, Flens & Gould, 2013; Bojuwoye & Akpan, 2009; De Jong, 2013; Emery & Rowen, 2013; Mahlobogwane, 2008; McIntosch, 2011; Mayer, 2013; Robinson, 2010; Solomon & George, 2011; Stahl & Martin, 2013; Sullivan, 2013;

¹ For the purpose of this study and unless it appears otherwise from the context, 'children' mean persons under the age of 18 years.

Tornello). Prilleltensky and Prilleltensky (2006) assert that effective parenting, family harmony and the satisfaction of material, physical, affective and psychological needs are essential for the wellbeing of the family, and particularly for children. This study proposed that one of the primary risk factors of stressful life events that impacts negatively on children's wellbeing is divorce and separation (Prilleltensky, 2005; Prilleltensky & Prilleltensky, 2006; Van Schalkwyk & Wissing, 2010).

In their research, Baris et al. (2001) found that the reactions of children on divorce range from age-specific aggression, behavioural problems, depression, rage and panic to extraordinary distress, developing mistrust in the world, emotional disorganisation and confusion. Recent research by Boyan and Termini (2009) identified two negative consequences to children's psychosocial wellbeing. Firstly, a child often feels trapped in the middle of the parental conflict. Such an experience creates confusion for the child and leads to feelings of resentment toward the parents. Secondly, the child displays feelings of failure at not being able to fix her² parents' problems. A child would often believe she is the cause for the divorce, and experience feelings of abandonment when one parent is less available.

Dealing with divorce in cases where children are involved therefore requires insight and understanding from those professionals (lawyers, social workers and psychologists) who assist the parents to dissolve the family unit with due consideration for the children's' needs. Baris et al. (2001) argue that the most powerful determining factor for ensuring a good outcome for the child is the lack of the intensity of the conflict. The higher the levels of conflict, the more parents

² For the purpose of this study and unless it appears otherwise from the context, words importing the feminine gender shall also include the masculine with specific reference to 'the child'.

sacrifice their children's wellbeing (Meyer, 2000). Boyan and Termini (2009) note a decrease in the level of happiness and loss of self-esteem in children who were exposed to extensive conflict during the divorce process. Wallerstein and Blakeslee (2003, p. 34) state that *where parents fight bitterly, the children's terror is boundless*. Furthermore, children feel alone and frightened during the divorce process (Wallerstein & Kelly, 1976). The greater economic and social burden that follows divorce as well as a possible move into a new environment with a new school and home is also important factors that adds to children's distress during divorce (Wallerstein & Blakeslee, 2004).

Ricci (2006) highlights the grief that children suffer as the consequence of divorce and conflict between the parents. Stolberg, Complair and Zacharia (1991) and Wallerstein and Blakeslee (1989) state that children experience divorce as the most stressful and disruptive event in their lives, and consequently often experience associated feelings of shame and guilt. Ricci (2012) went as far as stating that the divorce process is toxic for children. In a South African study, Bojuwoye and Akpan (2009) assert that boys are more at risk than girls are, and that emotional, scholastic and behavioural problems are more evident in boys. They also caution against the *sleeper effect* (p. 261) where all kinds of traumatic experiences in pre-school children are suppressed into the sub-consciousness.

Boyan and Termini (2005) claim that the age of a child affects her reaction to divorce. A study they conducted found that most children's grades plummet during the first year after the breakup. Wallerstein and Blakeslee (2004) found evidence of high incidence of underachievement; low self-esteem, inhibition of anger and a high incidence of alcoholism in their fifteen-year follow up study with children and divorce.

In view of the serious consequences that divorce holds for the development of children, the divorce mediation process and the development of parenting plans have to be designed with the aim of serving the best interests of the children involved. In this thesis the focus is on the development of guidelines for all professionals who are involved in the process.

1.2 PROBLEM STATEMENT

The United Nations Convention of the Rights of the Child (1989) states the following in Article 3:

In all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be of primary consideration.

The principle of the 'best interests of the child' is enshrined in the *Constitution of South Africa 1996*, Section 28 (2). In accordance with Section 7 of the *Children's Act*, 38 of 2005, the best interests of the child is the single most important principle to be considered in the entire Act (Basson, 2004; Bosman-Sadie, Corrie & Swanepoel, 2010; Schäfer, 2011). Divorce, care and contact are elements of family law that affect vulnerable members of the South African society, namely children, and therefore have to be treated with sensitivity (South African Law Reform Commission, 2015).

Schäfer (2011) explains that this principle has triggered important judgements. In the case of *P v P* (2007) 5 SA 94 SCA a warning was issued that expert witnesses should not be allowed to usurp the functions of the court. Barrie (2011) states that this case is unusual in that despite recommendations from the family advocate, a psychiatrist, a social worker, a family counselor and two clinical psychologists that residency (care) be awarded to the mother, Judge Chetty J awarded residency (care)

to the father. Judge Chetty J refused the father's appeal for leave to appeal, but the Supreme Court of Appeal granted leave to appeal.

Notwithstanding, Judge Chetty J remained unimpressed by the expert witnesses. He described the second clinical psychologist as a poor witness who was evasive and unable to answer questions directly. Judges Farlam, JA, Cameron, JA, Van Heerden, JA, Hancke, AJA and Theron AJA presided in this matter at the Supreme Court of Appeal. In their judgement, the judges stated that they had to find the least detrimental choice for safeguarding the child's growth and development.

The judges argued that in the process of determining the child's best interests entailed that the court makes a value judgement. The court did not seek the perfect parent, but aimed to find the least detrimental available alternative for safeguarding the child's growth and development. The Supreme Court of Appeal dismissed the appeal on the ground that the mother's parenting ability was not impacted by her depression and personality disorders, therefore it would be in the best interests of the children to continue to be in her care.

Yet, despite the emphasis on the best interests of the child principle in *The Constitution of South Africa 1996* (Act 108 of 1996), the *Children's Act, 38 of 2005* and the legal application thereof in certain cases, there are no explicit indications of what constitutes the best interests of the child (Strous, 2007; Cohen, 2010). Therefore, Schäfer (2011) argues that the principle of the best interests of the child is notoriously difficult (p. 154). This principle is often discredited, due to the indiscriminate nature that causes professionals to reach quite opposing conclusions and recommendations in terms of what constitutes the best interests of a child.

Judge Goldstein (*In Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 C) declared that the principle of the best interests of the child has never been given exhaustive content, but is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child. In *S v M* 2008 (3) SA 232 CC, the issues concerning the best interests of the child and the various professionals dealing with the matter held quite different perspectives on the concept. In *Jooste v Botha* 2000 (2) SA 199 T the following conclusion was reached ...of Section 28 (2) ... *this provision is intended as a general guideline and not as a rule of horizontal application – that is left to the probative law and any amendments it may undergo.*

The legislation in terms of the *Children's Act*, 38 of 2005, is cognisant of the negative effects of a divorce action (opposed or unopposed) upon the youth of the country and attempts to curtail such effects as much as possible. In an attempt to limit the effects of divorce on children, the Act in Sections 33, 34 and 35, promulgated on 1 April 2010, rules that parents with children who intend to divorce have to submit a parenting plan, either by registering the plan at the Office of the Family Advocate or by making it part of the decree of divorce (Juta's Statutes, 2011). Section 34 of *Children's Act*, 38 of 2005 (Schäfer, 2011) describes the formalities of the parenting plan while Section 33 states that a parenting plan has to disclose all issues connected with parental rights and responsibilities (Bosman-Sadie et al., 2010).

The parenting plan, according to Robinson (2010), is a document used to organise family life and the division of responsibility in the reconstructed family. Furthermore, it indicates how major decisions that concern the interests of a child or children caught up in the divorce mediation process should be made. The parenting plan serves to mediate any further disputes over spousal maintenance, division of

assets and residency, contact and care³ (previously known as custody) of the children with both parents (Cohen, 2010; Couzens, 2010).

The *Children's Act*, 38 of 2005 makes provision for professionals suitably qualified to mediate between parents to enable them to formulate a parenting plan. Based on Section 10 of the *Children's Act*, 38 of 2005, the mediation process leading to the construction of a parenting plan has to consider the best interests of a child (Cohen, 2010; Strous, 2011). This, according to Mahlobogwane, (2010) is a complex task, as the *Children's Act*, 38 of 2005 contains no specific criteria that can be applied to determine the best interests of the child. Consequently, Schäfer (2011) propounds that the courts mainly rely on expert opinions that are often influenced by the expert's life experiences and are therefore subjective in nature.

Schutte and Duchen (2012) concur that professionals hold different views about the placement, care and contact of the children with their parents after the divorce. Based on these concerns, Schäfer (2011) advocates for a statutory checklist similar to the one applied in the United Kingdom in the *Children's Act*, 1989 UK and Australian Family Law. Advocate Chris Maree (Schutte & Duchen, 2012) of the Office of the Family Advocate clearly states that the potential misuse of the professional's participation in terms of the best interests of the child is therefore a subject of ongoing debate.

³ Care refers to care *in relation to a child and includes providing the child with a suitable place to live and* promoting the wellbeing of the child, protecting the child from maltreatment, abuse and neglect, securing the child's education and maintaining a sound relationship with the child. Contact in relation to a child means maintaining a *personal relationship with the child*, communication on a regular basis with the child including visiting the child and being visited by the child. Care has a wider ambit than the term custody as previously used. The term care includes providing for the child's daily needs such as a safe home, food, education and love.

The mediation process often focuses on the resolution of conflict between the parents (Zaal, 2010) rather than on the child's best interests, consequently silencing the voice of the child/children in the process. (Byrnes, 2011; Conell, 2010; Cashmore & Parkinson, 2009). In a comparative study of United States and South African perspectives on the best interests of the child, the researchers concluded, "*the rights of the children are generally viewed through the lens of parental rights when making decision on child-rearing and not from the perspective of the child.*" This confirms a statement by Judge Van Zyl's statement in 1992 in *Quintuo v Wilson*, Unreported Judgement WLD Case No. 3048/92, who said: *I believe that far too much emphasis has been placed on the rights of access of parents of children and too little emphasis on the interests of the child.*

From a psychological perspective, various professionals who mediate in divorce cases where parenting plans are required show an alarming lack of knowledge on the development of children, the needs associated with each developmental phase and the impact of divorce in the various phases of development. During a mediation training session, an Advocate from the Office of the Family Advocate stated that it is difficult to reach a balance between a child's needs and interests (Schutte & Duchen, 2012). He suggested that research is required in the South African context to enable legal practitioners, psychologists, mediators and other professionals to ensure that the child's best interests are served during the divorce mediation process. Yet, despite the enshrinement of the best interests of the child principle in the *Constitution of South Africa 1996*, and the paramount importance given to the application of this principle in the *Children's Act, 38 of 2005*, professionals have clearer guidelines to mediate the process. In the research literature, Bosman-Sadie et al. (2010), Darlington (2006) and Robinson (2010) expressed concerns with reference to the fact that many professionals do not have sufficient insight into the legal requirements to formulate and adapt parenting plans. However, limited references are made to the

lack of sufficient knowledge about children's development and the associated psychosocial needs of the child.

To address this problem research was conducted from a psychological well-being perspective with the intention to provide guidelines that can provide a basis for professionals to deal effectively with the complexity of the challenges associated with divorce mediation.

The following main question guided the research:

How can professionals who act as mediators in divorce cases where children are involved be guided to ensure that the best interests of the child principle is applied during the mediation processes and the development of parenting plans?

The following subsequent questions were addressed:

- How was the best interests of the child principle applied in previous mediation processes?
- How do professionals in the mediation process perceive the enhancement of the best interests of the child in their role as mediators?
- What knowledge and skills would enable professionals in the mediation process to apply the best interests of the child principle more effectively in their role as mediators?

1.3 PURPOSE AND AIMS OF THE RESEARCH

The purpose of this study is to contribute to the improvement of the mediation process and in the process facilitate a better dispensation for children in divorce and a more child-orientated practice.

The main aim of this study was to develop substantive guidelines for professionals engaged in the divorce mediation process to facilitate the application of the best interests of the child principle during the divorce mediation process and the development of parenting plans.

To reach this aim the following objectives were set:

- Conduct a literature study on
 - 1) The legal instruments pertaining to the best interests of the child principle, including the *Children's Act, 38 of 2005*; *The Constitution of South Africa 1996*; The United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC).
 - 2) Child wellbeing, development and attachment from a psychological perspective.
- Present a conceptual framework for understanding the application of the best interests of the child principle from a psychological perspective.
- Establish through the analysis of existing documents, how the best interests of the child principle was applied in previous mediation processes that entailed the development of the parenting plans.
- Investigate how professionals in the mediation process perceive the best interests of the child principle and how they applied this principle during the facilitation of mediation processes.
- Establish what knowledge and skills would enable professionals to apply the best interests of the child principle during divorce mediation and the development of parenting plans.

1.4 RESEARCH PARADIGM, DESIGN AND METHODOLOGY

1.4.1 Research paradigm

All human beings are engaged in the process to make sense of their world. To this end, actions are continuously interpreted, created, defined and rationalised. The aim of human science is to understand people and their behaviour where people are viewed as conscious and self-directing human beings. The study was therefore conducted within an interpretivist paradigm based on the *centrality of human consciousness* (Babbie & Mouton, 2012, p. 28).

From a meta-theoretical perspective, an interpretivist paradigm is based on the assumption that human phenomena are distinct from natural phenomena. Ontologically, the interpretivist paradigm reflects the worldview, namely that people socially construct meanings through their interaction with the world around them. Human behaviour has an inherent symbolic nature or meaning-creating behaviour. This implies that professionals, who participate in the mediation process, are viewed as active agents who make meaning of the mediation processes. The intention of the research was to understand and interpret these meanings (Babbie & Mouton, 2012).

1.4.2 Research design

A qualitative, descriptive, interpretive design was applied in this study. Thorne (2008) defines this design as an approach that *responds to the imperative for informed action* (p. 26). The intention with this study was to interpretatively describe the practice of mediation with specific reference to the application of the best interests of the child principle.

Interpretive descriptive design is a research method that is applied in the social sciences that accounts for the constructed and contextual nature of human experiences while at the same time allowing for shared realities (Thorne, 2008).

Interpretive descriptive design allows for meanings and explanations to be generated from the narrative, and entails constant comparisons of pieces of data within and across the interviews and documents and noting similarities and differences (Thorne, 2000).

Sound interpretive description contributes to our understanding of how people experience and make meaning of their lives (Thorne, Reimer, Kirkham & O'Flynn-Magee, 2004). Interpretive descriptive design provides grounding for the linkages that become apparent when attempting to locate a particular phenomenon within the general (Thorne, Reimer, Kirkham & MacDonald-Emes, 1997).

The foundation of interpretive descriptive design is a qualitative investigation of a clinical phenomenon for the purpose of capturing themes and generating an interpretive description. As in this study, interpretive descriptive design is informed by relatively small samples, using data collection as interviews and document analysis. Interpretive descriptive design entails multiple data-collection strategies to avoid naïve overemphasis and provides a better understanding of complex experiential phenomena (Carlander, Ternestedt, Sandberg & Hellstrom, 2013).

Furthermore, interpretive descriptive design borrows from grounded theory, ethnography and phenomenology when presenting designs, samples, data collection and analysis. The influence from grounded theory is apparent by the use of questions such as 'What is happening here?' and 'What am I learning about this?' In this design, interpretive descriptive design depends on the subjective experiences of the participants while learning from the broader patterns within the phenomenon that is being studied (Thorne, 2008).

The description of situations and events is a major purpose of social science research (Babbie & Mouton, 2012; Babbie, 2013). The researcher's purpose is to observe and to describe what is observed, as in the case of this study. On the one hand the researcher can emphasise the specific descriptions of the specific interviews, reports and judgements and on the other, the frequency of which a specific variable occurs can be described (Babbie & Mouton, 2012).

Descriptive design entails the intensive examination of phenomena and their deeper meanings that ultimately lead to thicker descriptions. Therefore, it is an approach to generate knowledge and clarifying or explaining the meaning of phenomena (St. George, 2010; Berterö, 2015).

In this study the researcher was interested in describing the phenomenon of the best interests of the child in the mediation process. Research such as this is named descriptive research, according to Babbie and Mouton (2012). In this study the researcher had access to in-depth quality descriptions through the reports and judgements, as well as from the literature and one-on-one interviews with professionals. For the greater part of this research, data was collected qualitatively. It was of great importance that the questions asked during the interviews were diverse and relevant (Bless, Higson-Smith & Sithole, 2013).

1.4.3 Research methodology

The research methodology is presented with reference to the two consecutive phases in which the research for this study was conducted. A more comprehensive discussion of the research methodology is presented in Chapter 4.

Phase 1: Document analysis

(a) Document selection

The documents selected for analysis included public documents such as court orders, forensic reports and assessments, parenting plans that were part of reported and unreported cases. The reports and parenting plans sampled differ in content and purpose, reflecting the range of types of activities of participating legal and mental health professionals during the course of facilitating parenting plans. The diversity of the documents used is indicated in the diagram in Chapter 5, Table 5.1 (Sections of the *Children's Act*, 38 of 2005) and Table 5.2 (Profile of families in reports, assessments and judgements),

The researcher collected documents for data analysis by liaising with the Family Advocate's Office and case managers, advocates, social workers and psychologists in the area where the research was conducted. Reported cases were also collected through law reports after a search through various legal textbooks on reported cases in family law.

The researcher requested the participants for reports and reported cases that they were willing to share with the researcher, on condition that the researcher removed the names of the families and the participants' names from the reports and cases. The reference method used in the research ensured that the participants from the interviews and the participants' names in the reports remained anonymous.

The documents were selected in terms of the following criteria: i) The documents had to be open to public scrutiny, i.e. judgements published in textbooks and law reports and used by lawyers and students, or ii) The documents could be accessed with the professional's consent provided that the families remain anonymous in the research, i.e. forensic assessments and parenting plans. The parenting plans used were based on the criteria that the children are younger than 18 years and the plans

were registered with the Office of the Family Advocate or were made an Order of Court.

(b) Document analysis

The data collected in the first phase of this study was analysed with the aim of investigating how the best interests of the child principle had been applied in previous mediation processes in which parenting plans were developed.

Content analysis was applied in the first phase, with the aim of identifying possible indicators of how the best interests of the child principle was considered or dismissed in the mediation process (Babbie & Mouton, 2012). Babbie (2013) describes this as an operation in which communication and raw data are coded by focusing on the words, context, internal consistency, frequency and specificity of comments (Greeff, 2011).

Phase 2: Individual interviews (semi-structured)

In this phase, individual interviews were conducted with 12 professionals (participants) who are experienced in their specific discipline as well as knowledge in the field of divorce mediation, and with more than five years' experience in mediation.

(a) Participant selection

The population for this study included Judges of the High Court; Advocates of the Bar (the specific Bar is not specified in order to protect the advocates' privacy and anonymity); Attorneys registered with the Law Society (attorneys are automatically governed by the rules of the relevant Law Societies that act as disciplinary bodies); registered social workers; registered clinical and counseling psychologists, as well as mediators registered with the South African Association of Mediators. The participants were purposively selected to include a group of professional lawyers,

family advocates, advocates who specialise in family law, judges and social workers, as well as psychologists and mediators who specialise in divorce mediation and who were available during the period in which the research was conducted.

The following criteria applied to all professionals who participated in the study:

- The participants had to be resident citizens of the Republic of South Africa.
- The participants had to specialise and have extensive knowledge in the field of divorce and children (Family Law), mediation, parenting plans and the *Children's Act*, 38 of 2005.
- Social workers and psychologists who participated in this study had to be registered with the South African Association of Mediators.

Additional criteria for each category of professional include the following:

- Advocates had to be members of the Bar, and attorneys members of the Law Society.
- Social workers had to be qualified and registered with the South African Association for Social workers in private practice.
- Psychologists had to be qualified and registered psychologists with the Health Professions Council of South Africa.

(b) Data gathering

According to Patton (2002, p. 340), we *interview people to find out from them those things we cannot directly observe*. Therefore, the researcher can enter the other person's perspective to find out what is in his mind and so gather his stories. The interview schedule as suggested by Mason (2005) consisted of questions and themes that are relevant to the research study. Semi-structured interviews were conducted with 12 professionals (Babbie & Mouton, 2012).

An interview schedule (Appendix D) was used as a guideline during the interviews. The following questions were included in the schedule for the semi-structured interviews:

1. Is the construct of the best interests of the child relevant during the divorce mediation process?
2. What criteria can be used to determine the best interests of the child?
3. Based on your experience of the divorce mediation process, how do you perceive the current position of child in this process?
4. Based on your experience of the divorce mediation process, how are the best interests of the child protected during this process?
5. Based on your experience of the divorce mediation process, what skills and knowledge do professionals need to best serve the best interests of the child?

The interviews ranged from one hour to two hours, depending upon the amount of information participants had to share. During the interviews the researcher engaged actively with the participants, asked them questions, listened to them and gained access to their accounts and articulations in order to obtain descriptions of their lives regarding the interpretations of the meaning of the described phenomena (Moustakas, 1994). Neuman (2003) argues that semi-structured interviews may be best if the researcher wants to find out how the professional thinks, to discover what is really important to the professional and to get an answer to a question with many possible answers.

All the interviews were recorded on a tablet and were later transcribed onto a computer disc. Participants were informed about the use of the recording in the consent form, and again when the interview commenced. The use of the recording

device increased the accuracy of the research information and at the same time allowed the researcher to focus on the interviewee with full attention. Patton (2002) asserts that if the researcher makes notes during the interview, she is unable to respond appropriately to the professional's cues. Additionally, verbatim note taking can also interfere with the researcher's ability to listen attentively.

(c) Data analysis

Thematic analysis was applied in the second phase of the proposed study. Thematic analysis is a method for analysing and reporting themes with the data collected from the interviews. In this study, thematic analysis reported the experiences, meanings and realities of the participants. It therefore reflected reality; providing rich description of the data and inductive analysis within the thematic analysis (Braun & Clarke, 2006).

The inductive approach implies that the themes are linked to the data. The process of thematic analysis entailed the researcher familiarised herself with the data, generating initial codes, searching for themes, defining and naming themes, and lastly, producing the report (Braun & Clarke, 2006).

Themes were identified by repetitions, metaphors, transitions, similarities and differences, missing data and linguistic connectors (Ryan & Bernard, 2003). Thematic analysis is flexible in that it allows the researcher to determine the themes in a number of ways. Rich thematic descriptions of the data provided the important themes. The researcher's theoretical interests in the topic did not drive the identified themes, but the coding of the data is a process without fitting into an existing coding frame. This form of thematic analysis was data-driven. Verbal data of the interviews were transcribed into written format to conduct a thematic analysis (Braun & Clarke, 2006).

1.5 TRUSTWORTHINESS OF THE STUDY

The quality of the research conducted in this study was ensured through the application of the following criteria. Firstly, the researcher ensured rigour by collecting rich, in-depth data that was sufficient, appropriate and complex enough to make a contribution to the field of divorce mediation (Creswell, 2009).

Secondly, the researcher's own involvement in divorce mediation necessitated self-reflexivity about the biases and inclination of the research to ensure that the data was trustworthy. This implied that the researcher, who acted as the main instrument in this study, constantly reflected on psychological, sociocultural, academic, career-related or any other personal characteristics that might have influenced data collection and interpretation in order to minimise biased findings.

The researcher shared her biases and assumptions about participants and the phenomenon with her supervisor to reduce researcher biases, while upholding self-reflectivity (Creswell, 2009). Furthermore, the methods of data collection as well as the challenges faced in the process of obtaining the documents and identifying appropriate participants were described clearly.

Thirdly, credibility that refers to trustworthiness and plausibility of the findings was ensured through the application of the principles of crystallisation in each of the phases of the study. Thick descriptions were presented to show the data to the readers *without telling them what to think* (Ellingson, 2009, p. 843). In this study, the following principles of crystallisation were applied either across or in specific phases as indicated below:

Across phases: The use of multiple data sources including documents relating to divorce mediation and the experiences of professionals engaged in divorce

mediation, as well as various methods of data collection, which in this case included document analysis and semi-structured interviews with professionals.

Phase 1: (Document analysis): Using a coder who was able to provide a different lens and allow for a more complex understanding of the documents.

Phase 2: (Interviews): Including participants who were involved in a variety of contexts to ensure multi-vocality as their different viewpoints would be clearly heard without being influenced in any way.

Crystallisation in each phase of the study included the following:

Phase 1: Using an independent coder to code the documents.

Phase 2: Including the various professionals who work in the field of divorce mediation ensured multi-vocality to guarantee a variety of opinions.

Member checking: Testing the data, analytical categories, interpretations and conclusions with members of the group from whom the data was collected (Lincoln & Guba, 1985) to ensure the credibility of the findings.

Member reflection was applied as a way to obtain correspondence between the findings and the participants' understanding of acting in the best interests of the child during the divorce mediation process. Through this process a rich deeper analysis of the research findings emerged that enhanced the trustworthiness of the set guidelines.

1.6 ETHICAL CONSIDERATIONS OF THE STUDY

The framework for the proposed research was the *Constitution of South Africa* 1996, approved by the Constitutional Court on 4 December 1996 and took effect on 4

February 1997 (Juta's Statutes Editors, 2011). This study furthermore focused on Chapter 2 of the *Constitution of South Africa* 1996, that deals with the Bill of Rights in terms of equality (Section 9), human dignity (Section 10), everyone has a right to life (Section 11), freedom and security of the person (Section 12), freedom of religion, belief and opinion (Section 15) and freedom of expression (Section 16).

The emphasis of the research focused on Section 28, namely children's rights, and specifically Section 28 (2): *A child's best interests are of paramount importance in every matter concerning the child* (Juta's Statutes Editors, 2011, p. 7).

The ethics of the study was typically associated with morality as it dealt with matters of right and wrong with associated emphasis on human rights. The general agreement of the social scientific community in what is proper and improper in the conduct of the scientific inquiry was part of this process (Babbie & Mouton, 2012). The ethical issues were pervasive and complex, as the research was not conducted in a clinical laboratory setting, but involved humans.

The following ethical principles were adhered to in this research:

The fundamental ethical rule is that the research should not bring harm to the participants. In the first phase of the study secondary data, including reports on completed mediation processes and parenting plans were used. The identities of the persons referred to in these documents were protected to ensure that no harm is inflicted.

In the second phase of this study the participants were professionals, thus harm may have been limited as they are familiar with the challenge associated with the mediation process. Those participants who indicated that they might need support due to the researcher's engagement with them were debriefed and follow-up

sessions were booked for thorough debriefing and support. The researcher paid particular attention to gauge whether any distressing issues for the participants had been aroused by the interview, and participants were given the opportunity to deal with any stressful issues that were evoked.

The researcher clearly and openly stated the research procedures to the participants and the aim of the study to the participants. No physical harm was caused to the participants, as they were merely required to relate incidents from their own experience. After the interviews, the researcher provided the participants with an opportunity to reflect upon issues and to discuss matters that may have been evoked during the interviews.

Participation in this study is a disruption in a person's life and his or her regular activities. It is therefore important that participants were well informed about the procedures and the expectations and that participation is voluntarily. To ensure informed consent from the participants, the researcher informed them about the duration of the process, how they would be engaged in the process, what procedures would be followed, possible advantages as well as the credibility of the researcher (Strydom, 2011). The researcher did not deceive the participants in any way and maintained participants' right to refuse to be interviewed, to answer any questions or fill in any forms, and also respected their time.

The protection of the participants' interests and identities were paramount in this study and the researcher ensured confidentiality at all times by protecting their anonymity. A participant is anonymous when the researcher cannot identify a given response with a given subject. To ensure confidentiality in Phase 1, the names and addresses were removed from the reports and replaced by numbers. The same criteria of anonymity and confidentiality applied for participants in Phase 2.

The researcher endeavoured to maintain integrity in the data analysis and reporting, which also included ethical practices, appropriate authorship to a publication, and no form of plagiarism and no clandestine research. A professional code of ethics was adhered to at all times (Babbie & Mouton, 2012; Mouton, 2001). The data collected was stored at NWU and will be destroyed after 7 years.

1.7 CLARIFICATION OF TERMINOLOGY

The following themes were introduced in the study and are briefly clarified below:

1.7.1 Best interests of the child

Section 28 of the *Constitution of the Republic of South Africa 1996*, enshrines the rights of children. The best interests of the child principle is captured in Section 7 of the *Children's Act, 38 of 2005* and Section 28 (2) of the Bill of Rights. The United Nations Convention of the Rights of the Child (1989) states as follows in article 3: *In all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

1.7.2 Children's Act, 38 of 2005

The *Children's Act, 38 of 2005*, codifies South African Child Law and is child-centric (Bosman-Sadie et al., 2010). The Act adopts a developmental approach towards children; assist to strengthen families and to improve the environment for the protection of children (Robinson, 2010). The Act gives effect to certain rights of children and for the purpose of this study section 7 (best interests of the child), section 33 and 34 (content and formalities with regard to parenting plans) are analysed in this study.

1.7.3 Effects of divorce on the child

Factors closely associated with the child's reactions to divorce includes age, gender, socio-economic status, relationship with parents before the divorce and the degree to which the child is drawn into the conflict, the parents' ability to separate their roles as parents and spouse and the perceived loss of the non-residential parent (Bojuwoye & Akpan, 2009). According to Louw and Scherrer (2004) and Shekhawat (2013), it is generally accepted that divorce is traumatic and disruptive for the child. Wallerstein and Lewis (2003) established in their study that children from divorced families tend to demonstrate a variety of problems in functioning in their lives.

1.7.4 Guidelines

According to the Oxford Advanced Learner's Dictionary (s v guideline, p. 129), guidelines are ... *general rule[s], instruction[s] or piece[s] of advice*. Robinson (2010, p. vii) concludes that professionals are not necessarily equipped to *structure high quality parenting plans*.

1.7.5 Legal aspects of divorce

The parties to a divorce are known as the plaintiff and the defendant. The plaintiff is the person who initiates the divorce process and is the person who will appear in court if the divorce is uncontested. In a contested divorce, both the plaintiff and defendant appear in court. A divorce action is initiated by issuing a summons that is served in person on the defendant. The formal documents in the divorce proceedings are referred to as pleadings (Preller, 2013). The pleadings typically consist of a summons, particulars of claim and notice of defense, pleas, counterclaim and a plea to counterclaim and further pleadings. A divorce trial culminates when a judgement is granted in the High Court or the Magistrate's Court (Preller, 2013).

The Office of the Family Advocate in South Africa deals with disputes between parents or family members over parental responsibility and the rights of children. The functions of the Family Advocate have been extended by the *Children's Act*, 2005 (Act 38 of 2005). This is in line with The Hague Convention, which was adopted in 1980 in a bid to curb the international abductions of children. A Family Advocate is an unbiased Family Law specialist who assists parties to reach an agreement on disputes regarding parental responsibilities and rights of children through mediation.

The Family Advocate can be consulted in instances where:

1. There is a dispute regarding contact, care or guardianship of the child during divorce or separation
2. A person wants to draft a parental rights and responsibilities agreement
3. Parties want to draw up a parenting plan
4. The parents want to register their parental rights
5. A person wants to amend or terminate parental rights and responsibilities agreement registered with the Family Advocate
6. A person wants to draft a parental rights responsibilities agreement
7. There is a dispute on whether the unmarried father of the child born out of wedlock has satisfied the requirements which makes him eligible to acquire full parental rights and responsibilities in terms of the Act
8. Courts also make orders that the Family Advocate has to conduct an inquiry as to what is in the best interests of the child.

1.7.6 Mediation

During mediation a neutral third party works with the parents to reach a settlement agreement. Conflict is normal, according to De la Harpe SAAM (2014), and is not always negative. The prerequisite for an effective mediator is the ability to use negotiation skills positively during mediation. A mediator in South Africa usually

has a background in law and/or psychology. The mediator has no authority to make any decisions on behalf of the parents and cannot force an order onto the parents. The mediation process is without prejudice and the decision making process remains with the parents (Preller, 2013, 2014; O'Leary, 2014). The mediator guides the parents into making decisions of the division of the joint estate and the maintenance of the minor children and care and contact of the minor children. The parents can request their attorneys to review the settlement agreement. If children are involved, the Family Advocate should also review it and draft their opinion to the court.

1.7.8 Parenting plans

Part of the outcome of mediation during divorce matters is usually a parenting plan. Although the *Children's Act*, 38 of 2005 does not provide a definition of a parenting plan, the following are the issues that have to be dealt with in accordance with the Act, namely, holders of parental responsibilities and rights, details of children, guardianship, residence, day-to-day care, maintenance of the children, medical care for the children, educational costs for the children, contact between children and holders of parental rights and responsibilities, decisions regarding children, due consideration for children's views, informing children of the parenting plan, change of address of holders of parental responsibilities and rights and dispute resolution (O'Leary, 2014). Mandatory mediation is required in terms of Section 33 of the *Children's Act*, 38 of 2005, that states that parents may agree on a parenting plan where children are involved.

1.7.9 Parental responsibilities and rights

In relation to a child, means the responsibilities and rights referred to in section 18 (Children's Act, 38 of 2005, definitions). Section 6(5) of the Act determines that a child and a person who has parental rights and responsibilities in respect of that child must be informed of actions or decisions that affect the child. Parental responsibilities

and rights are dealt with in article 18 in the *Children's Act*, 38 of 2005. The guardianship of a child in terms of the *Children's Act*, 38 of 2005, is the same component as parental responsibilities and rights, and replaced the notion of parental authority or power (Himonga, 2013). Parental responsibilities and rights are dealt with in a much broader sense than under the previous era of paternal dispensation. The current focus is on the rights of the child to parental care and not on parental powers, according to Bosman-Sadie, Corrie and Swanepoel (2011) and Preller (2013). Care and visitation rights have been changed to care and contact in *Children's Act*, 38 of 2005. Parental authority can be divided into three main groups, namely guardianship, care (custody)⁴ and contact (visitation rights). In terms of The Act a person can have full or specific parental rights regarding the child.

1.8 CONCLUSION

In this chapter the research design and method, problem statement, purpose and aims of the research and clarification of terminology were discussed. Fundamental terminology for the purposes of this research such as interpretive descriptive qualitative design and qualitative data analysis regarding content and thematic analysis was discussed. Subjects such as sampling, method of data collection that were applied in this study were explicated in order to find the essential aspects of the best interests of the child during the divorce mediation process.

In Chapter 2 the best interests of the child principle is expounded from a legal perspective.

⁴ The term *care* (*Children's Act*, 38 of 2005) is used in the study instead of *custody*.

CHAPTER 2 :

A LEGAL PERSPECTIVE ON THE BEST INTERESTS OF THE CHILD PRINCIPLE AND THE DIVORCE MEDIATION PROCESS

2.1 INTRODUCTION

Divorce mediation and the protection of the best interests of the child are embedded in a legal context. The objective of this chapter is to present an overview of this legal context, which informs the study. A global perspective on the origins of the best interests of the child principle is presented, followed by a South African perspective. Mediation as a legal process is then discussed in the context of divorce with reference to mediation styles, the role of mediators, and the development of parenting plans as an outcome of mediation processes where children are involved. This is followed by deliberations on the way in which the best interests of the child are facilitated during mediation and the development of parenting plans from a legal perspective. Specific attention is paid to the participation of children in the process and a brief critical evaluation of the implementation of the best interests of the child principle.

2.2 A GLOBAL PERSPECTIVE ON THE BEST INTERESTS OF THE CHILD PRINCIPLE

This study presents a global perspective on the best interests of the child with reference to the Declaration of the Rights of the Child, the United Nations Convention and the African Charter of the Rights and Welfare of the Child. The best interests of the child principle has had global acknowledgement for 55 years. The Declaration on the Rights of the Child was adopted by the General Assembly of the United Nations in 1959. According to Basson (2004), the second principle of the Declaration states that the best interests of the child shall be of paramount importance. As a result of the adoption of the United Nations Convention on the Rights of the Child (UNCRC,

1989), children's rights have become a field of intensive study during the past decade. According to the Geneva Declaration of the Rights of the Child adopted in 1924, the claim was recognised that *mankind owes the child the best it has to give*. The United Nations Convention on the Rights of the Child was agreed to by the United Nations in 1989. The Declaration on the Rights of the Child gave rise to a growing international awareness on the rights of the child. The declaration reflected that the child's proverbial safe haven – the family home – is in fact also the very place where the most grievous abuse of children occurs.

The most important Article within the United Nations Convention on the Rights of the Child (UNCRC) is Article 3.1:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 12.1 and 12.2 provides for the child's views and wishes:

12.1 State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child;

12.2 For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Reynaert, Bouverne-de Bie and Vandervelde (2009) identified child-specific themes which advocate that children's rights have to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body.

Article 9 emphasises the best interests of the child with reference to separation of children from their parents:

Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or where the parents are living separately and a decision must be made as to the child's place of residence. In any proceedings pursuant to paragraph 1 of the present Article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Article 10 emphasises the right of the child to have regular and direct contact with both parents:

A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contact with both parents. Towards that end and in accordance with the obligation of States Parties under Article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (order public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognised in the present Convention.

The African Charter of the Rights and Welfare of the Child (ACRWC) was adopted by the Organisation of African Unity (OAU) in 1990. The ACRWC is, as the UNCRC, a comprehensive instrument that defines universal principles and norms on the status of children and sets out the rights of children. Articles 4, 7, 9 and 12 of the ACRWC are important articles when considering the child's best interests and the child's rights in parenting plans:

Article 4:

In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration. In all juridical or administrative proceedings affecting the child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

Article 7:

Every child who is capable of communicating his own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.

Article 9:

Every child shall have the right to freedom of thought, conscience and religion. Parents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child. States Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.

Article 12:

State parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. States Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

The rights of the child in the ACRWC are similar to the child's rights in the UNCRC. Furthermore, the rights of the child in the ACWRC are focused on the child in the African context. According to Lloyd (2002), the ACRWC represents recognition

of the rights and welfare of African children and establishes a legal framework for their protection. The children's rights movement recognised that children's rights are universal (South African Law Reform Commission, 2015). Regarding the child's rights versus those of the parent(s), Article 12 became one of the controversial articles of the UNCRC due to its perceived potential to undermine adult authority, but in practice children's enjoyment of the Article is dependent on the cooperation of the adult. Lundy (2007) further argues that it is easy for adults to comply with Article 12 with various outward signs on consultation and ultimately ignore the children's views.

Aspects to be considered when mediating and drafting a parenting plan in an African context according to Robinson (2010) are the following:

- *The best interests of the child should be the primary consideration ACRWC: A (4:1)*
- *The child's views are of importance A (4.2)*
- *Children who are capable should express their opinions ACRWC A (7)*
- *Parents have the duty to give guidance and direction to their children ACRWC A (9.2)*
- *Parents have the right and duty to choose their children's schools ACRWC A (9)*
- *Recreational activities should be valued for children ACRWC A (12)*
- *No child should be deprived of maintenance ACRWC A (18.3)*
- *The child has the right to parental care and protection ACRWC A (19.1)*
- *The child has the right to reside with his/her parent ACRWC A (19.1)*
- *The child has the right to a personal and direct relationship with separated parents ACRWC A (19.2)*
- *Parents have primary responsibility for the upbringing and development of their children ACRWC A (20.1).*

The UNCRC (1989) considers the child as an individual and an autonomous human being to ensure the child's dignity. This has led to the concept that the child is now a visible member of the family. Reynaert, Bouverne-de Bie and Vandervelde

(2009) argue that the child's rights are juxtaposed with those of the parents, which are functional rights to ensure the rights of children (Reynaert et al., 2009). The role of the government is to support parents, not to replace them and for parents to be the advocates of their children. Government intervention is only required where the best interests of the child is in danger.

The European Convention on Human Rights and the International Covenant on Civil and Political Rights deal with the rights of the child and the International Covenant on Civil and Political Rights in Article 18 (1) states that both parents have common responsibilities for the upbringing of the child. In the case of the dissolution of the marriage, the protection of the child has to be provided for (Robinson, 2002).

2.3 A SOUTH AFRICAN PERSPECTIVE ON THE BEST INTERESTS OF THE CHILD

The *Children's Act*, 38 of 2005, gives effect to certain rights of children that led to an improvement of the protection of children. The Act adopts a developmental approach that emphasises the state's role in the provision of social services to support and strengthen families and communities to care for and protect children. The best interests of the child is enshrined in the *Constitution of South Africa* 1996 in section 28 (2) of the *Constitution of South African*, 108 of 1996 and in the *Children's Act*, 38 of 2005. The best interests of the child in the South African context are discussed hereunder.

2.3.1 The Constitution of South Africa 1996

Section 28 of Chapter 2 of the *Constitution of South Africa* 1996, 108 of 1996, deals exclusively with the human rights of children. These rights were translated into legal subjective rights in *Children's Act*, 38 of 2005.

Section 28 of Chapter 2 of the Bill of Rights in the *Constitution of South Africa 1996*, 108 of 1996, promotes inter alia that:

(1) *Every child has the right to...*

(b) *family care or parental care, or to appropriate alternative care when removed from the family environment;*

(d) *to be protected from malnutrition, neglect, abuse or degradation;*

(h) *to have a legal practitioner assigned to the child by the State, at the State's expense in civil proceedings affecting the child, if substantiated injustice would otherwise result.*

(2) *A child's best interests are of paramount importance in every matter concerning the child.*

The Bill of Rights in the *Constitution of South Africa 1996*, safeguards the human rights of children and adults. Children have the same rights as adults, except for age related matters such as the right to vote and the right to stand for public office. A parenting plan should reflect a child's right to parental care and the child should be protected through the recommendations of the parenting plan. According to Robinson (2010), the child's best interests take priority over the child's wishes.

2.3.2 *Children's Act, 38 of 2005*

The *Children's Act, 38 of 2005* provides the legal basis for the reshaping of parental responsibilities and rights. The Act appears to set the bar high for all professionals in matters where the best interests of a child may be at stake or endangered. In the introductory paragraph of The Act, the legislature recorded that The Act was promulgated: *To give effect to retain rights of children as contained in the Constitution; to sort out properly relating to the care and protection of children; to define parental responsibilities and rights.* The preamble of The Act states: *Whereas the Constitution establishes a society based on democratic values, social justice and fundamental human rights and seeks to improve the quality of life of all citizens and*

to free the potential of every person. Whereas every child has the rights set out in Section 28 of the Constitution; and whereas the State must respect, protect, promote and fulfill these rights; and whereas protection of the children's rights in isolation from their families and communities. According to Greyvenstein (SAAM Mediation Conference, 2014), during 2013 13 million children were implicated in maintenance orders countrywide. This is a substantial number of children, increasing the need for efficient mediators and working toward the child's best interests. The question that will be addressed is whether *Children's Act*, 38 of 2005 succeeds in fulfilling its self-proclaimed purpose. According to Clark (2000, p. 3), the standard of the best interests of the child *runs throughout the whole fabric of our law relating to children*. According to Robinson (2010) the child's best interests is a relative concept, and should ideally include the child's physical, economic, emotional, intellectual, cultural, spiritual, social, moral and religious wellbeing.

Section 7 of *Children's Act*, 38 of 2005 lists 14 factors to take into account when considering the best interests of the child. Section 9 requires that the standard that the child's best interests is of paramount importance and must be applied in all matters concerning a child's care, protection and wellbeing. According to sections 9 and 33 of The Act, a parenting plan has to comply with the best interests of the child. Section 33 (3) states that a parenting plan may determine any matter in connection with parental rights and responsibilities to establish the nature and content of the plans. The 14 factors for consideration in determining the best interests of the child (Section 7(1)) are:

- (a) *The nature of the personal relationship between -*
 - (i) *The child and the parents, or any specific parent; and*
 - (ii) *The child and any other caregiver or person relevant in those circumstances;*
- (b) *The attitude of the parents, or any specific parent, towards -*

- (i) *The child; and*
- (ii) *The exercise of parental responsibilities and rights in respect of the child;*
- (c) *The capacity of the parents, or any specific parent, or of any other caregiver or person, to provide for the needs of the child, including emotional and intellectual needs;*
- (d) *The likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from -*
 - (i) *Both or either of the parents; or*
 - (ii) *Any brother or sister or other child, or any other caregiver or person, with whom the child has been living;*
- (e) *The practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;*
- (f) *The need for the child -*
 - (i) *To remain in the care of his or her parent, family and extended family; and*
 - (ii) *To maintain a connection with his or her family, extended culture or tradition;*
- (g) *The child's -*
 - (i) *Age, maturity and stage of development;*
 - (ii) *Gender;*
 - (iii) *Background; and*
 - (iv) *Any other relevant characteristics of the child;*
- (h) *The child's physical and emotional security and his or her intellectual, emotional, social and cultural development;*
 - (i) *Any disability that a child may have;*
 - (j) *Any chronic illness from which a child may suffer;*
- (k) *The need for a child to be brought up within a stable environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;*

- (l) *The need to protect the child from any physical or psychological harm that may be caused by -*
 - (i) *Subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or*
 - (ii) *Exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;*
- (m) *Any family violence involving the child or a family member of the child; and*
- (n) *Which action or decisions would avoid or minimise further legal or administrative proceedings in relation to the child.*

Bosman-Sadie and Corrie (2010) state that Section 7 (1) should be read with Section (2) of the *Constitution of South Africa 1996*, that the best interests of the child is of paramount (supreme or utmost) importance. Section 28 states as follows:

Every child has the right

- (a) *to a name and a nationality from birth;*
- (b) *to family care, parental care, or appropriate alternative care when removed from the family environment;*
- (c) *to basic nutrition, shelter, basic health care services, and social services;*
- (d) *to be protected from exploitative labour practices;*
- (f) *if not to be required or permitted to perform work or provide services that –*
 - (i) *are inappropriate for a person of that child's age; or*
 - (ii) *place at risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development;*
- (g) *not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-*
 - (i) *kept separately from detained persons over the age of 18 years; and*
 - (ii) *treated in a manner, and kept in conditions, that take account of the child's age;*

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child. If substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in every matter concerning the child

(2) A child's best interests is of paramount importance in every matter concerning the child.

(3) In this section, "child" means a person under the age of 18 years.

Schäfer (2011) argues that the best interests of the child principle does not necessarily mean that the child's short terms rights will always prevail in terms of the child's long-term best interests.

Section 9 of The Act concerns supreme importance of the best interests of the child: *In all matters concerning the care, protection and wellbeing of a child the standard that the child's best interests is of paramount importance.* Bosman-Sadie and Corrie (2010) state that the best interests of the child are of supreme and utmost importance and the best interests of the child principle is the most important principle in the Act.

Section 10 of The Act states, *Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.*

2.4 MEDIATION IN THE CONTEXT OF DIVORCE

2.4.1 Divorce process

A plaintiff and a defendant constitute the parties to a divorce (Cohen, 2010), in terms of the *Divorce Act, 70 Of 1979* (Juta's Statutes Editors, 2011). The plaintiff is the person who initiates the divorce and is the person who will appear in the court if the divorce is uncontested (Heaton, 2010; Preller, 2013). A decree of divorce may be

granted under the *Divorce Act* 70 of 1979, on the following grounds: irretrievable breakdown of the marriage, incurable mental illness for a continuous period of 2 years and continuous unconsciousness for a period of at least 6 months (Himonga, 2013). Section 4 (2) of the *Divorce Act* 70 of 1979, indicate the circumstances where the court may accept as proof of irretrievable breakdown:

- (a) *that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of institution of the divorce action;*
- (b) *that the defendant has committed adultery and that the plaintiff finds it irreconcilable with a continued marriage relationship;*
- (c) *that the defendant has in terms of a sentence of a court been declared a habitual criminal and is undergoing imprisonment as a result of such sentence.*

In a contested divorce, both the plaintiff and the defendant will appear in court. A divorce action is initiated by the issuing of a summons (Van Zyl, 1997; Heaton, 2010). The summons should be served personally on the defendant (Preller, 2013). The formal documents in the divorce proceedings are referred to as pleadings (Preller, 2013). The pleadings will typically consist of a summons, particulars of claim and notice of defense, pleas, counterclaim and a plea to counterclaim and further pleadings (Cohen, 2010). A court has jurisdiction in a divorce action if one or both parties are domiciled in the area of jurisdiction of the court on the date on which the action is instituted, or an ordinarily resident in the area of jurisdiction of the court on the said date and has/have been ordinarily resident in South Africa for a period of not less than one year immediately prior to that date (Du Bois, 2013; Preller, 2013).

A divorce trial will culminate in the granting of a judgement in the High Court (Heaton, 2010). Divorce courts fall within the High Court in South Africa and the regional divisions of the magistrate's courts (Preller, 2013). Once a divorce is contested, the adversarial system is activated and the parties prepare to go to trial with their respective attorneys (Van Zyl, 1997; Du Bois, 2013). The adversarial system is built on the ancient legal practice of having legal representatives on each side, focusing on winners and losers according to Preller (2013), it is a long and costly road for parents. An uncontested divorce could cost anything between R 800, 00 and R 20 000, 00 whereas a contested divorce can amount to hundreds of thousands of rands in legal fees. In most divorce cases, a settlement agreement is reached a few hours or days before the trial (Preller, 2013).

2.4.2 Mediation

Mediation is an alternative dispute resolution where a neutral third party, a mediator, works with the parents to reach a settlement agreement. It is neither therapy nor arbitration (De Jong, 2010). Mediation allows the parents to be directly involved in the decision-making process (De Jong, 2010). The settlement is tailored to their needs, with the best interests of the child in mind (Marnewick, 2015). The parents can enter into mediation regardless of whether children are engaged in the process (Cohen, 2010). The word mediation is used in the *Children's Act*, 38 of 2005, however, the Act contains no definition of mediation, and neither does the *Mediation in Certain Divorce Matters Act* 24 of 1987 (Paleker, 2008).

2.4.2 Mediation styles

Mediation, according to O'Leary (2014), is the management of other people's negotiations. The mediator uses conflict positively where the mediator is in a relationship with each party and with each party's legal representative (De la Harpe (2014). Mediation is a multifaceted negotiation process where the process is of

achieving goals (Marnewick, 2015). The mediator should have the ability to listen and should be able to change the process from confrontation to cooperation (Boniface, 2008; De La Harpe, 2014). Negotiation is always mainly about listening, not talking, and the mediator should be respectful at all times (Marnewick, 2015). The mediator should have the ability to reframe a particular situation to change the process from confrontation to cooperation (Boniface, 2008; De la Harpe, 2014; O'Leary, 2014).

De la Harpe (2014) asserts that the mediator should know his personal strengths and weaknesses. The various styles of negotiation in mediation include the competitor, the problem-solver, the compromiser (seeks solution for conflict), the accommodator (over-accommodates for the other side) and the conflict avoider. De la Harpe (2014) reasons that it is possible for the mediator to have an influence over the mediation. Other factors may also influence mediation such as potential loss of a child that leads to heightened levels of emotion, fear and anxiety (Hoffman & Wolman, 2013).

De la Harpe (2014) proposes the following four negotiation strategies for use in mediation:

1. Co-operative negotiation, where an agreement can be reached that is fair and acceptable.
2. Competitive strategy, where there is a seek-to-win strategy and tries to obtain the best results.
3. Collaborative or problem-solving strategy, where parties work together to reach an agreement.
4. Pragmatic strategy, where the strategy is adapted to meet the needs of the negotiation and principled negotiation where people look for opportunities to

solve the problem and focus on the underlying problem and opportunities to benefit both sides.

De la Harpe (2014) emphasises further that although many mediators are not natural negotiators, preparation is key for successful negotiation and mediation.

(a) Directive and indirective mediation

The essential elements are firstly a process with a dynamic of its own and secondly management is essentially what mediators do. Mediation is also a voluntary process and the mediator needs to remain neutral and impartial (De la Harpe, 2014).

Mediation can be either directive – where a directive approach is followed, for instance when an independent person to assist the parents to limit the issues refers the disputes for an insight, or indirective – where the mediator places the emphasis on the facilitation of the process (O'Leary, 2014). Voluntary mediation occurs when the parents choose mediation on a voluntary basis and mandatory mediation occurs when regulations introduced to give practical effect to the *Children's Act*, 38 of 2005, or rules of court require that mediation be used (O'Leary, 2014).

Given the high divorce rates (Amato, 2001, Kelly, 2004, Nelson, 2013) and the negative impact it has on children, it is imperative that mediation promotes the positive engagement of both parents and children in the process. Professional boundaries are set in mediation and it can be an ongoing process in families, as families change over time (Emery, 2004).

The child's basic awareness of the divorce should be assessed, as well as the child's age, stage of development and level of maturity before the child is included in the mediation process (Emery, 2004; Nelson, 2013). The mediator has to be trained and qualified to hear the child's voice, by having a sound knowledge base about the

child's development and family dynamics (Marnewick, 2015). Where children are included, the model of having two mediators – a mental health professional and a lawyer – is beneficial (Emery, 2004).

(b) Child-focused or child-inclusive mediation

Mediation can be either child-focused or child-inclusive. In child-focused mediation, the child does not meet with the mediator, but parents are given feedback and education regarding the needs and developmental stages of the child (Cohen, 2010). In child-inclusive mediation the child forms part of the process and meets with the mediator. The mediator should be a skilled professional and both parents have to consent to the interview. Child-inclusive mediation has more effective outcomes for children than child-focused mediation (McIntosh, Wells, Smyte & Long, 2008). Cashmore and Parkinson (2011) also recommend child-inclusive mediation as it assists the parents in understanding the child's emotional and psychological state of mind.

In Bagshaw's (2007) study, children stated they wanted to be involved in the mediation process and included in the decision-making process, except in cases of allegations of sexual or physical abuse. Mediation becomes a controversial issue where allegations of domestic abuse or sexual abuse are made. Lowenstein (2009) argues that mediation as an intervention in such cases would be unsafe or unfair.

Nelson (2013) recommends that before and after mediation the child's attachment styles should remain in focus. A baseline could be established in terms of the impact of the divorce on the child and the child's wellbeing, and whether the crisis of the divorce had an impact on the adjustment and attachment styles of the parents and the child (Nelson, 2013).

2.4.2.1 Role of the mediator

In South Africa a mediator usually has a background in law and/or psychology. The mediator has no authority to make any decisions on behalf of the parents and cannot force an order onto the parents (Nelson, 2013). The mediation process is without prejudice and the decision-making process remains with the parents. The combination of mental health professionals and lawyers in mediation is common (Preller, 2013; Nelson, 2013; O'Leary, 2014).

The mediator acts as a go-between and facilitates the conflict between parents to assist them in reaching a mutually acceptable agreement (Boniface, 2013). Mediation can be used where there is a dispute between family members, also for unmarried parents who live together and want to reach an agreement on the division of property, where siblings want to reach an agreement in terms of care of their aged parents, or where a child has reached the age of majority and wants to claim maintenance from her parents (Boniface, 2013, Marnewick, 2015).

The mediator should remain neutral at all times and encourage cooperation and respect for both parents (Nelson, 2013). The mediator does not offer legal or therapeutic advice, but should make referrals where required to family therapists and psychiatrists (Nelson, 2013). Finally, the mediator should not have had previous dealings with either of the parents (Cohen, 2010).

The mediator guides the parents into making decisions of the division of the joint estate and the maintenance of the minor children as well as the care and contact of the minor children (Boniface, 2013). The parents can request their attorneys to review the settlement agreement. Where children are involved, the family advocates should also review the settlement and draft their opinion to the court (Cohen, 2010).

In the event that the mediation fails, information provided to the mediator cannot be disclosed during a trial at a later stage (Preller, 2013). The National Accreditation Board for Family mediators (NABFAM) is currently focusing on the standardisation of training and accreditation of mediators in South Africa (Preller, 2013). Options for certification in South Africa range from a one-day workshop or up to four days (Duchen & Schutte, 2012).

De Jong (2008), Field (2006) and Boniface (2008) argue that mediation might be unsuitable in certain cases, such as domestic violence. De Jong (2008) contends that women might feel powerless in the mediation process. De Jong (2008), Heaton (2009) and Van Zyl (1997) opine that women do not have the same bargaining power as their partners or husbands and they might be in a position to feel that they have to agree to agreements that are unfavourable to them.

Mediating when there is a history of domestic violence is, according to Ballard, Holtzworth-Munroe, Applegate and Beck (2011), one of the most controversial issues in the field of divorce mediation. A concern is that the victim of abuse might be at a potential risk for threat to physical safety if the abuser becomes angry (Cohen, 2010). Furthermore, Ballard et al. (2011) contend that these cases are inappropriate for mediation due to the fact that the relationship is inherently unequal due to power imbalances and possible coercion in the relationship. Therefore, mediation in such cases cannot be viewed as a fair process (Beck, Walsh & Weston, 2009). However, Edwards, Baron and Ferrick (2008), aver that automatically excluding victims of domestic violence during mediation is based upon the false assumption that the victims are not able to promote their interests and those of their children.

Rivera, Zeoli and Sullivan (2012) argue that mediation is neither safe nor effective when domestic violence exists. The situation of forcing a victim to be

present with as well as argue against their abusers, can be potentially unsafe. Furthermore, Boniface (2008) contends that mediation is unsuitable if one parent has been diagnosed with a personality disorder. Kelly and Johnson (2008) aver that the pertinent issue is whether mediators are able to identify cases of domestic violence.

2.4.3 Parenting plans

Part of the outcome of mediation during divorce matters is usually a parenting plan. Although the *Children's Act*, 38 of 2005, does not provide a definition of a parenting plan, the following issues have to be dealt with in accordance with the Act, namely:

- Holders of parental responsibilities and rights
- Details of children
- Guardianship
- Residence
- Day-to-day care
- Maintenance of the children
- Medical care for the children
- Educational costs for the children
- Contact between children and the holders of the parental rights and responsibilities
- Decisions regarding children
- Due consideration for the children's views
- Informing children of the parenting plan
- Change of address of holders of parental rights
- Responsibilities and rights and dispute resolution (O'Leary, 2014).

Mediation is mandatory in certain instances only and in terms of section 33 of the *Children's Act*, 38 of 2005, which states that parents require a parenting plan where children are involved. According to O'Leary (2014), during the last few years the courts have referred positively to mediation, the most notable case being *MB v NB* 2010 (3) SALR 220 and *S v J* (659/10) (2010) ZASCA 139. In *S v J Lewis* it was stated that mediation is useful to (i) avoid expensive litigation, and (ii) where a *conciliation and problem-solving* approach should be followed and a *confrontational approach* avoided.

Professionals have to contend with divorcing parents who are in need of a structured and practical parenting plan that is suitable for the needs of the whole family. Article 33 (3) of *Children's Act*, 38 of 2005 states that a parenting plan may determine any matter in connection with parental rights and responsibilities. Robinson (2010) argues that the established needs and the best interests of the child is the core of the parenting plan, and the dismissal of the family members' needs is problematic. Such a parenting plan is therefore not representative of the family's needs. High-conflict families require a very structured and detailed parenting plan. The goal of a parenting plan especially for high-conflict families is the disengagement between the parents with access to the child from the parents (Baris et al., 2011; Henig, 2013).

2.4.4 Parental responsibilities and rights

Section 6 (5) of the *Children's Act*, 38 of 2005, determines that a child and a person who has parental rights and responsibilities in respect of that child should be informed of actions or decisions that affect the child. Parental responsibilities and rights are dealt with in article 18 in the *Children's Act*, 38 of 2005. Parental responsibilities and rights are dealt with in a much broader sense than under the previous era of paternal dispensation.

The current focus is on the rights of the child to parental care and not on parental powers (Bosman-Sadie et al. (2010); Preller, 2013). Care and visitation rights have been replaced by care and contact in *Children's Act*, 38 of 2005. Parental authority can be divided into three main groups, namely guardianship, care (custody) and contact (visitation rights). A person can have, in terms of the Act, full or specific parental rights regarding the child. Care, contact, guardianship and the financial support of a child are the main themes in section 18 of the *Children's Act*, 38 of 2005. The biological mother has automatic full parental rights and responsibilities as she has given birth to the child. If the biological father is married to the child's mother, was married to the child's mother at the time of the conception or birth or at any time between the child's conception or birth or he was married to the child's mother at any time after the birth, he has automatic full parental rights and responsibilities (Preller, 2013).

The *Children's Act*, 38 of 2005, does not confer automatic inherent parental rights and responsibilities to unmarried biological fathers. An unmarried biological father will only have full parental rights and responsibilities if he was living in a life partnership with the mother. If he consents to be identified as the father of the child and he contributes or attempted to contribute in good faith to the upbringing of the child within a reasonable period of time (Preller, 2013). The Act states that parental rights and responsibilities can only be suspended, confirmed or amended by the High Court, as the High Court is the upper guardian of the child. Parental responsibilities and rights are viewed in a much broader manner than before and the focus is on children's right to parental care rather than parental powers (Henig, 2013). The Magistrate's Court (the term 'Children's Court' is still used in some courts) can also make orders regarding care and contact, but not regarding guardianship orders.

2.4.5 African-style mediation in South Africa

In South Africa Western-style mediation as well as African-style mediation – with its *Ubuntu*-influenced values – is practiced. South Africa has high levels of poverty, ethnic and cultural differences and religious affiliations, and Boniface (2012) poses the question whether the African style of mediation can improve on the Western model. Boniface (2012) continues by stating that mediation as used in the West is an ancient process that has been re-engineered to suit urbanised and industrialised societies.

The African style of mediation takes the tradition of family or neighbourhood mediation. The mediation is facilitated by elders and takes place in the spirit of Ubuntu, an attitude of togetherness (Boniface, 2012). Conflicts are viewed in their social context and not as an isolated event. During mediation, the consequences for the parties are investigated as well as the consequences for the others in the families, with the emphasis firmly on humanistic values (Preller, 2013).

Boniface (2012, p. 382) avers that the *Lekgotla/Inkundla* (community courts where senior members of the community mediate for restoration of community relations) is a group or a public mediation forum where the entire community is involved and the mediation is conducted by the elders and the headman or chief. The elders guide the process and intermediate between the chief or headman and the community (Cohen, 2010). The essence of the mediation process is reconciliation with the focus on the *Ubuntu*-style values (Boniface, 2012). The restoration of harmony is more important than stating the rule of law (Boniface, 2012).

When the mediation is concluded, family members and neighbours can check whether the parties are abiding by the resolutions of the mediation. Boniface (2012) concurs that African mediation methods influenced South African legislature, for

instance the *Children's Act*, 38 of 2005, provides for mediation of dispute resolution in terms of disputes over parental rights and responsibilities (Cohen, 2010, Preller, 2013).

Boniface (2012) proposes that the knowledge of Western style mediation as well as the knowledge of African style mediation should be embraced in South Africa. The fact that mediation in African style mediation is open to all members of the community is a benefit that goes beyond the Western style mediation, where the process is closed and more than often adversarial (Boniface, 2012). The strengths of Western style mediation and the African style of mediation should be combined to allow for an opportunity of healing and not just a settlement. Boniface (2012) proposes that two elders from both families attend the mediation process during or after the divorce to fulfill the roles of investigators to ensure a holistic mediation process.

2.5 BEST INTERESTS OF THE CHILD IN MEDIATION AND PARENTING PLANS

As far back as 1948 the South African Courts applied the principle of the best interests of the child. According to Heaton (2009), the best interests of the child can be described as a golden thread that runs throughout the fabric of law in all decisions relating to children. *McCall v McCall* 1994 3 SA 201 (C) 204J-205G contains the most comprehensive list of standards in terms of what constitutes the best interests of the child. A court has to consider the following guiding factors in terms of granting an application, according to King J (*McCall v McCall* 1994 3 SA 201 (C) 204J – 205G) are the following:

In determining the best interests of a child, the court must decide which of the parents is better able to promote and ensure the child's physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria, which are set out hereunder, not in order of importance, and

also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:

- (a) *The love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;*
- (b) *The capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;*
- (c) *The ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;*
- (d) *The capacity and disposition of the parent to give the child the guidance which he requires;*
- (e) *The ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts' such as food, clothing, housing and the other material needs generally speaking, the provision of economic security;*
- (f) *The ability of the parent to provide for the educational wellbeing and security of the child, both religious and secular;*
- (g) *The ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;*
- (h) *The mental and physical health and moral fitness of the parent;*
- (i) *The stability or otherwise of the child's existing environment, having regard to the desirability of maintaining status quo;*
- (j) *The desirability or otherwise of keeping siblings together;*
- (k) *The child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration;*
- (l) *The desirability or otherwise of applying the doctrine of same sex matching;*
- (m) *Any other factor which is relevant to the particular case with which the court is concerned.*

According to Strous (2007) the McCall case (1994) can only be viewed as a guide, and that the best interests of the child principle is an indeterminate and relative guide. Schäfer (2011) states that the best interests of child principle have triggered important judgements.

Schäfer (2011) states that the courts rely on expert's opinion and he believes these opinions are highly subjective in terms of the child's best interests and are influenced by the expert's life experiences. He advocates a statutory checklist as applied in the United Kingdom (*Children's Act*, 1989 UK) and in Australian Family Law (Schäfer, 2011). Advocate Chris Maree of the office of the Family Advocate (2010) stated that the potential misuse of the professional's involvement pertaining to the best interests of the child is a subject of ongoing debate. Heaton (2009) argues that the cultural and religious circumstances, interests and needs of the child should be considered. An individualised, contextualised and child-centered approach is required to determine the child's best interests.

In the past judges presumed that it was in the best interests of the child to be in the care of their mothers (tender years principle) and older boys to be in the care of their fathers. Maternal preference was the general rule in the majority of cases (Mahlobogwane, 2013). The maternal preference or tender years principle is not consistent with the equality clauses in the Constitution, because of discrimination based on gender. In *Van der Linde v Van der Linde* 1996 (3) SA 509 (O), Hattingh J stated that men could equally fulfill the role of a mother in parenting and vice versa. In *Madiehe v Madiehe* 1997 (2) ALL SA 153 (B), the court stated that care is not a gender privilege but a responsibility and privilege that has to be earned.

Before the implementation of *Children's Act*, 38 of 2005, courts in South Africa used terms such as 'parental power' and later 'parental authority.' This parental power or parental authority entailed care, access and guardianship, with care awarded to one parent only and access to the non-residential parent (Mahlobogwane, 2013).

The *Children's Act*, 38 of 2005 makes provision for professionals suitably qualified to mediate between parents in order to enable them with the assistance of professional help, to formulate the parenting plan. Based on Section 10 of The Act, it is incumbent upon a mediator to take note that the mediation process that culminates in the development of a parenting plan, has to consider the best interests of the child (Strous, 2011).

Barrie (2013) states that section 10 is regarded as a general principle of the *Children's Act*, 38 of 2005, and argues further that the child's right to be heard in family law is an ongoing debate and interpretation in South Africa. Basson (2004) and Freeman (1997) contend that the best interests of the child principle has the advantage that the primary focus is on the child, and the principle is flexible and adaptable.

Bosman-Sadie and Corrie (2010) warn that it should not be incumbent on the child to choose between her parents nor that she has to make the final decision in this regard. No age limits and boundaries are set in Section 10 of Children's Act, 38 of 2005; the Act refers to *any matter*. Mabry (2014) argues that the best interests of the child principle is a means to achieve the child's physical, moral and social growth, including her age and maturity, culture, ethnicity and her socio-economic status as well as the degree of attachment she has with the parents.

Barrie (2013), Lapsatis (2012) and Kushner (2008) state that unfortunately no objective or absolute standard exists for determining what is in any child's best interest. The term 'best interests' is often ill defined, vague and interpreted to suit the needs of professionals who develop the parenting plans pertaining to care. According to Reed (2014), the best interests of the child principle appears to fulfill the goal of the standard, but only on paper. Reed (2014, p. 150) names it *the façade of the best*

interests of the child principle, while Kushner (2008, p. 71) questions whether the ‘best interests of the child’ is just a *catchall phrase to plug potholes in the court system*. Kanavy (2013, p. 1081) argues that under the *amorphous best interests of child principle* judges have ordered parents to take their children to church, but also refrained them from bringing their intimate partners near their children.

Determining the best interests of the child principle is often an acrimonious and adversarial process between parents (Stoner, Perry, Marcum, 2011). The South African Law Reform Commission (2015, p. 133) states that in some cases the resident parent *uses the child as a weapon in the matrimonial warfare*. Bonthuys (2006, p. 23) maintains the criticism of the best interests of the child principle is a *question no less ultimate than the purposes and values of life itself*. The judicial discretion of what the best interests of the child entails can easily lead to prejudice and discrimination. Each case should be decided on its own merits to establish the best interests of the child Bonthuys (2006). However, in the South African Courts an extent of confusion and disagreement is apparent in the application of the principle. High Courts use this principle in different ways and some ignore its existence as a *constitutional rather than common law principle* (Bonthuys, 2006, p. 39).

Kanavy (2013) contends that the family courtroom has the potential to become “twilight zones” by violating parents’ constitutional rights in the name of children’s best interests. Judge van Zyl stated in 1992 already (*Quintuo v Wilson*, Unreported Judgement WLD Case No. 3048/92) *the first and foremost consideration is and remain the best interests of the child concerned. I believe that far too much emphasis has been placed on the rights of access of parents and children and too little emphasis on the interests of the child*. Judge Goldstein (In *Minister of Welfare and Population Development v Fitzpatrick and others*; 2000 (3) SA 422 (C)) states that *the best interests principle has never been given exhaustive content, but is*

necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child.

S v M (3) SA 232 (CC) addresses the concern of various professionals with different perspectives on the concept of the best interests of the child. In *Jooste v Botha* 2000 (2) SA 100 (T) the following conclusion was reached: ...*of Section 28 (2) ... this provision is intended as a general guideline and not as a rule of horizontal application – that is left to the positive law and any amendments it may undergo.* According to Barrie (2011), the judgement of *McCall v McCall* (1994 3 SA 201 (C) 204J-205G) has the most comprehensive list of standards in terms of what constitutes the best interests of the child.

Garber (undated, p. 10) states that the best interests of the child principle will remain nothing more than an empty phrase *under which care litigants can do battle unless and until it can be adequately operationalised.* Garber (undated) further proposes an empirically sound model of child and family development to allow for reliable measures and valid predictions of healthy outcomes. The issue is that the facts with a particular child and family can differ dramatically, making it very difficult to implement the best interests of the child (Barrie, 2011). According to Firestone and Weinstein (2004), the best interests of the child during the divorce process cannot be defined primarily in legal terms – it is a complex psychological, social and legal problem that becomes intertwined with other issues such as child support.

According to Firestone and Weinstein (2004, p. 203), the law is not the *appropriate forum for assisting dysfunctional families to function better.* The underlying dynamics are often not resolved or improved in the legal cases. Parents become disempowered in litigation and the attorneys' zealous advocacy for a client frequently overrides the child's best interests. Litigation often results in the

destruction of the relationship between the parents to the detriment of the child. Not only can the process be protracted with delayed outcomes, but it is usually costly. The two parents present their cases to their respective lawyers, and both versions contain their subjective truths, not the objective reality of the child.

Child care disputes are about the future of the child and litigation deals with the past. However, information about the past is relevant in child care disputes, but is not determinative. The adversarial legal system often pushes professional experts to polarise their roles in the process, diminishing their role to that of neutral, objective witnesses in the case (Firestone & Weinstein, 2004).

However, as stated by Couzens (2010), *Children's Act*, 38 of 2005 contains no specific criteria that need to be applied to determine the best interests of the child. Zaal (2010) and Strous (2011) argue that in most divorce cases, the focus remains mainly on resolution of the conflict that exist between the spouses. During a mediation and litigation course focusing upon the outcome of mediation presented by advocates and psychologists, advocate Chris Maree from the office of the Family Advocate, stated that it is difficult to reach a balance between a child's needs and the child's best interests. Henig (2013) opined that there is no standard definition of the best interests of the child, and the term best interests of the child refers to the deliberation the courts undertake in determining who is best suited to take care of the child and what types of services, orders and actions best serve the child.

Mahlobogwane (2013) argues that joint care was applied unnecessarily cautiously before the commencement of the Act. In the case of *Pinion v Pinion* 1994 (2) SA 725 (D) the parents applied for a joint care order, and Judge Page focused on the disadvantages inherent in such an order and he acknowledged the complex nature of human behaviour. In his judgement he stated: *The future behaviour of parents, as*

other humans is unpredictable; and where their potential behaviour can give rise to a situation which will be detrimental to the interests of the minor concerned, it would, in my view, be better to exclude that possibility by avoiding creating a situation where it can occur unless the advantages to the minor of such a course are so significant as to justify taking risk involved. I do not think that the fact that the parties may approach the court should risk materialise is any justification for taking it; it would serve the minor's interests far better than to take it all.

The judge stated that a joint care order would not be in the best interests of the child. In *Heiman v Heiman* 1948 (4) SA 926 (W) the court ordered that there should be one parent directly responsible for the child, and therefore could not grant an order of joint care. In *Edwards v Edwards* 1960 (2) 523 (D) rejected the appellation of joint care of a 14-year-old boy because such an order would lead to a position of deadlock. In *Venton v Venton* 1993 (1) SA 763 (D) and *Krugel v Krugel* 2003 (6) 220 (T) the court granted an order of joint care where the children were to spend equal time with both parents. Joint care orders and shared residency in terms of the parenting plans both imply that it is in the best interests of children to have both parents involved in their lives.

2.6 DETERMINING THE BEST INTERESTS OF THE CHILD

This section explicates how the best interests of the child can be determined by considering what the child wants and what is good for the child by examining Section 10 and Section 7 of the *Children's Act*, 38 of 2005.

Section 10 of the Children's Act, 38 of 2005, provides that every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in any matter in an appropriate way and views expressed by the child must be given due consideration.

Mahlobogwane (2010) raised the question as to whether a child's views should be taken into account determining primary residence. It was argued that children have a lack of emotional and intellectual maturity. Historically children were deemed incompetent to decide what is in their best interests. The best interests of the child was often related to the mother's care (Naude & Maree, 2001).

This was proven in the case of *Greenshields v Wyllie*, 1989 4 SA 898 (W) 899 where judgement of Flemming J held that: (*The Court is not inclined to give much weight to the preferences of children of 12 and 14. It is not because that what they say is not important but because the courts know that there is more to it than the way they respond emotionally at this stage. It is therefore not that the Court simply ignores their desire, but, as a father sometimes tell a child 'no', the Court as the children's super father, can tell both their father and mother 'no' when necessary.*

Certain limited adults' rights are extended to children, depending on their age and maturity. According to Naude and Maree (2001, p. 34), in acrimonious divorces, *the decision-making capacity of the minor child in divorce is often disputed when such a child indicates a decided preference for a specific parent's care.* In accordance with UNICEF, Convention of the Rights of the Child adopted by the UN General Assembly in 1989:

1. *State Parties shall assure to the child who is capable of forming his or her own views the right to express freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
2. *For this purpose, the child in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

2.7 PARTICIPATION OF CHILDREN DURING MEDIATION

As South Africa is a signatory of the Convention, there is a moral obligation to implement the principles. These principles are also provided for in Article 4(2) of the 1990 African Charter on the Rights and Welfare of the Child. According to Mahlobogwane (2010), once children have voiced their wishes it would be harmful to engage them in a discussion in which it is evident that such wishes could not be met. There is also the other possibility of a child's fears that once he or she has spoken out, the child can face resentment from the other parent. When considering the child's voice, the following factors should also be considered: the child's age, subjective factors such as perceived maturity and capacity to make reasoned decisions, the child's level of cognitive and emotional functioning and the child's relationship with each parent, and vulnerability to parental pressures as well as parental alienation.

Bagshaw (2007) argues that children's coping capacity improves when their views are respected. Byrnes (2011) asserts that the child's voice should be taken into account and her wishes and needs canvassed. However, the child's preference for one parent over the other can be influenced by a parent through parental alienation, demonstrating the importance about recognising abnormal behaviour of parents, and this ultimately influences the best interests of the child. The weight given to the child's view and wishes, though, is a matter for a court to decide. The identifying criteria are the maturity of the child, the strength and duration of their wishes, the child's ability to appreciate the factors involved in the case as well as the long-term issues (Byrnes, 2011).

Currently no guidelines are available on whether a child should express her views through family reports, through an interview with the judge, through the lawyer, directly in the courtroom or through the mediator, social worker or psychologist.

Family reports in South Africa are the most common way for the child's voice to be heard through the Office of the Family Advocate, psychologists and social workers. These reports are often very costly for parents and there is unfortunately no guarantee that the best interests of the child will be served through these reports and investigations (Mahlobogwane, 2010). The legal role of the Family Advocate is in protecting the best interests of the child, for example by approving parenting plans (settlement agreements).

Doogue (2006) asserts that the child's views should be canvassed through an expert, who should consider the child's age, gender, ethnicity, culture, personality, cognitive development and verbal capacity. The expert should also consider whether the child has been subject to alienation and trauma and whether she has any special psychological, educational or medical needs.

Mahlobogwane (2010) argues that it amounts to window dressing to inform the child her views and wishes will be included and respected whilst knowing the child's preferences may not be considered. Children can also be manipulated by adult agendas, therefore it is difficult to provide guidelines on the weight the child's wishes should carry. However, as Mahlobogwane (2010) states, decisions concerning children's futures in care matters concern the children, and they should be consulted as they are the ones who ultimately live with those decisions. The child should be engaged in a sensitive manner, and not be manipulated or pressured. The evaluator should build a relationship with the child, to assess a child in one session only is not adequate. The child should also be assessed in the context of her school and peers, as well as the interaction and attachment with her parents and her home environment.

Cashmore and Parkinson (2009) question the extent to which a child should be engaged in the process of expressing her views and wishes and especially when the parents cannot agree. They state that these children can either be *allowed in the boxing ring or be given ringside seats to the boxing match*. They recommend utilising two rationales in taking the child's views and wishes into consideration, namely enlightenment and empowerment (Cashmore & Parkinson, 2009).

The enlightenment rationale is that children can provide valuable information in the process of decision-making by revealing their perspectives and experience. This will ultimately lead to more informed decisions with workable and positive outcomes. The empowerment rationale entails that children feel empowered by being part of the process; they learn how to make decisions, and have a greater sense of control and self-esteem. However, Warschak (2003) warns that this process is potentially detrimental to children, who may experience loyalty conflicts and could be manipulated by one of the parents.

Nonetheless, there are ways to ensure that children participate meaningfully without feeling they have to choose between their parents. Cashmore and Parkinson (2009) propose a process where children do not have a say in a once-off event, but rather by having a say at some stage and a choice or control over some aspects in the decision-making process. Where primary residence is not in dispute, children could be consulted and this information can be relayed to the parents. It is evident that there is continuous tension between the participation of children in the process and the protection of children.

2.7.1 Hearing the voice of the child

Naude and Maree (2001) propose the convergence between the psychological and juridical elements in the process. Pillay and Zaal (2005) note a discrepancy in

what ought to happen and what actually happens in terms of the views of the child and find grounds for concern that the child's voice is not heard in a significant proportion of cases. They propose the use of a child-interactive video recording as a means of obtaining the child's voice in a non-intrusive manner, and state that these recordings would provide the children with a sense of participation. In Australia, England and most United States jurisdictions, judges regularly interview children during divorce matters in their chambers. However, according to the South African Law Reform Commission (2015), the indirect method of informing the court of the children's views and wishes through family assessment reports is widely preferred. Judges at conferences in South Africa, and judges interviewed for this study have expressed that they regularly interview children in their chambers (SAAM Conference, 2014; Schutte & Duchen, 2012).

2.7.2 Conditions for including the voice of the child

In the case of *Lubbe v Du Plessis* 2001 (4) SA 57 (C), Van Heerden J held that if a child has sufficient maturity, intellectual and emotional functioning, the court should give serious consideration to the child's preference. In the case of *Soller v G* 2003 (5) SA 430 (W), the 15-year-old boy sought a variation of the care order that had been issued at the time of his parent's divorce. Judge Satchwell held that the child's wish to live with a parent in this case was the determining factor.

According to Pillay and Zaal (2005) children rarely appear in divorce proceedings and it is unusual for them to have their own legal representation. It is also difficult to establish to what degree the child's voice is successfully considered. The Family Advocate reports the child's wishes and views, however findings in an empirical study from Kassan (2003), conducted by Africa, Dawes, Swartz and Brandt, suggest that the Family Advocate's reports do not always contain sufficient information on the views and wishes of children.

At the time of the above study, only 17% of the reports contained the views of the children. Although subsequent analysis by Pillar (2003) revealed that 44% of children's views were reported, and 16% of these reports included children who are too young to express their views. No recent empirical studies have been conducted on the percentage of children whose views and wishes are included in reports from the Family Advocate's office. Pillay and Zaal (2005) argue that the family advocates frequently carry high caseload and are under-resourced. Parkinson and Cashmore (2008) have identified the following pitfalls when the child's voice is included in the process, namely that the child may be placed at the center of their parents' conflict and there is a risk of undue influence from parents as well as the parents' decision making authority is placed on the child, therefore the child's voice may provide an excuse for the parents to avoid decisions.

2.7.3 Developing a child-centered parenting plan

Child care is currently evaluated in terms of two models, the maximalist and minimalist approaches. Maximalist models are designed to accommodate the legal process and make recommendations to the court. In South Africa social workers and psychologists usually compile such reports. This is a detailed report and assessments include academic and collaborative medical material (interviews with doctors, psychiatrists and therapists, such as speech and occupational therapists), home visits to the parents' homes, and interviews with parents, collaborative interviews with teachers and close family of the parents and children. This approach can also include various psychometric tests completed by parents (Kushner, 2009).

The minimalist approach is less detailed and the parenting plan in accordance to the Act constitutes the minimalist approach. Since the introduction of the best interests of the child standard in the *Children's Act*, child care experts have been more involved than ever before (Kushner, 2009).

Robinson (2010) states that the following aspects are important to consider when preparing a child-centered parenting plan:

The protection of the child is of paramount importance (UNCRC: A (2))

The child should maintain personal relations and direct contact with both parents on a regular basis (UNCRC: A (9.3))

Children should not be separated from their parents except in special circumstances (UNCRC: A (9.1))

Best interests of the child should be prioritised and should be the basic concern of the parents (UNCRC: A (3); A (18.1))

A child should be heard in proceedings (UNCRC: A (12.2))

Children have to express their views if capable (UNCRC: A (12.1))

A child has the right to a certain standard of living to promote their development (UNCRC: A (27.1))

On relocation children should have the right to maintain contact on a regular basis with the parent (UNCRC: A (10))

A child should be protected against abuse, neglect, negligent treatment, maltreatment, and exploitation (UNCRC: A (19.1))

Caregiving and protection has to conform to certain standards (UNCRC: A (18.1))

Both parents have a common primary responsibility for the upbringing and development of their children (UNCRC: A (5))

Parents have to give direction and guidance to their children (UNCRC: A (5))

Parents' responsibilities, rights and duties have to be respected (UNCRC: A (5))

All parties should participate in intervention (UNCRC: A (9.2)).

2.8. CRITIQUE ON THE IMPLEMENTATION OF BEST INTERESTS OF THE CHILD

According to Mahlobogwane (2013), the needs of the child have to be promoted in as much as the child has the right to grow up in an environment that is as close as possible to a caring family environment, including the child's right to have access to

both parents. The *Children's Act*, 38 of 2005 adopted the parenting plan that attempts to assist parents to establish a plan that is in their child's best interests. Deciding where the children will live after separation is usually very difficult for parents (Wallerstein, Lewis, 2004). Mawdsley, Beckman, De Waal and Russo (2010) and Mahlobogwane (2013) caution that the best interests of the child should not take priority over other interests such as parents and other siblings. Mahlobogwane (2013) and Schäfer (2011) argue that the use of predictions is rather unsatisfactory and difficult to make, as a judge is unable to foresee the future and predict what would be in the best interests of the child.

Basson (2004) contends that the best interests principle in the Act is paternalistic, subjective, meaningless, indeterminate, and unjust towards parents, value-ridden and nothing but a cliché. According to Barrie (2013) there is unfortunately no objective standard for determining what is in any child's best interest. Lapsatis (2012) argues that judges do not follow the same approach or come to the same result and they do not attribute weight to every factor. Most care decisions in New York Family Law rely on case law on deciding on care for the children and determining the best interests of the child, as the case in South Africa. According to Irma Schutte (Schutte & Duchen, 2012), South Africa still has a long way to go before the country is on par with developments abroad in terms of establishing the child's best interests. South Africa has only recently started paying attention to involve psychology in the legal arena (Roos & Vorster, 2009). With regards to forensic reports as compiled by psychologists, every word is open to cross-examination and psychologists must be cognizant about this. As Roos and Vorster (2009, p. 24) state: *Psychologists in the legal field need to be very sure of the precise legal connotations of terms used in reports, minutes and evidence. An example would be the precise legal use of the words 'possibility' and probability.'* The underlying paradigm of a forensic report rendered to the Court is a service to the

Court, and is not an alliance with the parents or any other party. The psychologist has to maintain an impartial and neutral stance and conduct the assessment in a scientific manner. However, it is also of importance that the psychologist should adhere to the ethics of the profession in treating the parties with dignity and empathy (Naylor, Vorster, Cronjè & Donaldson, 2009).

According to Kassan (2004) and Fasser (2014) there is a lack of research and literature concerning the substantive issues that inform psychologist's decision-making process in terms of the best interests of the child. (Garber, undated) argues that there is a paucity of research in South Africa on the criteria utilised by professionals in conducting care evaluations.

According to Heaton (2009) and Schäfer (2011), there is always the risk that psychologists, social workers and lawyers applying the best interests of the child principle could manipulate the principle to reflect their own subjective views. This principle is difficult to apply, it is of indeterminate nature and the results are even more difficult to challenge, according to Schäfer (2011). Due to the work context of lawyers, psychologists and social workers, lawyers are more cognisant of the parents' needs and wishes, while psychologists and social workers take the child's needs and wishes into account.

Brandt et al. (2004) argue that mental health professionals (social workers and psychologists) are the only ones with training in child psychology and development. Strous (2011) warns against offering opinions from psychologists and social workers without research evidence that fuels legal disputes, as no standards or guidelines exist in terms of what constitutes the best interests of the child. Pruett, Ebling and Insabella (2004, p. 56) agree that the debate around the best interests of the child has become a *murky realm*.

Assumptions by social workers, psychologists and lawyers are often made in terms of what constitutes the child's best interests without in-depth knowledge about child developmental psychology. However, during the divorce process the antagonism between parents may become so strong that they rarely reach consensus on the best interests of the child as each battles in the power play to become the child's custodian. Very often, during the mediation process, children become the victims and the adversarial legal process exacerbates their suffering with the focus invested in the parents' best interests (Mahlobogwane, 2010).

Kushner (2008) and Couzens (2010) confirm a lack of clear definition and criteria of the child's best interests in the Act. Mahlobogwane (2005) argues that the Act does not comprehensively specify factors for consideration in determining the best interests of the child. There is no easy and simple way to establish the best interests of the child. The question remains whether such interests should include the parent's income, religion, race or ancestry and the nurture and care of the child.

Kushner (2008) further states that in her experience judges find care cases stressful and beyond the realm of their experience. These decisions are referred to social workers and psychologists who decide what the best interests of the child are and make recommendations to the court. Social workers and psychologists rely on information from the child's past to make predictions in terms of the child's future, which is inherently speculative. Furthermore, the expert's opinions also differ pertaining to the same family. Kushner (2008) cites an example of a child who wishes to reside with her alcoholic mother. One expert may recommend that the child reside with her mother because she has a responsible nature, while another may advise that the child be removed from her mother's care due to parentification and role reversal. Kushner (2008) questions whether somewhere within the

overwhelming amount of reports, recommendations, assessments and rulings, the everyday needs of the child become evident.

South African courts, as the upper guardian of the child, places emphasis on the best interests of the child. Section 28(2) of the *Constitution of South Africa 1996*, supports the notion that the *child's best interests are of paramount importance in every matter concerning the child*. Even in the case of sentencing a parent convicted of a crime, the courts have taken the best interests of the child into account (*S v Kika* 1998 (2) SACR 428 (W); *Howells v S* (1999) 2 All SA 239 (C); *S v M* 2008 (3) SA 232 (CC) 2007 (2) SACR 539 (CC), and in deciding whether to detain a father pending his possible deportation (*Patel and Another v Minister of Home Affairs and Another* 2000 (2) SA 343 (D) (Mahlobogwane, 2010). The judiciary has attempted over the years to lay down specific guidelines:

- In *Van Deijl v Van Deijl* 1996 SA 206 (R) emphasised economic, social, moral and religious considerations, as well as emotional needs and ties of affection
- In *French v French* 1971 4 SA 298 (W) the court emphasised the suitability of the care parent, as well as emotional needs and ties of affection
- King J in *McCall v McCall* 1994 3 SA 201 (C) 204J-205G laid down 13 criteria and has since been extensively quoted in care cases such as *Bethell v Bland* 1996 2 SA 194 (W) 208F-209F; *Krsin v Ogle* 1997 1 ALL SA 557 (W) 567g-158c; *Madiehe (born Ratlehogo) v Madiehe* 1997 2 ALL SA 153 (B) 157g-158c; *Ex part Critchfield* 1999 3 SA 132 (W) 142E-F; *Meyer v Gerber* 1999 2 SA 650 (O) 655H-I; *Fritchen v Fritchen* 1997 JOL 1612 (C) par 6-7, 34-37.

Psychologists often use tests to measure parental capacity and functioning. Many of the traditional tests used by psychologists were not designed to measure parental capacity. There are major differences in what constitutes effective parental

capacity. The projective tests used by psychologists when working with children such as the DAP and KFD have psychometric defects when it comes to making care recommendations. These tests have weak reliability and questionable validity (Kushner, 2009). Psychologists and social workers also use the Marschak Intervention Method to assess attachment, Baker's Alienation questionnaire (not standardised) and the Divorce Apperception Test (DAT) (not standardised). Although psychologists use standardised tests, the procedure to come to the conclusion of the best interests of the child is not standardised. Psychologists and social workers currently assess children through interviews, in conjunction with methods that they developed themselves to establish the familial relationships and the child's views. Psychological tests are governed by professional rules as prescribed in the *Medical, Dental and Supplementary Health Services Profession Act* 56 of 1974. Only registered psychologists are permitted to perform these psychological tests as prescribed and defined in section 37 (2) (a), (b), (c), (d) and (e) of the *Medical, Dental and Supplementary Health Services Profession Act* 56 of 1974. The goal of the psychological tests is to obtain a relatively objective measurement of parents' characteristics. However, these tests have limitations and flaws and should be used properly as argued by Naylor, Vorster, Cronjè and Donaldson (2009). The selection of the tests falls within several categories such as intelligence tests, neuropsychological tests, objective personality tests, projective personality tests and aptitude and achievement tests. It is of importance that children's age and developmental levels are taken into account when interpreting the tests. Naylor et al. (2009, p. 41) aver that *Psychological evaluations make a contribution to the justice system by providing information that increases the accuracy of the decision-making process*. The essence of such an evaluation is to find the fit between the needs of the child and the parents' capacity to provide for those needs (Stahl, 1994; Brandt, Swartz & Dawes, 2005). There are unfortunately no specific guidelines for

psychologists who specialise in forensic work in South Africa, except that they should adhere to the ethical guidelines within their profession (Naylor, Donaldson & Piek, 2009).

When psychologists or social workers make recommendations in a report and parents disagree with such recommendations, they often request the Court's assistance in the matter. According to Mahlobogwane (2013) it is important to question the courts ability to deal with such cases. He states an example of how the courts should intervene in determining which religious preference is in the best interests of the child if the parents disagree. He continues by stating that decisions about care and contact of children have enormous repercussions for children that reverberate into adulthood. He argues that the challenging question remains whether the child's best interests should be viewed from a short-term or long-term perspective and whether they should be viewed from a subjective or objective perspective (Mahlobogwane, 2010).

Naude and Maree (2001) propose criteria for consideration where disputes exist in terms of placement of the child. They state that children's best interests are associated with a parent who:

- Displays stability and adequate parenting skills
- Has a stable and satisfactory relationship with the minor child
- Can provide for the child's financial and emotional needs
- Can facilitate and promote solid ties with home, family, school and community
- Provides possible vulnerable and special educational needs of the minor child.

Pruett, HoganBruen and Jackson (2008) included the following criteria:

- Emotional ties between the child and the adults
- The capacity of the adult to love, guide, educate and raise the child
- The adult's moral fitness
- The mental and physical health of all involved
- The adult's capacity to facilitate the other parent's relationship with the child
- The permanence of the adult's home
- The amount of time the child has lived in a stable environment and the adult's potential to maintain such continuity.

Gunsberg and Hymowitz (2007) recommend an ongoing dialogue between mental health professionals (psychologists and social workers) and the legal community.

Mahlobogwane (2013) argues that the concept of co-holders of parenting rights and responsibilities of both parents are only fair in terms of the parents, and for children the concept of fairness is less obvious. The Act ensures that children enjoy a close relationship with parents, but domestic violence, child abuse and hostility and lack of communication between parents complicate co-parenting considerably. If one parent fails to provide the child with adequate food, clothing, lodging and medical assistance the court may also vary the parenting plan in accordance with the best interests of the child. The child has the right to be heard, and this is complicated if there is resistance from the child to maintain a relationship with the non-residential parent. This issue is further complicated where overt parental alienation is evident.

Elrod (2006) proposes a further complication in child care evaluations as the relocation of one of the parents within South Africa as well as the emigration of one of the parents. The non-moving parent usually objects and the courts have to decide whether to allow the child to move with the parent, resulting in a costly exercise.

Elrod (2006, p. 30) states that relocations cases *present some of the knottiest and most disturbing problems*. Schäfer (2011, p. 154) concludes that the best interests of the child principle is *notoriously difficult to apply*, with results that are difficult to challenge. Reasons for relocation include lack of family support, crime, job opportunities and better education (South African Law Reform Commission, 2015). Such a move affects the relationship between the child and the other parent, and requires a change in parenting arrangements (Stahl, 2013). Different professionals reach dissimilar conclusions in terms of what entails the best interests of the same child. Polarised views are not helpful in making relocation decisions, however, relocation needs to be considered within a risk context as the familial, residential and mobility factors may decrease or increase risk or resilience for the child in each family. The following cases are important in terms of relocation and the child's best interests:

AC v KC A389/08 2008 ZAGPHC 369 16 June 2008 (unreported to date)

B v M 2006 3 All SA 109 (W)

Cunningham v Pretorius 31197/08 2008 ZAGPHC 258 21 August 2008 (unreported to date)

F v F 2006 3 SA 42 (SCA)

Godbeer v Godbeer 2000 3 SA 976 (W)

HG v CG 2010 3 SA 352 (ECP)

Jackson v Jackson 2002 2 SA 303 (SCA)

Joubert v Joubert 2008 JOL 219229 (C) (unreported to date)

MK v RK 17189/08 South Gauteng High Court (Johannesburg) 6 May 2009 (unreported to date)

RC v CS (2011) JOL 28064 (GSJ)

Shawzin v Laufer 1968 (4) SA 657 (A)

Tropea v Tropea 665 NE 2d 145 (NY 1996)

Van Rooyen v Van Rooyen 1999 4 SA 435 (C)

2.9 SPECIFIC CHALLENGES RELATING TO FACILITATING THE BEST INTERESTS OF THE CHILD

2.9.1. Hostile parents

The question of the best interests of the child is far from apparent with very hostile parents in a legal battle, according to Sandler, Wheeler and Sanford (2013). The best interests of the child is a psychological issue and the family courts often look to current research literature to guide them in determining the best interests of the child. Research has established that the qualities of parenting of both parents are related to the wellbeing of children post-divorce.

High levels of conflict between parents have a direct negative impact on parenting. In a contentious statement, Sandler et al. (2013) proposed that in families with constant high conflict, it is better for the child to reside with mainly one parent. The authors do admit that the child's wellbeing in high-conflict divorces is a matter of dispute with studies showing positive as well as negative effects.

2.9.2 Balancing parental rights and the rights of the child

The interaction between balancing parental rights and rights of the child are becoming more complicated (Robinson, 2013). The Constitution offers no guidelines how to regulate the issue of the rights of the child and the rights of the parents. There are situations where the child's best interests are *prima facie* not treated as a paramount consideration (Robinson, 2013) namely the care of the child on a day-to-day basis, granting of divorce, financial redistribution of property on divorce, disclosure of evidence and anonymity for sperm donors and biological paternity tests.

2.9.3 Challenges in a multi-cultural society

Burman (2003) argues that South Africa is a third world country and the best interests of the child are often difficult to implement in a divorce. Due to the high rate of

unemployment, lack of housing and the low level of women's earnings, African women are often in no position to contest care (Burman, 2003). In South Africa the high rates of alcoholism and drug abuse pose a further hurdle in determining the child's best interests. Often both parents are unsuitable, where one parent is in jail and/or both parents are alcoholics or drug addicts.

However, the child's wellbeing rarely considers contextual factors that may affect the child negatively (Sandler et al., 2013). Contextual factors such as environmental stress, social isolation and lack of resources available to parents have a definite influence on their parenting. Three contextual factors are important and of special interests to the Courts, namely, the level of conflict between the parents, the quality of parenting provided and the amount of time the parents spend with the child. Inter-parental conflict is of interest to the Courts as the conflict has a negative influence on the child.

2.9.4 Delays at the office of the Family Advocate

Advocate Jenny Woodward SC (Family Law Conference, 2014) mentioned that the delay in the decision-making process in terms of children is not covered in the Children's Act, 38 of 2005, as there are often huge delays at the Family Advocate's office. Advocate Chris Maree of the office of the Family Advocate (Family Law Conference, 2014), responded to Advocate Woodward's comments by stating that in one city alone their office dealt with 90 000 divorces during 2013, and serves 13 Courts with a staff of only six Advocates. During a two-day training conference advocate Chris Maree stated that the Office of the Family Advocate was unable to cope with the numbers of parents and children reporting at their offices (Schutte & Duchen, 2012).

2.10 SUMMARY

In this chapter the legal context in which divorce mediation and the development of parenting plans takes place was discussed. The best interests of the child principle has been applied over a period of 55 years in global and local contexts. Recent local developments in the legal context once again emphasised the importance of applying this principle in the divorce mediation process as stated in the Constitution of South Africa and the Children's Act. The researcher concurs with Robinson (2010) who proposes that the professional should be well versed with the legal instruments pertaining to children and children's rights and the UNCRC and the ACRWC in order to act in the best interests of the child. However, a legal perspective should be complemented by a psychological perspective on the divorce mediation process in order to ensure that all those involved – but the children in particular – are protected against the trauma associated with divorce. Chapter 3 presents a conceptual framework for understanding the facilitation of the best interests of the child principle during divorce mediation from a psychological perspective.

CHAPTER 3

A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING THE FACILITATION OF THE BEST INTERESTS OF THE CHILD FROM A PSYCHOLOGICAL PERSPECTIVE

3.1 INTRODUCTION

Three psychological theories, namely attachment theory, the developmental theory of Erik Erikson and family systems theory form the basis for the conceptual framework developed to understand the facilitation of the best interests of the child from a psychological perspective. The promotion of wellbeing and other heuristic constructs associated with the facilitation of the best interests of the child are also presented to expand the conceptual framework (Chenail, 2011).

3.2 ATTACHMENT THEORY

The attachment theory of John Bowlby (1969, 1973, 1951) is applied in this research as divorce implies that the child is separated from that parent with whom she does not reside at a specific moment. The implications of such separations are discussed in this section.

Attachment theory has connections within psychology as well as neuroscience. Interpersonal neurobiology explains how early experiences indelibly influences later experiences. Therefore, the emotional relational environment provided by the primary caregiver shapes the experience-dependent maturation of the brain systems involved in attachment functions that are accessed throughout a persons' life. However, although the family structure changes for a child/children, they remain part of a family (Schore & McIntosch, 2011). Left with memories of the family that used to be, the child exists in a phase of mourning. In the divorce and separation field, attachment is a concept that is frequently used to assess and make decisions and

recommendations in terms of residence, care schedules and relocation (McIntosh, 2011; Main et al., 2011). Attachment remains an actively developing field and researchers are exploring new domains including the cultural, anthropological and genetic domains (Main et al., 2011).

John Bowlby (1969,1973,1988) is the proponent of attachment theory. Bowlby (1988) explains that attachment theory was developed through the investigation of several studies of the effects of frequent changes in mother-figure care of the children and the effects of prolonged institutional care of children during the child's early years of life. The author spent six months at the World Health Organisation investigating, studying and discussing literature on the effects of frequent changes in maternal care and long-term institutionalisation of children. Bowlby (1988) published *Maternal Care and Mental Health* in 1951 after his work was completed at the World Health Organisation.

In an effort to understand and conceptualise the construction of a parenting plan and to put forward proposals for the child's placement at the parents' respective homes, attachment theory has to be investigated as a fundamental part of the child's future wellbeing. Infants do not have gender biases when it comes to attachment formation. Their bias is for responsive, attuned, predictable and warm care within consistent caregiving relationship (Stroufe, 2005; Main et al., 2011). However, while being a mother or a woman is clearly not a prerequisite for being a primary caregiver, current neuroscience research indicates that dominant mothercare of infants is not merely sociologically informed; the female brain is specifically equipped for the largely nonverbal, affinitive, nurturing aspects of attachment formation with an infant (Main et al., 2011). Care arrangements should support the growth and consolidation of the primary relationship and if and where possible, allow for familiarity and growing

attachment with the second parent. The primary parent does not denote being a better parent, but primary for the fundamental aspects of attachment development.

Attachment theory focuses on the proximity of a secure base, namely the primary caregiver. Bowlby (In Wezet, 2008) proposes that the attachment to the primary caregiver is vital for the survival of the species, as the protection offered by the primary caregiver safeguards the child from predators and provides a safe environment for the child from which to explore the world. Bowlby integrated elements of psychoanalysis, developmental psychology, social psychology, etiology and biology in his discussion of attachment (Gold, 2011). Connors (2011) describes attachment theory as having an unusually sound foundation of empirical support.

Attachment is the *lasting psychological connectedness between human beings* (Bowlby, 1969, p. 194). Attachment essentially refers to the nurturing bond of physical and emotional love and care formed between a parent and their child in the early years of development. Attachment can best be described as a *reciprocal, enduring emotional tie between an infant and a caregiver* (Papalia, Olds & Feldman, 2009, p. 189). Bowlby (1988) proposes that attachment behaviour occurs irrespective of the concerned individual's age, and that the intensity of the emotion that accompanies such behaviour is significant. Attachment behaviour comprises any form of behaviour *that results in a person attaining or maintaining proximity to some other clearly identified individual...* (Bowlby, 1988. p. 27) If the relationship goes well, there is associated joy and a sense of security and if it is threatened, there is jealousy and anger. With threats, there are usually grief and depression present. Bowlby's theory features two central constructs (Bowlby, 1969, 1973, 1988). Firstly, the effectiveness of infant-caregiver attachment relationships which emanates from the history of interaction with the caregiver, and secondly, variations in attachment

quality which are the foundation for later differences in the individual's personality (Bowlby, 1988; Stroufe, 2005).

Attachment in the first two years of life is different from attachment in the third or fourth year of life. The emotional right-brain circuits are in a critical period of formation where in the third and fourth year of life, the full cognitive system is involved in maturing. Therefore, the first two years is critical in the formation of the attachment. To emphasise the attachment system while it is organising in the first two years has more far-reaching effects than attachment in the third or fourth years of life when the full cognitive system involved is maturing. However, children remain sensitive to attachment distress and opportunities throughout childhood, implying there is not an exclusive early window of opportunity (George, Solomon & McIntosch, 2011). Attachment drives brain development (Schore & McIntosch, 2011), and particularly the young child's growing capacity to know, express and self-regulate her emotional world. The brain growth is influenced by social forces and is thus experience-dependent. Therefore the emotional experiences embedded in the relationship with her caregiver are as vital as nutrients (Schore & McIntosch, 2011). The survival function for the child is to communicate her own subjective internal states to other human beings, and subsequently the capacity to self-regulate. Self-regulation occurs between the first 18 to 24 months of life and is influenced by the attachment of that period of time (Siegel & McIntosch, 2011). Communication is primarily non-verbal, emotional and body-based in the attachment relationship (Siegel & McIntosch, 2011).

MacDonald (2011) considers Bowlby's work to be a landmark piece of research in which Bowlby gathered emotional data rather than economic, medical or social data that was used at that time. Bowlby (1988) recognises the contribution and support of Robert Hinde (1974) and Mary Ainsworth (1967, 1982) in the development

of attachment theory to where it is widely regarded as *the best supported theory of socio-economical development* (Bowlby, 1988, p. 28).

Ainsworth and Main and their colleagues nurtured and developed Bowlby's theory. Ainsworth (1967) developed the 'strange situation' as a laboratory technique where the attachment patterns between the mother and child could be assessed. Ainsworth phrased the hypothesis of attunement, *the sensitive responsiveness to the infant's cues* (Stroufe & Siegel, undated, p. 2). Attunement can also be described as sensitivity and warmth in responding to a child's cues.

Bowlby (1988) explains that parenting is a human activity with an ethological approach. The nature of the child's attachment is a result of a pre-programmed set of behaviours in keeping the child in close proximity of the primary attachment figure. The child's attachment behaviour is activated among other things by pain, fatigue and anything fearful and frightening, and when the mother (primary attachment figure) appears to be inaccessible. If the relationship between the child and the primary caregiver is congenial, the child demonstrates joy and security. If the relationship is threatened, is the child demonstrates anger, jealousy and anxiety. Children who are severely mentally disturbed fail to form such a close attachment to a primary caregiver or any other figures (Bowlby, 1969).

Bowlby (1969) proposes that the infant builds an internal working model on its interaction with its mother. The basis of the internal working model is if the mother's behaviour is consistent, the infant builds on the working model and if the mother's behaviour changes consistently, the infant will revise the model, resulting in the security of attachment that might change. These internal working models guide future behaviour for the infants and later for the child. This working model of the infant is related to Erikson's concept of basic trust (Papalia et al., 2009).

The attachment system is not rigid, however it does not mean that there are not long-term effects of relationship instability (Solomon & George, 2011). In terms of adopted infants, research has proven that the infant does not have to start out with the primary attachment relationship to form an attachment relationship (George et al., 2011). Attachment requires the primary caregivers' physical and emotional presence.

3.2.1 Separation anxiety

Bowlby (1988) also addresses the issue of separation anxiety, and identified a sequence of reactions displayed by infants upon separation from a primary caregiver. The basis of separation anxiety lies in that the infant perceives the absence of the primary attachment figure as an increase of risk, fear and anger. The most common age of onset for separation anxiety is 6 to 15 months (APA, 2000). Separation is a natural process in development and helps the child to survive. Some infants show stranger fear and separation much more frequently than others. The term maternal deprivation (Bowlby, 1988) refers to the separation or loss of the mother. If the attachment is disrupted during the first two years, the child will suffer irreversible long-term consequences of this maternal deprivation. Bowlby (1988) uses the term maternal deprivation to refer to the separation or loss of the mother as well as failure to develop an attachment.

In estimating time spent with both parents after the divorce, it is a given that a near or equal distribution of caregiving time is not normative. Attachment formation is dependent on quality of caregiving, with regular times of warm interactions that includes, feeding, soothing and comforting (McIntosch, 2011). According to Main, Hesse and Hesse (2011), many unanswered questions remain about the relationship in terms of attachment with the second parent, noting normative situations in which healthy attachments develop over time from a basis of comfortable familiarity and care. In terms of overnight contact with the second parent, the infant requires

consolidation with the first attachment relationship and development of adequate receptive and expressive language and therefore professionals cannot view age as a predictor for overnight contact.

3.2.2 Threats to attachment

When the primary attachment figure uses threats of abandoning as well as actually leaving the child without the necessary preparation for the separation, the child goes through phases of protest, despair and denial or detachment. Intense separation anxiety stems from either repeated threats of abandonment or rejection from the primary caregiver, or the death or illness of a sibling where the child might feel responsible. Two sets of stimuli are primarily responsible for eliciting fear in children, namely where there are clues to danger and/or the absence of the attachment figure (Bowlby, 1988, Schore & McIntosh, 2011; Siegel & McIntosh, 2011).

Solomon (In George, Solomon & McIntosh, 2011) declares that nighttime is especially stressful for infants, and separation from the infant's primary attachment figure should be carefully considered. He continues by stating that there is a special vulnerability about nighttime. The infant is hard-wired in the cortisol rhythms of the body to be more anxious at night. Such vulnerability is even more so evident in the hostile environment of divorcing or separating parents where the parents are rarely able to help the infant negotiate this additional stress (Solomon in George et al., 2011). George (In George et al., 2011) argues that overnights with infants may work for some families, however, regular overnights away from their primary caregiver can be extremely stressful.

The attachment system functions to help the child to manage normal stress and to reduce all types of fear. It is the infant's primary defense mechanism for regulating

fear. The attachment relationship is the child's dominant mechanism for a long time until she can learn how to manage fear on her own. Neural integration is at the heart of health and the heart of secure attachments and impaired integration results in psychological rigidity or chaos (Siegel & McIntosh, 2011; Schore & McIntosh, 2011). Attachment styles are not inherited; attachment security depends on patterns of interaction with each parent. Attachment experiences shape the way neurons are connecting up to each other from birth in the early years of life (Siegel In McIntosh, 2011). Bowlby (1973) states that no variables have more far-reaching effects on personality development than a child's experiences with her primary caregivers. The evolutionary biological rationale offered by Bowlby (Avery, Matthews, Hoffman, Powell, & Cooper, 2008) implies that the secure base relationships with the child and her primary caregivers are observable across diverse social contexts and cultures. Bowlby (1988) proposes a hypothesis that the cause of a symbiosis in the mother-child relationship can be traced to the mother who grew up in an anxious-attached relationship and who turns her own child into her attachment figure. The child is burdened by caring for her mother, and may react by becoming anxious, guilty and possibly phobic.

3.2.3 Different types of attachment

Ainsworth, Blehar, Waters and Wall (1978) describe the different types of attachment by observing the child in the strange situation. Ainsworth's (1982, 1989) criteria for an attachment relationship are that the bond is emotionally significant and persistent, that it entails seeking proximity and takes place in a specific fashion with a primary caregiver. The goal of seeking attachment is a feeling of security where actual physical closeness is also important.

Bretherton (1992), in an article with input from Ainsworth, indicated that Ainsworth's methodology facilitated the empirical testing of Bowlby's ideas and

expanded his theory. Ainsworth based her initial research on security theory indicating that infants need to develop a secure dependence on parents before reaching out to unfamiliar situations (Bretherton, 1992). Ainsworth joined Bowlby's team in 1950, researching the effect on personality development of separation from the mother in early childhood (Bretherton, 1992). Ainsworth et al. (1978) contributed to the concept of the primary attachment figure as the secure base in the child's life and identified four types of attachment:

- Secure attachment
- Anxious-avoidant attachment (insecure attachment)
- Anxious-ambivalent attachment (insecure attachment)
- Disorganised attachment.

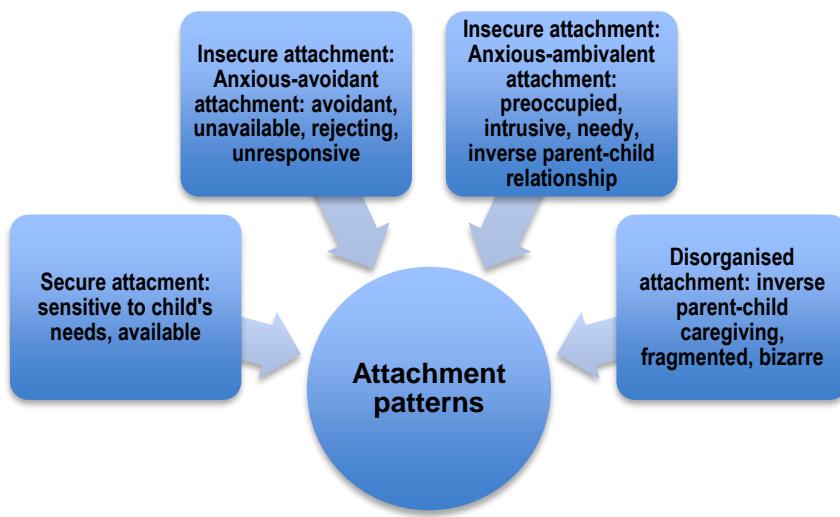


Figure 3.1: Attachment patterns

Each attachment pattern is linked to the behaviour of a mother or primary caregiver and the child's responses. Infants and children regulate their behaviour in terms of safety versus threat in their current environment. The infant constantly organises information about the attachment figure's availability and regulates her behaviour accordingly. Securely attached infants use their attachment figure to find

ways to regulate affect; insecure attached infants must find alternative ways in the absence of a closely attached figure. Insecure infants and children develop strategies that will enable them to preserve a degree of proximity to the problematic caregiver (Main, 1995, Schore & McItosch, 2011; Siegel & McIntsoch, 2011; Tarabulsky & Symons, 2016).

3.2.3.1 Secure attachment

According to Ainsworth et al. (1978), the first type of attachment is secure attachment where the infant cries or protests when the mother leaves and shows joy when she returns. Where the primary caregiver has sensitivity, she or he is the infant's secure base, and when she or he returns, this secure base is available to the infant. In a secure attachment between the infant and primary caregiver, the infant is active in initiating renewed engagement with the primary caregiver upon her or his return. Secure attachment has the result of encouraging the growth of self-reliance in the infant, capacity of emotional regulation and the emergence of social competence (Stroufe, 2005; Tarabulsky & Symons, 2016). An infant who shows normal distress on separation, and who is quickly comforted upon reunion, has a secure attachment (Ainsworth et al., 1978). A securely attached child is confident about her parent's physical and emotional availability. The "secure base" (Powell, Cooper, Hoffman & Marvin, 2009) that the parent provides for the child permits the child to explore independently, knowing that the parent will step in to protect where required.

3.2.3.2 Insecure attachment: Anxious-Avoidant Attachment

In laboratory settings the anxious-avoidant attached child tends to be preoccupied with her caregiver when she is present and will only show limited interests and exploratory behaviour in the toys (Ainsworth et al., 1978). Such a child rarely cries when the caregiver leaves the room and avoids her when she returns.

She could demonstrate great distress on separation and alternate between behaviour of intense anger and intense proximity seeking when the caregiver returns.

The caregivers of such children were observed to be unpredictable, inconsistent and insensitive, although they were able to show warmth at times (Ainsworth et al., 1978). The strongest predictor of secure or insecure attachment is found in the caregiver's state of mind (Cooper, Hoffman, Marvin & Powell, 2007). The child tends to be angry and does not reach out to her primary care giver in its time of need. The child dislikes being held but shows even greater distress when the primary attachment figure puts her down (Powell, Cooper, Hoffman & Marvin, 2013). Caregivers of children with this type of attachment style display a lower psychological awareness and the child displays development delays due to the anxious-avoidant attachment. These caregivers often display negative feelings about parenthood and are tense and irritable. Patterns of anxious-avoidant attachment have a potential risk for later disturbance in the child's life (Stroufe, 2005). A child that presents with avoidant attachment would often turn away from a caregiver with apparent disregard. The child might appear not to notice when the caregiver returns or might start to move towards the caregiver but change direction. Such a child presents an over-use of exploration and an over-focus on the environment, but an under-focus on the relationship (Cooper et al., 2007; Powell et al., 2009).

3.2.3.3 Insecure attachment: Anxious-ambivalent attachment

An infant or child with anxious-ambivalent or resistant attachment becomes anxious even before the caregiver leaves and is very upset when she leaves. When she returns, the child is resistant to being picked up or put down (Powell et al., 2009; Shore & McIntosch, 2011). The child shows no reaction on brief separation from her caregiver and will interact as readily with a stranger as she does with her caregiver. The child ignores her caregiver on return, often busying herself with toys. These

caregivers are constantly rebuffing and rejecting their infants' attention, avoiding physical contact and withdrawing from them when the infant shows any signs of distress. In turn the child will often not seek out a caregiver when in distress. The child's exploration is limited and appears over focused on the relationship and under focused on the environment. The child is fussy and inconsolable and it appears as if the parent is unable to soothe the child (Ainsworth et al., 1978).

3.2.3.4 Disorganised attachment

Main and Solomon (1986) identified a fourth attachment pattern, namely the disorganised-disorientated attachment. Children seek closeness with the stranger instead of the caregiver, indicating behaviour by repetitive or misdirected patterns. They may greet the caregiver when she returns, but will continue what they are doing and often seem confused and afraid. They may freeze and appear disorientated and display fear. For the child, the parent is both the source of security and danger (Main & Hesse, 1990). Disorganised attachment is the irresolvable paradox that occurs when the parent is both the source of the child's fear and the haven for the child's safety. This paradox leaves the child feeling chronically afraid, on the verge of losing emotional and behavioural control and with a diminished capacity to see adults as a resource (Powell et al., 2013). Cooper, Hoffman and Powell (2009, p. 20) illustrate it by stating the following: *I need you but you are frightened or frightening that I have no one to turn to and I don't know what to do.*

Such a child will appear to experience a *collapse of strategy* (Solomon & George, 2011), or the inability of the infant to maintain a strategy for seeking proximity to the caregiver in stressful situations. The caregiver is unable to provide the child with a secure base and haven of safety. Disorganised children develop strategies of desperation that focus their attachment behaviour into either controlling or punitive behaviour that are involved in coercing, attacking or humiliating the parent. The

disorganised child is raised in a context of fear, namely hostile and intrusive, that is frightening or helpless for the child and helpless and withdrawn that leaves the child frightened. Controlling caregiving children might further attempt to entertain direct or reassure the parent (Powell et al., 2009).

Parentified behaviour in the child may be the disorganised child's attempt to reduce stress levels, as she cannot depend on the caregiver as the secure base. The child's reactions may range from being continuously vigilant to being fearful. The child experiences the most distress and displays the most insecure behaviour as opposed to a child in a secure attachment with a caregiver (Solomon & George, 2011).

The caregiver's relationship toward the child can be described as hostile, disruptive, conflict-laden, disengaged or confrontational and in others as constricted and submissive, according to Solomon and George (2011). The child does not view these caregivers as the stronger and wiser person in the room. These caregivers would often describe themselves as struggling and enraged, and failing to control not only the child's, but also their own emotions. They would often shut themselves in their own rooms and they will describe their children as 'wild' and out of control, aggressive or defiant (Solomon & George, 2011).

Physical abuse would lead to disorganised attachment, and emotional unavailability makes it difficult for the child to organise attachment (Stroufe, 2005). Stroufe (2005) went so far as to propose that disorganised attachment might lead to dissociation in later life. Children in domestic violence are caught in a disorganising attachment context, being both afraid of and about their parent/s (McIntosch, 2011).

Solomon and George (2011) and Powell, Cooper, Hoffman and Marvin (2013) describe these caregivers as most likely to receive mental health diagnoses such as major depression and borderline personality disorders. Precursors of disorganized attachment is when there is maltreatment of the child present such as abuse or neglect, substance abuse by the caregivers, frightening behaviour by the caregivers or unresolved loss or trauma by the caregiver (Powell et al., 2013; Solomon & George, 2011).

The child with disorganized attachment is in a constant predicament as an infant; she would have had to flee from her primary caregiver from fear, however at the same time she would flee towards her primary caregiver. Caregivers of disorganized children display alarming and punitive ways in their interaction with the children, arousing strong affect in them without alleviation (Solomon & George, 2011). Developmental outcomes of disorganized attachment in early childhood is increased problems with aggression in school-age children, difficulty calming after stressful events, elevated risk of dissociative symptoms in adolescence, difficulties in emotion regulation, lower reflective function, academic problems, lower self-esteem and rejection by peers (Stroufe et al., 2005; Powell et al., 2013). However, Main et al. (2011) argue that most of the children who have been classified as disorganized attachment have not been maltreated, but that disorganized attachment is often associated with interaction with a parent who is fearsome to the child. Disorganized attachment is indicative of the relationship of that caregiver with the child. Excessive fear present in a child if separations have been poorly monitored, such as separations was not promptly curtailed when the child was highly distressed. In such a situation, disorganized behaviour appeared to be caused by excessive fear induced by the situation and not by the parent (Main et al., 2011). Another explanation may be that these children's mothers or fathers were frightened by their

children's weekly leave-taking and may have unwittingly transmitted those fears to the child, yielding a disorganised outcome (McIntosch, 2011; Main et al., 2011).

Stroufe (2005) and Owen (2011) are working toward the hypothesis between the link between disorganised attachment and personality disorders. Solomon and George (2011) argue that disorganised attachment might lead to a diagnosis of childhood bipolar disorder in children. The cardinal features of depression are displayed in a disorganised attachment, namely alienation and hopelessness on the one hand and anxiety and helplessness on the other hand (Stroufe, 2005).

3.3 PSYCHO-SOCIAL DEVELOPMENT OF THE CHILD: ERIK ERIKSON

During mediation it is important to consider that children have specific and unique needs in the respective developmental stages. Therefore, to gain a comprehensive understanding of the child's needs and developmental stages, Erikson's theory is fundamental to this study.

Erikson (1950) is the proponent of the psychosocial theory of human development. He proposes that personality is influenced by society and develops through a series of resolving developmental challenges. Erikson (1950) modified and extended the Freudian theory by emphasising the influence of society on a person. Marcia and Josselson (2013) contend that Erikson's theory covers the lifespan of a person's development and details of the psychosocial crises at different points of a person's life. Erikson, according to Marcia and Josselson (2013), states that his theory is inherently psychosocial and conceptualises the links between the inner and outer reality. While Sigmund Freud (1856-1939) proposes that early childhood experiences have a permanent effect on a person, Erikson maintains that the development of ego is lifelong and that psychosocial development occurs lifelong over eight stages of development (Louw & Louw, 2010), listed in Table 3.1 below.

Table 3.1: Erikson's eight stages of psychological development (Source: Louw & Louw, 2010, p. 20)

Erikson's eight stages of psychosocial development	Age group	Challenge
Basic trust versus mistrust	Birth to one year	Develop a sense that the world is safe
Autonomy versus shame and doubt	1 to 3 years	Realise that one is an independent person who can make decisions
Initiative versus guilt	3 to 6 years	Develop a willingness to try new things and to handle failure
Industry versus inferiority	6 years to adolescence	Learn basic skills and to work with others
Identity versus identity confusion	Adolescence	Develop a lasting, integrated sense of self
Intimacy versus isolation	Young adulthood	Commit to another in a loving relationship
Generativity versus stagnation	Middle adulthood	Contribute to younger people, through child rearing, child care or other productive work
Integrity versus despair	Later life	View one's life as satisfactory and worth living

Erikson's theory takes the social context into account (Donald, Lazarus & Lolwana, 2010). He proposes that at each stage of his theory a challenge or developmental tension exists between two opposites. Every person has a challenge at a specific stage, and when the experiences are predominantly negative for a person, developmental difficulties may arise (Donald et al., 2010). For example, if adolescents do not meet the challenge of developing an identity, they will not be able to establish intimate relationships as an adult and will become overly dependent on their parents as a source of identity (Louw & Louw, 2010). This developmental challenge has to be resolved satisfactorily for the child to move on to the next stage. Each stage therefore has the potential for progress or regression. The degree of progress and success or lack of resolution the child reaches at every stage has an effect on all the later stages. The successful outcome of every stage is the development of a virtue or strength. The early stages of development provide the foundation for the later stages. When children are able to deal with the obstacles easily, they are better equipped to handle later challenges. The challenges are listed in Table 3.1 (Erikson, 1950; 1963; 1968; 1977; 1982).

The first five stages of Erikson's psychosocial theory are applicable to this study and are discussed in greater detail below.

3.3.1 Trust versus Mistrust (birth to 1 year)

The first stage (birth to 12-18 months) is that of basic trust versus mistrust where the infant develops a sense of whether the world is a good or bad place. (Donald et al., 2010). This stage centers on the parents meeting the infant's basic needs (Marcia & Josselson, 2013). The infant depends on her caregiver for food, sustenance and comfort. If the caregiver is available and exposes the infant to warmth, regularity and affection, the infant's view would be one of trust. Conversely, if the caregiver is unavailable and/or abusive, the infant learns mistrust.

The successful outcome for this stage is the development of hope (Erikson, 1950; 1963; 1968; 1977; 1982). Some infants would experience more of the negative experiences, while others more of the positive experiences. It is of importance how the infant accommodates all the experiences, and if the infant has resolved the challenge, she will enter the second stage with a sense of hope. There are different strengths at every stage and the strength during this stage is trust (Capps, 2007; Donald et al., 2010; Marcia & Josselson, 2013).

3.3.2 Autonomy versus shame (1 to 3 years)

The second stage is autonomy versus shame which takes place from 12 to 18 months until three years. The child begins to explore the surroundings as she gains more control over motor abilities. It is important for the child to develop a sense of balance of independence and self-sufficiency as opposed to shame and doubt. The parents provide the secure base for the child and help to foster autonomy in the child. If the parents demand too much too soon, the child may develop a sense of

shame and doubt about her ability. The successful outcome for this stage is the development of will (Erikson, 1950; 1963; 1968; 1977; 1982).

3.3.3 Initiative versus guilt (3 to 6 years)

Stage 3 of Erikson's (1950) theory is initiative versus guilt that usually takes place between three to six years. The conflict in the child arises from plans that the child wants to carry out and the conscience that the child might have about such plans. Preschool children are able to carry out more ideas and plans, at the same time learning that some of the plans are socially appropriate and some are not. The successful outcome for this stage of development is purpose. According to Marcia and Josselson (2013), the child's work in this stage is play.

3.3.4 Industry versus inferiority (6 years to adolescence)

The fourth stage is the industry versus inferiority stage from six years until puberty (Erikson, 1982). Inferiority develops if the child did not master the challenges in this psychosocial developmental stage. When the child is physically, mentally and emotionally capable, she will be ready to learn the skills of her culture (Marcia & Josselson, 2013). The major determinant of self-esteem is the child's view of her capacity for productive work. Children should learn the skills that are of value in their society, for instance reading, writing and counting. If children feel inadequate in comparison with their peers, they might retreat into the safety of their families. Conversely, if they become too industrious, they might neglect social relationships. The successful outcome for this stage of development is skill (Erikson, 1950; 1963; 1968; 1977; 1982).

3.3.5 Identity versus Identity role confusion (adolescence)

Stage 5 is the identity versus identity role confusion that ranges from puberty until young adulthood, in which adolescents attempt to establish their identity and

develop a sense of self. If they fail to succeed they will experience a confusion of roles (Marcia & Josselson, 2013). Adolescents are especially concerned about how they appear to others. The stage of identity versus role confusion is a unique stage in that it is a synthesis of earlier stages and an anticipation of later ones. Adolescents require freedom to explore and experiment as they are seeking ways of establishing an identity. They need to re-establish boundaries for themselves. Eventually some adolescents achieve a sense of identity regarding who they are and where their lives are headed. The successful outcome for this stage of development is fidelity (Erikson, 1950; 1968; 1982).

3.4 GENERAL SYSTEMS THEORY

In the context of the divorce of parents, a discussion of the General Systems Theory is important as divorce is an event that disrupts the system in which the child used to function. Ludwig von Bertalanffy (1968) proposes that in order to understand phenomena, and in this case the divorce, the individual elements should be considered as well as the interrelationships between these elements. Von Bertalanffy (1968) proposes a system as a set or group of elements with the focus on the system's processes, with General Systems Theory supplying the rules to describe the systems. This is the clearest of the cybernetic revolution (Becvar & Becvar, 2009). Within this theory, every action is seen as a response and every response is seen as an action. General Systems Theory examines the principles in systems and creates models to describe the systems. It can therefore be described as a meta-theory, a theory of theories. Family Systems Theory originated from General Systems Theory and the discipline of cybernetics in the 1940s. The science of cybernetics concerned itself with organisation, pattern and process rather than matter, material and content (Piercy, 2015).

Systems Theory is based on the assumption that all parts in the system are interconnected with each other (Piercy, 2015). L'Abate (2015) indicates that family interactions can be classified according to a scheme where at the bottom of the scheme is the presence or absence of intimacy. Systems Theory therefore focuses on the interactions that occur among members of the system whereby the family is the unit of analysis (Carr, 2013; Karakurt & Silver, 2014).

3.4.1 Family Systems Theory (systemic/cybernetic theory)

George Bateson and the Palo Alto Group developed and refined the Family Systems Theory (Becvar & Becvar, 2009) where the family is viewed as an integral whole or as a system. The life history of a family is a succession of experiments in living. Family Systems Theory is holistic and dialectical, subjective and perceptual, the focus is on the here and now, it is relational, contextual and relativistic and reciprocal causality and patterns are recognised with the emphasis on freedom of choice (L'Abate, 2015). The emphasis is on recursion, reciprocity and shared responsibility instead of linear causality. Clinicians and researchers that work from the family systems approach no longer focus on *why* things happen the way they do, instead, they focus on the *what* and the *how* of the phenomena (Hoffman, 1981), and on the *here-and-now* and experience of events (Tomm, 1984). People exist in a relationship in which the one influences the other and both are the cause and effect of each other's behaviour. To understand the relationship patterns in divorcing adults, the *who* perspective should be holistic with the focus on the processes and context that give meaning to issues and events, rather than on the individuals (Becvar & Becvar, 2009).

The characteristic of the systemic/cybernetic world is theoretical relativity. Individual psychology is not rejected, but is recognised as being intricately connected

to systemic theory. Judgements such as good and bad and right and wrong are rejected, and goodness and badness is only considered relative to the context.

Family Systems Theory underpins this study as divorce is presented as a phenomenon that impact on the child and the family as a whole. A systemic perspective was adopted to gain a better understanding of divorce and the mediation process. Families are considered to be interactive systems where the function of the whole is dependent on the interaction of all the parts (Donald et al., 2010). A discussion of Family Systems Theory and the core ideas relevant to understanding relational and system dynamics is appropriate to underpin the family's, and specifically the child's experiences in the divorce and mediation process (Reay, 2015).

Family Systems Theory was developed through the work of several prominent researchers and therapists working with couples and families (Shepherd, 2014). Marriage and family therapists originated in the late 1950s and 1960s with therapists who rejected the individual-based therapies and psychoanalytic models of the time. They focused on the centrality of the family system (Karakurt & Silver, 2014), the interconnection between people and things and changing problematic communications (Karam, Blow, Sprenkle & Davis, 2015), therefore, all behaviour should be considered within the larger system (Reay, 2015). Changes regarding the manner in which individuals and families were viewed signaled a paradigm shift in the field of psychology. From then on, individuals and individual problems were viewed and understood in the context of relationships and relationship issues between individuals, rather than in isolation (Willis & Walter, 2015).

Throughout recent years, this social constructionism was influenced by a new understanding of discourse, namely the field of family therapy (Karakurt & Silver,

2014). This field has evolved to incorporate not only the above patterns, processes and sequences, but also begun to stress meaning, the centrality of language and the joined construction of understanding between system members as patterns in themselves (Dallos & Stedman, 2006). It is thus implied that all patterns and regularities are understood to be created through language and in turn, this creation is regarded as a pattern or process in itself (Karam, Blow, Sprenkle & Davis, 2015). Accordingly, from a family systems perspective, families and relationships are not only cybernetic systems, they are also systems of meaning, and are therefore interpretative, as well as interactive (Hoffman, 1981).

3.4.1.1 Subsystems

Subsystems are part of the overall system and every subsystem should carry out certain functions within the system as a whole (Dallos & Stedman, 2006). A system functions in certain characteristic ways, and it is continuously in the process of evolution as it seeks new and steady states (Donald et al., 2010). Subsystems are part of the overall system assigned to perform certain functions or processes within the system as a whole. Each system exists as a part of a larger suprasystem, and includes smaller subsystems, of which it is in turn the suprasystem (Donald et al., 2010).

Three subsystems are evident within the family system, namely the spouse subsystem, the parental subsystem and the sibling subsystem, with appropriate boundaries between the different generations (Donald et al., 2010). Families consist of several coexisting subsystems; the husband and the wife dyad make up a subsystem, so do the mother-child; father-child and child-child-dyads. The subsystems can further be formed by generation (mother and father), gender (fathers and sons), interests (intellectual pursuits) or function (parental caregiver) (Nichols & Everett, 1986). The husband and wife dyad is critical within this system, as any

dysfunction in this subsystem will reverberate throughout the family and often children are scapegoated alliances with one parent against the other (Minuchin, 1974). The spousal subsystem teaches the child about male-female intimacy and commitment, by providing a model of marital interaction (Minuchin, 1974).

Certain subsystems in the family system namely the spouse subsystem, the parent subsystem and the sibling subsystem, interact with one another and affect the entire system (Donald et al., 2010), These are discussed below.

(a) Spousal subsystem

Minuchin (1974) originally states that the spousal subsystem is formed when two individuals marry and create a new family. Today this subsystem is defined when two people marry and/or enter into a committed relationship with one another. Becvar and Becvar (2009) argue that one of the processes required for the subsystem is accommodation, which implies a negotiation of rules between the spouses/partners. This negotiation of rules can only be successful if both partners have accomplished a certain degree of independence from their families of origin (Minuchin & Fishman, 1981). Spouses who remain enmeshed with their families of origin will experience difficulty accommodating and negotiating the above rules with one another. This implies that their families of origin failed to provide them with sufficient autonomy to negotiate successfully alternative roles with their new spouses (Munichin & Fishman, 1981).

Some of the roles within this partnership are transitory while others are permanent, and are negotiated at the beginning of the partnership. However, the basis to successful direction is finding a life as a family by negotiation and accommodation, especially concerning rules and roles (Goldenberg & Goldenberg,

2004). Complementary roles imply that certain family functions should be performed so that the family can function effectively (Becvar & Becvar, 2009).

One of the most important tasks of the spousal subsystem is the development of boundaries to protect the partners/spouses (Munichin & Fishman, 1981). These boundaries provide spouses with a space in which to satisfy their psychological needs without the intrusion of in-laws and children. Goldenberg and Goldenberg (2004) argue that the strength of the spousal subsystem is most important in terms of family stability. The husband and wife should learn to accommodate one another's needs and the development of complimentary roles is a vital factor in family stability. The parents should continue to work at strengthening and maintaining their spousal subsystem that is fundamental to the wellbeing of the family (Goldenberg & Goldenberg, 2004).

An important requirement of the spousal subsystem is that the couple is supportive of one another in the development of their respective talents and interests, while additionally retaining their own individuality (Piercy, 2015; L'Abate, 2015). In a healthy and well-functioning spousal system there is co-operation, conciliation and mutual respect for the uniqueness of the other. Munichin and Fishman (1981) argue that the spousal subsystem may provide a supportive place wherein members can deal with the extra-familial world, which may also offer a safe haven from external stresses (Dallos & Stedman, 2006).

(b) Parental subsystem

The parental subsystem or executive subsystem is the second system. The birth of a child transforms the spousal subsystem into a parent subsystem (Munichin & Fishman, 1981). A grandfather, uncle or an aunt may be included in the parental subsystem if they are fulfilling a parental role (Watzlawick, Weekland & Fisch, 1974).

The parental subsystem holds the main responsibility for providing adequate child rearing, nurturing, guidance, limit setting and discipline. Through interacting with their parents, children learn how to deal with authority figures, how to solve problems and they develop the quality to make decisions (Becvar & Becvar, 2009).

(c) Sibling subsystem

The sibling subsystem comprises of the siblings within the family. Munichin and Fishman (1981) describe the sibling subsystem as the child's first peer group. Becvar and Becvar (2009) maintain that a child's sibling relationships are the longest lasting connections the individual makes in her life. Becvar and Becvar (2009, p. 173) describe the sibling subsystem as a *social laboratory* where children can experiment without the concomitant responsibility of being an adult. Sibling subsystems form their own transactional patterns for negotiating, cooperating and competing (Munichin & Fishman, 1981).

(d) Supra systems

Families are part of a larger system such as extended family, the neighbourhood and society as a whole. Families are embedded in their cultural, ethnic, social class and social history. Family systems interact with and are influenced by health care, religious organisations, welfare, schools and the legal system (Munichin & Fishman, 1981; Goldenberg & Goldenberg, 2004). Unfortunately, many families become entangled with larger systems in adverse ways, which in turn will impede growth and the development of the family members (Goldenberg & Goldenberg, 2004).

3.4.2 Elements and processes that characterise family systems

The following elements and processes discussed below characterise human systems, namely boundaries, open and closed systems, communication and information processing, triangulation, relationship patterns, relationship definitions,

relationship roles, relationship rules and closeness and connectedness (Pistole, 1994).

3.4.2.1 Boundaries

Becvar and Becvar (2009) define a boundary as an invisible line that helps to define the individual independence of a subsystem's separate members. Boundaries also exist between subsystems and between systems (Donald et al., 2010) and help to protect the integrity of the system by determining who is the outsider and who remains inside, therefore serving a gatekeeper function. Minuchin (1974) maintains that such divisions need to be well defined to allow subsystem members to perform their tasks without interference whilst simultaneously be open enough to allow contact between subsystem members and others. The permeability of the boundaries is an important issue as well, as the boundaries differ in how easily they allow information to flow to and from the environment (Becvar & Becvar, 2009). When the boundaries are too blurred or too rigid, they induce confusion or inflexibility, thereby increasing the family's risk of instability and ultimate dysfunction (Nichols & Everett, 1986).

3.4.2.2 Open and closed systems

Family systems are never fully open or closed and exist along a continuum, depending on the flexibility or rigidity of the boundaries (Carr, 2013; Karakurt & Silver, 2014). Each spouse brings into the family the heritage of past generations of families. Effective families maintain the system by establishing a balance between openness and closeness and are attuned to the outside world so that appropriate change and adaptation can be achieved (Goldenberg & Goldenberg, 2004).

A couple with marital problems may respond by maintaining closed boundaries in which they refrain from telling their children as well as extended family members and

friends, and may not seek marriage counseling when required (Carr, 2013; Karakurt & Silver, 2014).

Divorce brings about a disruption to the system and the couple's boundaries undergo significant changes in terms of openness and closeness in the post-separation and divorce context. This subsystem shuts down with consequent emotional and physical distance between ex-spouses (Nichols & Everett, 1986). The spousal system loses its functionality and integrity. The co-holders of this system become disengaged, and have to adapt to necessary structural and emotional changes (Carr, 2013).

3.4.2.2 Communication and information processing

Communication and information processing are central to systemic thinking. The following three principles are essential to communication and information processing in a relationship:

- Principle 1: One cannot not behave: In other words, one cannot really ever be said to be doing nothing, even when one says that one is doing nothing, for example sitting still; one is sitting still, which constitutes a behaviour (Watzlawick, Weakland & Fisch, 1974).
- Principle 2: One cannot not communicate: It is impossible *not* to communicate: even when you are saying nothing, you are still communicating (Watzlawick, Weakland & Fisch, 1974).
- Principle 3: The meaning of a given behaviour is not the true meaning of that behaviour, but it is the personal truth for the person giving it that specific meaning: The third principle relates to the fact that a number of different meanings can be attributed to a specific behaviour or message and that no specific attribution or interpretation can be considered more correct or more

real than another as reality is subjective and everyone creates their own meanings and reality. (Watzlawick, Weakland & Fisch, 1974; Becvar & Becvar, 2009).

3.4.2.3 Triangulation elements

Initially the research into communication and interactional patterns and process in families focused on two-person exchanges, namely dyadic interaction. Researchers and therapists soon established that triads or three-person exchanges were also common in pathological as well as in healthy familial interactions. However, as soon as there is chronic stress or anxiety the dyad will be destabilised to such an extent that another party may be triangulated into the relationship in order to diffuse or refocus attention away from the dyad (Becvar & Becvar, 2009). Triangulation comes about when two people in a family dyad bring in a third party in an attempt to alleviate or end the stress between them.

3.4.2.4 Relationship patterns

People have a habitual way of communicating, behaving and relating to one another. These patterns maintain stability in the interactions, which are otherwise characterised by continuous changes over time (Watzlawick et al., 1974).

3.4.2.5 Relationship definitions

Relationship interactional patterns are defined as complementary, symmetrical or parallel. A complementary relationship is defined as where the interaction between two people is characterised by a high frequency of exchanges of opposite kinds of behaviour (Becvar & Becvar, 2009). For example, one partner is cruel and abusive and the other partner is on the receiving end of the abusive behaviour. A symmetrical relationship can be defined as when the interaction between two people is characterised by the same kind of behaviour (Watzlawick et al., 1974).

3.4.2.6 Roles in the family

Traditional roles in families are allocated to positions and traditional functions such as wife, husband, child, mother, father, provider and caregiver (Pistole, 1994). In the context of divorce, traditional roles have to be restructured and reassigned. This results in partners taking on multiple roles, and where there are dysfunctions in the family, role reversal might occur where children may adopt adult/parental roles (Becvar & Becvar, 2009).

3.4.2.7 Rules

The interaction of family members follow organised and established patterns based on the family structure (Watzlawick, Weakland & Fisch, 1974). These patterns enable each person to learn what is permitted or expected of him or her. A family's rules reflect the values and help to set up roles that are consistent with these values (Goldenberg & Goldenberg, 2004). Family rules help to stabilise and regulate family functioning, thereby providing dependability and regularity to the relationship within the family system (Goldenberg & Goldenberg, 2004).

3.4.2.8 Closeness and connectedness

Relational patterns of closeness and connectedness are complex and multi-dimensional (Karakurt & Silver, 2014). The permeability of boundaries can be judged by how easily information is allowed to flow to and from the environment. A pattern of closeness and connectedness is another dimension in which information flow can be judged (Piercy, 2015; L'Abate, 2015).

Difficulty with the closeness-distance regulation is a fundamental source of disagreement in all couple's relationships, and struggles in this regard are frequently a prominent theme in their relationship distress (L'Abate, 2015). A recurring pattern found amongst most couples is that one partner at some point in time may need or

desire greater involvement, intimacy or closeness, whereas the other partner requires disengagement (Pistole, 1994). When a mutually desirable level of closeness-distance has been reached, it will serve as part of the couple's system of parameters, rules and boundaries, and their relationship would achieve stability. This closeness-connectedness struggle is always accompanied by strong emotions (Pistole, 1994).

3.5 WELLBEING OF THE CHILD

In view of the challenges that children have to contend with during the divorce process, the best interests from a psychological perspective necessarily imply that the psycho-social wellbeing of the children involved have to be attended to during the divorce mediation process.

Nelson and Prilleltensky (2011) argue that families are not static entities and that they are continuously changing, which presents both challenges and opportunities. Children are dependent on others to meet their needs, for instance their needs for education, health care, protection and the supply of adequate resources. Nelson and Prilleltensky (2010) advocate a holistic and strengths-based ecological perspective to support families in crisis. Family assessments should be reframed to consider the strengths of the family and potential opportunities that are available to the family. Nelson and Prilleltensky (2010) further argue that it is not only the life event of the divorce that is stressful, but also the aftermath of the event. The adversity of divorce negatively impacts the child's academic competence, self-worth and coping skills and can thus have a negative effect on the child's behaviour.

Negovan (2010) argues that certain dimensions or components of wellbeing are required to evaluate children's positive evaluations of their lives. Wellbeing is a dynamic concept that includes subjective, social and psychological as well as health-

related behaviours. The study of wellbeing is divided into two groups of research, namely the hedonic approach, which conceptualises wellbeing in terms of happiness and the presence of pleasure and the absence of pain, and the eudaimonic approach which views wellbeing in terms of human potential that results in a child's optimal functioning in life (Negovan, 2010).

Evans et al. (2011) argue that the promotion of wellbeing in a family is based on the capabilities of time, participation and ecology. Subjective wellbeing is a child's cognitive and affective evaluations of life, and subjective wellbeing is divided into two components, a cognitive (satisfaction) and an affective (pleasant and low levels of pleasant affect) affect. Cowen (1996), a theorist on wellbeing, goes further to say that wellness can be defined as a secure attachment and the acquisition of age-appropriate competencies in early childhood.

Keyes (2002, 2003, 2004) states that the following aspects are important in a child's life for optimal wellbeing: namely,

- Social integration (wellbeing is the absence of negative conditions and the result of adjustment)
- Social acceptance (trusting others, and having favourable opinions about human nature)
- Social contribution (the feeling of being a vital member of the society)
- Social actualisation (the evaluation of a society member of the society)
- Social coherence (the perception of that the social world is well-organised).

Personal wellbeing does not depend on factors such as exceptional wealth, talent or fame; however, it is difficult to thrive if the child's basic needs are not met. Basic needs for the child include adequate nutrition, shelter and freedom from extreme pain and discomfort (Prilleltensky & Prilleltensky, 2006). A risk to the child's

wellness is the divorce of her parents and moving to an area with a good school is an opportunity for wellness for the child. Unlike adults, children are dependent on adults to meet their needs (Nelson & Prilleltensky, 2010).

Conversely, subjective wellbeing entails being satisfied with the course of one's life. Subjective wellbeing could be measured to elicit an evaluation of the child's life and whether she experiences life as satisfying, enjoyable and rewarding (Prilleltensky & Prilleltensky, 2006). Children who experience subjective wellbeing in their lives have mutually fulfilling relationships, feel a sense of control over many aspects of their lives and find meaning in their lives (Nelson & Prilleltensky, 2010). The importance of subjective wellbeing is that it is *not* about achieving perfection in one's life in relationships, resourcefulness or the working environment or being joyful and optimistic at all times irrespective of circumstances (Prilleltensky & Prilleltensky, 2006).

Psychological awareness is an important factor to promote wellbeing during adversity (Nelson & Prilleltensky, 2010). For example, when a child is grieving for the loss of a family during the divorce, psychological awareness is important to create an understanding of what it takes to promote awareness during this difficult time for the child (Prilleltensky & Prilleltensky, 2006). Unfortunately, and also due to their vulnerability and age group, children tend to be detached from the decision-making processes that directly affects their health and wellbeing. The underlying philosophy is therefore about recovery and validation of strengths, dignity and life-affirming struggles. Prilleltensky and Prilleltensky (2006) propose that instead of viewing the divorce in the child's life as a deficit, professionals should focus on the child's strengths, and on acquaintances, teachers and relatives who can support the child through the trauma of divorce. Focusing on the child's strengths during the parents' divorce provides positive assistance and support for the child and serves as an

affirmation to the child that there is more to her than the divorce (Prilleltensky & Prilleltensky, 2006). Family cohesion protects the child against adversity but secure attachment, effective parenting and family harmony are not easily found. Families are ideal places for emotional wellness; however, many parents lack emotional wellness themselves and are unable to teach it to their children (Prilleltensky & Prilleltensky, 2006).

Strategies to support the child in the divorce process should be holistic, therefore one cannot exclusively concentrate on personal wellbeing, as the infrastructure that enhances wellbeing should also be enhanced. Any strategy that only promotes environmental wellbeing is also limited, as psychological wellbeing is just as relevant for wellbeing. Social support enhances wellness through providing emotional support in times of crisis such as the impact of a divorce on the child. The negative effects of the divorce can be buffered through emotional support (Prilleltensky & Prilleltensky, 2006).

3.5.1 Psychological and subjective wellbeing

Psychological resources for the child include secure attachment, empathy and problem-solving ability (Prilleltensky, Nelson & Peirson, 2001). Negovan (2010) describes wellbeing as a multidimensional construct that includes the subjective, psychological and social dimensions, while Keyes, Shmotkin and Ryff (2002) term subjective wellbeing as an evaluation of life in terms of satisfaction and balance between positive and negative effects.

Psychological wellbeing is the perception of engagement with critical challenges of life, and psychological wellbeing is overall the satisfaction and happiness in life. What is of importance for this research is that children develop and maintain warm

and trusting relationships with others and shape their environment to meet personal needs (Prilleltensky, Nelson & Peirson, 2001; Negovan, 2010).

Nelson and Prilleltensky (2011) further argue that wellbeing is an ideal state, where wellbeing consists of individual components of the individual, relational and collective needs, and the synergy created with the needs combined. Wellbeing attends to the following domains of the individual components, namely the values of self-determination, caring and compassion and health. The objective of personal wellbeing is the creation of opportunities to pursue goals and the expression of care and concern, and the needs achieved are mastery, control, self-efficacy, choice, skills and growth and autonomy, empathy, love, attention, acceptance and positive regard. For children to achieve optimal wellbeing, they have to be in relationships that support them and reside in communities that support these values (Ryff, 1989; Nelson & Prilleltensky, 2010).

Currently professionals who train mediators argue that research is necessary to ensure that children's needs are met during divorce mediation. Schutte (in Duchen & Schutte, 2011) states there is still much research required in the South African context regarding children's psychosocial needs during the divorce process and it is difficult to balance children's needs and their best interests. Strong emotions, attachment and alienation may cloud the professionals' understanding of the best arrangements where children are involved.

Prilleltensky and Prilleltensky (2006) propose that effective parenting, family harmony and the satisfaction of material, physical and psychological needs are essential for the wellbeing of children. One of the primary risk factors of stressful life events that have a negative effect on children's wellbeing is divorce and separation (Prilleltensky, 2005; Prilleltensky & Prilleltensky, 2006; Van Schalkwyk & Wissing,

2010). Prilleltensky and Prilleltensky (2006) state that the child's wellbeing is underpinned by the attachment theory of Bowlby (1988) and Ainsworth et al. (1978), and that this determines the quality of early attachment.

3.6 THE IMPACT OF DIVORCE ON CHILDREN

The devastating effects of divorce on children were mentioned in the introduction to this study. In this section the effect of divorce as indicated in the research literature is presented as part of the conceptual framework for this study.

3.6.1 Children's' responses to divorce

The factors that are closely associated with children's reactions to divorce include age, gender, socio-economic status, relationship with parents before the divorce and the degree to which children are drawn into the conflict, the parents' ability to separate their roles as parents and spouse and the perceived loss of the non-custodial parent (Bojuwoye & Akpan, 2009). According to Louw and Scherrer (2004) and Shekhawat (2013), it is generally accepted that divorce is traumatic and disruptive for children.

Gatins et al. (2013) and Amato and Hohmann-Marriott (2007) argue that the differences found between divorced and intact families are difficult to attribute directly to divorce. With an immense pool of research and sophisticated methodologies, the impact of divorce is researched using factors such as financial strain, relocation, new family structures, difficulty relating to peers, academic or achievement problems, marital conflict, age and gender of children at the time of the divorce as well as parenting practices (Clarke-Stewart et al., 2000; Malone, 2004; VanderValk, Spruijt, De Goede, Maas & Meeus, 2005; Matsafu, 2005; Fallon, 2006; Ge, Natsuaki & Conger, 2006; Lansford et al., 2006; Bing et al., 2009; Kiesling, 2011; Vousoura et al., 2012).

Gatins et al. (2013) approached children and adolescents about their perceptions of the experience of divorce. Gatins et al. (2013) propose that unless the researcher asks direct questions about the divorce experience to children, he would be left with interpreting differences in standardised measures of problematic symptoms between populations of intact and divorced families. Research on the effects of divorce studied over the past two decades is expanding, as divorce is more common, but is fraught with conflicting results regarding children's adjustment after and during the divorce, according to Bing et al. (2009). Moon (2011) states that there is little agreement on the extent of the severity and duration of the problems caused by divorce in children, as there is diversity in children's responses to their parents' divorce. Conflicting findings and misleading conclusions are a result from using different samples and methodologies as well as different data analyses.

Amato (2000) concludes that divorce might vary in the effects it produces, namely the fact that some children will benefit from it, some will temporarily be harmed and others will permanently be damaged. Clarke-Stewart et al. (2000) argue that children are not negatively affected by their parents' divorce per se, but the detrimental effect to children's wellbeing is related to the mother's income, education, ethnicity, childrearing beliefs, depressive symptoms and behaviour. They (Clarke-Stewart et al. 2000, p. 308) conclude in their study that the so-called *divorce effects* could be present and apparent in the children's behaviour even before the divorce and/or separation. They cautioned researchers to investigate whether children's behavioural differences and development precede the marital breakup. Clarke and Steward (2000) contend that many children's behaviour were already present before the divorce.

Wallerstein and Lewis (2004) established in their study that children from divorced families tend to demonstrate a variety of problems in functioning in their

lives. However, Gatins, Kinlaw & Dunlap (2013) argue that the difference found between divorced and intact families are difficult to attribute directly to divorce.

Amato (2000) found in his studies that children from divorced families tend to have lower academic achievement, lower self-esteem, and difficulties with social relationships, more behaviour problems and early school dropout. However, Amato (2000) contends that these studies have not shown a significant difference between and effect on children from divorced families in comparison to children from intact families. It is the conflict between parents after the divorce that affects children's wellbeing negatively and not the divorce per se. Amato (2001) further suggests that the reasons for most of the children's problems after the divorce might have been present before the divorce occurred.

Research was conducted from the various fields of the effects of divorce on the child, namely the field of psychology (Schick, 2002; Amato, 2001; Mandemakers & Kalmijn, 2014), sociology (Amato & DeBoer, 2001; Cheadle, Amato & Kind, 2011), human ecology (Jacquet & Surra, 2001), law (Schäfer, 2011) and economics (Duncan & Hoffman, 1985). According to Woods (2008), communication researchers have largely overlooked the effects of divorce on children. This excludes the studies of Afifi, Huber and Ohs (2006) and that of Schrodt, Baxter, McBride and Braithwaite (2006) in which the communicative processes among co-parenting stepfamilies concerning the legal components and rulings of divorce were analysed.

Wallerstein and Blakeslee (2004) report that children pay the price of their parents' divorce for years to come in psychological and economic ways. It is a long-lasting effect from which children cannot recover. Gatins, Kinlaw and Dunlap (2013) argue that initial reports of the effects of divorce on children made multiple comparisons on multiple measures namely, academic achievement, conduct

problems, substance abuse, social and emotional adjustment and parental relationships of children from divorced families and children from intact families. Hanson (1999) contends that the divorce transition alone brings about numerous changes that have deleterious consequences for children. Divorce is usually associated with loss of income, moving of homes, new friends in new schools and reduced contact with resident parents.

3.6.2 Negative and traumatic effects of divorce in children

Kane, Spizman, Rodgers and Gaskins (2010) brought a different perspective and view their study from the perspective of a forensic economist to the perceived loss of income, guidance and loss of services a child experiences when her parents divorce. A child, according to a forensic economist, who loses a parent through divorce, death or abandonment, will have a negative impact on educational attainment and the child's future earnings as well. Children who grow up in intact families have better educational outcomes and therefore better prospects for careers and future earnings. Their evidence indicated that the absence of a role model of the same gender reduces expected educational attainment and lifetime earnings (Kane et al., 2013).

Pruett, Ebling and Insabella (2004) argue that the mental stability of the custodial parent determines how and to what extent a child is affected by her parents' divorce. According to Vousoura, Verdeli, Warner, Wickramaratne and Baily (2012) – with more than 30 years of research on the effects of divorce on children and their development – studies reported a link between parental divorce and depression, reduced educational attainment for children, early assumption of high risk behaviours such as early sexual activity and early marriage and cohabitation, and an increased risk for suicide attempts.

According to Oppawsky (2000) and Uphold-Carrier and Utz (2012), children from divorced homes are more likely to experience and develop health problems, poorer mental health and exhibit poorer academic performance, as well as delayed psychological development and strained relationships with family members. The care arrangements also disrupt a younger child's social network and education when moving between two parental homes, leading to a decreased educational attainment. Older children have established social networks, and might therefore not be so negatively affected by moving between two homes (Uphold-Carrier & Utz, 2012).

Another negative consequence of divorce is the lasting effect on familial relationships after a divorce in the family. Parent-child and sibling relationships include higher levels of conflict and lower levels of contact. This conflict in the family often persists beyond the transition period leading to long-term detriments in the contact between family members. Poorer family relationships might also be associated with lower levels of wellbeing in children (Uphold-Carrier & Utz, 2012).

The absence of healthy communication in the family creates a process that children also find it difficult to express their feelings. According to Shifflett and Cummings (1999), inter-parental conflict is linked to children's adjustment problems and emotional wellbeing, whether they are in intact or divorced families. Inter-parental conflict does not necessarily subside with the granting of the divorce, and can consequently often escalate, with a consequent negative effect on the children's post-divorce adjustment. Arnett and Tanner (2006) indicate that care should be taken when studying the adolescent's reactions to divorce, as young adulthood is associated with current and future mental health problems as well as possible physical health difficulties, criminal behaviour and antisocial personality disorders that are unrelated to their parents' divorce.

However, despite the aforementioned, Shifflett and Cummings (1999) argue that the distressing nature of divorce and the associated conflict, notwithstanding, care should be taken not to emphasise the negative effects of divorce on children. If the parents succeed in co-parenting effectively and have constructive conflict management strategies in place, the children should have minimal (if any) lasting negative effects.

According to Wolchik et al. (2013), certain limitations to the aforementioned studies have not been considered. They argue that none of the above studies examined programme effects on measures of onset and incidence of mental health or substance-related disorders subsequent to participation in interventions. Neither have these studies considered and examined the impact of prevention programmes in childhood, nor measured the effects of said prevention programmes.

Hetherington and Kelly (2002) listed the following risk factors that have a negative effect on children's wellbeing:

- Continuing conflict between the parents is the greatest predictor of poor outcomes for children. Parents frequently have scant regard of the negative consequences and effect on their children when they continue their non-ending war in front of the children. The worst experiences for children is when they have to carry negative messages between the parents or are encouraged to think poorly of the other parent.
- Mothers in high-conflict divorces tend to be less warm and are often harsher in discipline, while the fathers in these families are often withdrawn. As a consequence both parents would display diminished or incompetent parenting.

- An economic decline often means changes in location, school and activities and loss of peer support groups. These factors add confusion in an already difficult adjustment.
- Remarriage and re-partnering: Serial attachment and losses by the parents have negative effects on children and can hinder intimate relationships as the child grows into adulthood.

According to Jolivet (2011), parents are often advised by their respective lawyers to cease communication and cooperation efforts and focus on their own needs rather than the children's needs. Researchers have indicated five potential sources of stress for children during litigation over the children, namely, parents who engage children in the conflict, parent-child role reversals, living in a situation where the parent and child have little control over legal events, confusion over the parents' changed view of reality, and disillusionment over the child's family and values. These findings are difficult to interpret, as the effect of divorce might not be of a permanent nature on children. Vèlez, Wolchik, Tein and Sandler (2011) contend that psychological stressors such as the above constitute an increased risk for children's mental health problems, such as a divorce in the family.

Research has consistently shown that divorce has a traumatic effect on children. In a study conducted by Amato and Anthony (2014), children from divorced families score consistently lower on a variety of measures of achievement, adjustment and wellbeing than those results from children from intact families. However, Amato and Anthony (2014) question whether these differences are due to the causal effects of divorce or to unobserved variables that increased the risk of divorce. They propose that any existing problems the children may have had before the divorce was initiated, should also be taken into consideration (McLanahan, Tach & Schreider, 2013).

3.6.3 Possible explanations for the negative outcomes of divorce on children

Amato (2001) proposes three theories to explain the connection between parental divorce and negative outcomes for children, namely the marital disruption theory, the reduced resources theory and the parental conflict theory.

3.6.3.1 Marital disruption theory

Sun and Li (2002) argue that disruption caused by divorce affects the children negatively before and after the divorce. According to Sun and Li's (2002) research, divorce disrupts parenting as mothers are more depressed and fathers are less involved. Impaired parenting is responsible for much of the negative effects on children's wellbeing after the divorce. Mothers often rely on daughters for their disclosures in terms of the ex-husband and lack of finances causing significant distress among daughters. Sons are also often relied upon to fulfill the absent father's role in the home (Amato, 2000; Brenner and Hyde, 2006; McLanahan, Tach & Schreider, 2013).

3.6.3.2 Parental conflict theory

Although there is no consensus among researchers about how children are affected by divorce, most agree that divorce has a negative effect on the child's wellbeing, according to Woods (2008). Bing, Nelson III and Wesolowski (2009) state that the family conflict theory spurred much of the interests in the effects of divorce on the child's wellbeing. The theory states that inter parental hostility create a negative and conflicted home environment to the detriment of the child. Children experience feelings of unhappiness, stress and feelings of being unsafe as a direct result of the hostility and conflict of their parents. The theory indicates that the stress and unhappiness will decrease as time passes after the divorce. If the hostility

persists after the divorce, negative adjustment will not only continue but could possibly worsen.

3.6.3.3 Reduced resources theory

Amato (2000) summarises earlier studies conducted, namely that adults and children from divorced families score lower in indicators of wellbeing than those from intact families. The evidence is strong that divorce has a definite negative impact on wellbeing. Extensive research has provided adequate knowledge about the mechanisms that affect parents and children during divorce, such as discord between former spouses, loss of emotional support, economic hardship and an increase in the number of other life events such as moving and new schools for children. Some adults and children adjust relatively quickly to divorce (supporting the crisis model) while others fail to adjust to the divorce and exhibit long-term deficits (chronic strain model).

In a ground-breaking study, Amato and Keith (1991, p. 40) argue that researchers search for the effects of divorce in the *wrong place*, where the problems perceived by children in their childhood may be associated with decrements in psychological wellbeing in adulthood.

3.6.3.4 Child fixed-effects regression models

Amato and Anthony (2014) contend that when parents select into divorce, the same factors that lead them to this decision may also affect the children, therefore there are spurious associations between divorce and the child outcomes. Child fixed-effects regression models provide reasonable evidence to view the effects of divorce on children. In a child fixed-affects model, every child serves as her own control. These models control factors such as race, ethnicity, parents' social class prior to separation, parents' and children's stable personality traits and genetic factors in

estimating the effects of divorce. Therefore, the advantage of these models is that the time-invariant selection factors can be controlled, including those factors that are impossible to observe and fixed models adjust for unobserved heterogeneity (Amato & Anthony, 2014). Children from divorced families scored lower on a variety of measures of achievement, adjustment and wellbeing. Child fixed-effects regression models provide reasonably strong evidence to make the decision whether divorce has causal effects on children (Amato & Anthony, 2014).

Amato and Anthony (2014) examined children's pre- and post-divorce change scores in relation to the standard error of measurement to determine the percentage of children who improved or declined after the divorce. They considered the possibility that children's reactions to divorce are related to the parents' propensity to dissolve their marriages. They tried to establish whether divorce is followed by a further increase in children's problems and found that many of the negative outcomes attributed to divorce in children might be due to troubled family relationships and ineffective parenting in intact relationships (Amato & Anthony, 2014). These troubled family relationships and ineffective parenting may precede marital disruption and the question is whether the subsequent divorce may lead to a further increase in the children's problems. Parental death is included in the study due to the fact that the authors (Amato & Keith, 1991) experienced in their research that most children are unaware that their parents' are getting a divorce and death and divorce has ultimately the same outcome, namely, a shift from a two-parent household to a single-parent household.

Amato and Anthony' study (2014), based on the child fixed-effects model, found declines in children's achievement and adjustment, however, the average effects are modest. Divorce was associated with a decline in reading scores, mathematical scores, interpersonal skills, self-control, positive approach and an increase in

internalising problems and externalising problems. They established in their research that divorce is most harmful when parents have a high propensity to divorce. In other cases, problems arise at the time of separation and stabilise at a high level or increase further in subsequent years.

Uphold-Carrier and Utz (2012) claim that research focuses on both long- and short-term consequences of divorce, where short-term consequences are often referred to as a crisis model and long-term consequences documented as the chronic strain model. More importantly, Huurre, Junkkari & Aro (2006) emphasise that divorce is not a single event but a continuous process that changes the family relationships. Therefore, other factors such as the probability and possibility of divorce in a family as an indicator of other problems prevalent in these families should be considered.

3.6.4 The effects of parents' roles on the child after divorce

Amato (2000) avers that especially daughters reported a closer relationship with their mothers after the divorce and sons often became the mother's 'little right hand man'. Brenner and Hyde (2006) conducted a study in which they researched the mother-and-child interaction through a positive lens after the divorce. The divorce-stress-adjustment perspective as described by Amato (2000), views divorce as many researchers do, namely as a stressful and negative experience which in turn increase the risk of negative emotional, behavioural and health outcomes for adults and children.

Brenner and Hyde (2006), claim that it is possible to examine divorce in a more positive light. They propose that it could be possible that the worse the marriage, the better the outcome for mother and child relationships could be after the divorce. Brenner and Hyde (2006) examine the possibility that mothers and children are able

to benefit from the divorce, even though they admit that most research claims that the mother and child relationships are weakened by divorce. Conversely, Wallerstein, Lewis and Rosenthal (2013) established that most of the mothers in her study failed to recover and relied on their adolescent children to support and nurture them, leaving the adolescents overwhelmed and overburdened. Brenner and Hyde (2006) disagreed, stating that there were no significant differences between mother and child relationships in divorced families than in intact families of mothers and children.

Unfortunately, as Cooney (1994) reports, daughters often display extreme empathy towards their mothers after the divorce and the relationship that suffers the most after the divorce is the relationship between the non-resident parent and the child. Cooney (1994) avers that there is an alignment with the mother, where the mother is viewed as all 'good' and the non-resident parent, the father, is viewed as all 'bad.' The child is polarised between the two parents. Adolescents often choose sides after the divorce leading to diminished contact with the non-resident parent and a strained relationship with that parent (Garber, 2014).

Divorce almost always leads to a lower socio-economic status for the family and primarily for single mothers (Wauterickx, Gouwy & Bracke, 2006). Mothers often have to work longer hours, and therefore spend less time with their children. This in turn leads to a parent that is less available and less supportive, and affects the educational opportunities for these children (Wauterickx, Gouwy & Bracke, 2006).

Parents are faced with an enormous task after divorce – they have to build a new life including new routines with extremely anxious children and according to Wallerstein, Lewis and Rosenthal (2013, p.167), *they include the wrenching separation of their personal lives...* The emotional support and scaffolding that was present in the marriage and available for the children often disappears after the

divorce according to Wallerstein et al. (2013). Regarding shared residency, where the parents failed to resolve their hostility and animosity towards one another, the children remained close to both parents, but 40% of these children suffered from psychological symptoms (Amato & Anthony, 2014).

Thompson, Alonza, Grant and Hasin (2013, p. 295) caution that the likelihood of alcohol dependence doubles in children when either or both parents have problems with alcohol abuse. *Divorce and history of alcohol abuse problems for both parents tripled the likelihood.*

Mencarini, Meroni and Pronzato (2012) state that the quality and quantity with the child's contact with the non-resident parent is usually reduced and the child can also be forced to live in a stepfamily. Young adults who live with a single parent are more likely to leave home later than children who reside in a stepfamily, although children from single parent families and stepfamilies leave home earlier than children from intact families.

Bulduc, Caron and Logue (2007) report that many college students in their research reported that they had experienced some difficulties in their intimate relationships after their parents' divorce. According to Amato (2001) and Crary (2003), divorce among couples who have been married for approximately 25 years are increasingly common. Bulduc et al. (2007) conducted a limited study among college students, as they are the ones affected when their parents divorce after approximately 25 years. Bulduc et al. (2007) report that many college students in their research had experienced some difficulties in their intimate relationships after their parents' divorce.

Washington and Hans (2013) contend that residential stability, conflict between the parents and time with the non-residential parent improved the predictive ability of attachment anxiety among the children from divorced families. Washington and Hans' (2013) study was based on attachment theory, and they researched the romantic attachment of adults from divorced homes where residential instability was present. Links were found between the attachment and adjustment to divorce in childhood. Children need to spend time with both parents after the divorce, as they established that early life experiences impact attachment throughout the child's life (Washington & Hans, 2013).

Amato, Kane and James (2011) argue that the quality of the family relationship after the divorce is important to children's wellbeing. The children's adjustment is facilitated when parents are part of their children's lives and co-parent effectively. Children benefit when they have supportive relationships with both parents post-divorce (Havermans, Boterman & Matthijs, 2014).

3.6.5 Behavioural, emotional, social and scholastic problems

Children would often manifest certain behavioural, emotional, social and scholastic problems after divorce and it is widely accepted that there is a negative association between divorce and children's wellbeing. Studies from Uphold-Carrier and Utz (2012), Wolfinger, Kowaleski-Jones and Smith (2003) and Feinberg, Damon, Roettger, Solmeyer and Holstelter (2014), emphasise the lower academic performance in many children after their parents' divorce. Weaver and Schofield (2014) and Havermans, Boterman and Matthijs (2014) support this view and add that many of such children experience difficulty in functioning, including behaviour problems and a decline in academics. Furthermore, these authors conclude in their research study that children's behaviour and psychological problems persist for many years (Weaver & Schofield, 2014).

Albertini and Garriga (2011) conducted a study on the long-term effects of divorce on children and confirmed Weaver and Schofield's (2014) findings that children's problems persist for many years. Kim (2011) argues that children with divorced parents are disadvantaged only in areas such as dropping out of school but also in their general wellbeing. Research has also indicated that even with a diminished social stigma to divorce, the negative consequences for children have not diminished (Kim, 2011). However, Kim (2011) also emphasises that the effects of divorce is a complex issue, and questions the traditional hypothesis of homogenous negative outcomes.

Hanson (1999) contends that the divorce transition alone brings about numerous changes with deleterious consequences for children. Divorce is usually associated with loss of income, moving homes, new friends in new schools and reduced contact with resident parents. Weaver and Schofield (2014) state that many of the children experience difficulties in functioning, including behaviour problems and a decline in academics. They conclude that children's behaviour and psychological problems persist for many years (Weaver & Schofield, 2014).

Clarke-Stewart, McCartney, Vandell, Owen and Booth (2000) indicate in their research that many children from divorced families have negative associations between divorce and children's school achievements, self-esteem and psychological adjustment. Such children would show more behaviour problems, more social difficulties, more psychological distress and poorer academic performance. Adolescents from divorced families are more likely to engage in delinquent behaviour and experiment with sex at a younger age than their peers as well as experiencing emotional distress and academic difficulties (Clarke-Stewart et al., 2000).

Wallerstein et al. (2013) completed a 25-year long longitudinal study of mother-child relationships in a non-litigating population from 1971 to 2000. They established that over half of the mothers were less available and those with two or more minor children, were even less available and responsive to them. These mothers focused on gaining economic independence while some pursued intimate relationships. A collapse of maternal parenting occurred with those mothers who were diagnosed with psychiatric problems during their marriage. Often these mothers lost access to psychologists and psychiatrists after the divorce due to lack of financial resources, leaving most of the adolescents to care for these mothers. The mother-child attachment suffered due to diminished parenting, according to Wallerstein et al. (2013). Due to the diminished parenting and total collapse in some cases of maternal parenting, many adolescents engaged in delinquent behaviour and truancy after their parents' divorce. Wallerstein et al. (2013) claim that a decline is evident in the amount and quality of parenting care after the divorce for a period of two years, and this continues in cases of high levels of conflict.

Van Gils, Janssens and Rosmalen (2014) claim that functional somatic symptoms are common amongst adolescents and children (psychical symptoms that cannot be explained by organic pathology). Most commonly, functional somatic symptoms manifest in unexplained abdominal pain, headache and musculoskeletal pains. Girls are more vulnerable than boys and more prone to manifest in functional somatic symptoms. After a family disruption such as a divorce there might be an increase in functional somatic symptoms as well as anxiety and depression in adolescent boys and girls. Functional somatic symptoms are associated with stress-sensitive temperaments, adverse life events, altered physiological response to stressors and inadequate coping. The results of their study indicated a correlation between family disruption such as a divorce and functional somatic symptoms increase during adolescence (Van Gils et al., 2014).

Parents and children have to contend with a different set of stressors at every stage of the divorce. Hostile interactions between parents range from explosive to brittle and emotionally detached. Post-divorce stressors might include a drop in the socio-economic standard, a move to a new home and to a new school. Greater parenting demands are placed on the resident parent, with consequent increased strain on an already vulnerable family. It is through this process of dysfunctional family relationships that the child's wellbeing and mental health is negatively affected (Strohschein, 2012).

Children with divorced parents often suffer from sleep disorders, confusion, aggressiveness, behavioural problems, academic problems, resentment and fear of abandonment (Guinart & Grau, 2014). Compelling evidence demonstrates the effects of divorce on children's wellbeing, namely an increased risk for children and adolescents for multiple problems including mental health disorders and problems, elevations in substance use, early onset of sexual activity and physical health problems (Amato, 2001; Troxel & Matthews, 2004). For a sizeable group, these problems persist into adulthood (Afifi, Boman, Fleischer & Sareen, 2009).

According to Mencarini et al. (2012), there is a growing trend amongst young people who will have different life-course patterns. Therefore, there might be huge variations at what age these adult children leave home after the divorce of their parents during childhood or adolescence. The main result of studies in Europe and North America is that children who have experienced parental separation and/or divorce leave the home much earlier than children from intact families.

Children of separated families leave school earlier and complete fewer years of school in comparison with children from intact families, they have different attitudes towards sexuality, divorce and family formation and are subject to weaker parental

control over their behaviour (Amato & DeBoer, 2001). They start sexual activity earlier and have children at younger ages and they are more likely to have disruptions in their own marriages and suffer from long-term depression (O'Connor, Thorpe, Dunne & Golding, 2003).

Robbers et al. (2012) established in their study that the genetic and environmental influences on internalising and externalising problems were different for children from divorced families than from those in intact families. Robbers et al. (2012) assessed pre- as well as post-divorce problems in children. They concluded that more research is required to define which specific environmental factors are relevant in explaining the effects of divorce in children's problem behaviours.

Wallerstein and Lewis (2004) argue that children from divorced families are more likely to divorce as adults, and found that the children from divorced studies reported that they do not want to get married in the fear of getting a divorce, indicating a fear of commitment and relationships. The adolescents admitted that they felt unprepared for marriage and relationships.

Portnoy (2008) states that the long-term effects of divorce on children are far-reaching, while Amato (2001) suggests significant damage in the short-term in children of divorce. However, a close examination of findings shows a gradual recovery in the long term. Portnoy (2008) focuses on the contradictory findings and the lack of agreement on the effects of divorce on children, and argues that the difference in methodology is responsible for the different outcomes. Personal investigator beliefs are also responsible for the disagreement on the effects of divorce on children.

Studies that rely on interviews find more psychological and emotional stress than studies using objective and standardised measures. *They surmise that clinicians label difficult feelings, memories, and events as psychological disorder, while academic researchers' instruments may fail to pick up subtle effects* (Portnoy, 2008 p. 127).

Amato's (2000, 2001) research indicates that there is agreement among studies that children of divorce experience psychological and emotional difficulties after the divorce, and those effects may continue into adulthood. Amato (2000, 2001) indicates that the long-term effects are not as pervasive or as profound as Wallerstein and Lewis (2004) indicated, but it poses a risk factor for psychological problems during childhood and into adulthood.

Amato (2000, 2001) and Portnoy (2008) point to the different outcomes in the research on the effects of divorce on children. However, even if the results differ and the methodologies differ, the outcome is that the children experience emotional and psychological difficulties after their parents' divorce.

Conflict in the divorce may result in long-lasting effects on children. Bing et al. (2009), Jolivet (2011) and Vousoura et al. (2012) concur that when children witness high levels of parental hostility and conflict, they could present symptoms such as conduct disorders, antisocial behaviours, difficulty relating to peers, difficulty with authority figures, depression, anxiety disorders, substance dependence, disruptive behaviour problems, somatic symptoms, attention and cognitive problems, impaired psycho-social functioning, impaired emotion regulation strategies, difficult temperament, insecure attachment, as well as academic and achievement problems. Anxiety, depression, aggression, delinquency and defiance towards authority figures are common among these children. Despite the intent of mediation to resolve the

conflict between parents without turning to the court, the literature does not suggest that these parents and children have less psychological problems.

(Oppawsky, 2000) indicates that children who experience high levels of conflict will have difficulty adjusting after the divorce. Factors that identify a high-conflict divorce are the involvement of child welfare agencies in the dispute, ongoing litigation and a frequent change of lawyers (Jolivet, 2011).

Effects of chronic conflict on children lead to feelings of stress, insecurity, self-blame, guilt, helplessness, fears for their own physical safety, and feelings of rejection, neglect and unresponsiveness (Oppawsky, 2000). High-conflict families double the risk of behavioural and adjustment problems among children (Jolivet, 2011).

3.6.5.1 Mental health problems in children

Vousoura et al. (2012) argue that with more than 30 years of research on the effects of divorce on children and their development, studies have reported a link between parental divorce and depression, reduced educational attainment for children, early assumption of high risk behaviours such as early sexual activity and early marriage and cohabitation, and an increased risk for suicide attempts. Uphold-Carrier and Utz (2012) state that children from divorced homes are more likely to experience and develop health problems and poorer mental health problems, and exhibit poorer academic performance as well as delayed psychological development and strained relationships with other family members.

Care arrangements also disrupt a younger child's social network and education when moving between two parental homes, leading to a decreased educational attainment. Older children have established social networks, and might therefore not

be so negatively affected by moving between two homes (Uphold-Carrier and Utz, 2012). Uphold-Carrier and Utz (2012) state that divorce has long-lasting effects on the child's mental health and family solidarity. Vousoura et al. (2012) argue that there is an increased risk of suicide attempts among adolescents after their parents' divorce and significant higher risk of depression.

According to Clarke-Stewart, McCartney, Vandell, Owen and Booth (2000), research shows that divorce is detrimental to the wellbeing of very young children. These children (pre-school children) were more emotionally disturbed than older children (school-going children). Children whose parents divorced before the age of six years exhibited more behavioural disturbances than children whose parents divorced when they were older. These children were more anxious than their peers with intact families. Clarke-Stewart et al. (2000) argue that it is important to take into account the children's age in the specific study as well as the time the parents separated. In the study of Amato (2000), the conclusion was that older children were less affected than younger children by their parents' divorce and separation.

Schore (2011), McIntosh (2011) and Clements, Randall, Martin and Kane (2014) state that the high-conflict environment has a negative effect on the child's brain development. The negative emotion does not only move from parent to parent, but the child is also affected. The infant's right brain detects negative emotions, making the infant vulnerable in these conflict-laden situations. Further research also shows that intense stress interferes with parenting infants. This stress can lead to relational withdrawal and psychopathology in later life. Schore and McIntosch (2011) argue that massive increases in stress hormones in the infant's brain have a detrimental and negative effect on brain development. Clements et al. (2014) suggest that parental conflict during and after divorce is associated with child adjustment problems.

According to Strohschein's (2012) research, results showed significantly worse mental health problems among children from divorced families. Divorce is a process that commences when one parent leaves the household and creates ripples that continue far into the future (Strohschein, 2012).

Reed (2014) contends that children often feel rejected and face a greater risk for depression, which can lead to anxiety, low self-esteem and an increased dependency on others. The parents' decisions have a negative influence on the children during and after the divorce. The instability in the family life, inter parental conflict and ineffective parenting can lead to children feeling overburdened and overwhelmed.

Amato and Keith (1991) conducted a study of parental divorce and the wellbeing of children and examined 92 different studies to determine if the wellbeing of children is a function of whether the family is divorced or intact, comparing the differences in results from children of intact families and children from divorced families. In this ground-breaking study Amato and Keith (1991) confirmed the direct relation between the experience of a divorce for children and the growing symptoms of depression. The child's wellness correlates directly to the family's current state, whether the family is divorced or intact.

The study attempted to assess which three of theoretical perspectives best explained the findings of the meta-analysis, namely the parental absence perspective, the economic disadvantage perspective and the family conflict perspective. The measures of wellbeing were divided in the categories of academic achievement, psychological adjustment, conduct problems, self-concept, social adjustment, mother-child relationships and father-child relationships. Amato and Keith (1991) established that children from divorced homes have lower levels of

wellbeing than children from intact families. Wauterickx et al. (2006) indicate that there is a link between children who experience divorce in their childhood and depression. Amato and Keith (1991), Wauterickx et al. (2006) and Ballard, Holtzworth-Munroe, Applegate, D'Onofrio and Bates (2013) report that adults with divorced parents report a lower level of wellbeing, are depressed, have more emotional problems and are less satisfied with family related aspects.

Vousoura et al. (2012) argue that depression is prevalent amongst children from divorced parents; moreover, parental depression may compound this effect. Vousoura et al. (2012) further established in their research that the familial risk for depression is a higher risk in children than the effects of divorce alone on the child. Furthermore, divorce had a significant effect on children among high-risk grandchildren, namely those grandchildren with a depressed grandparent and non-depressed parents. This group showed a threefold risk for anxiety disorders. Therefore, the risk of familial depression overshadows the effects of parental divorce on children's psychopathology. Research on marital relationships indicated depression as a result of marital discord, therefore the effects of divorce on children might not be the direct result of the divorce as such (Vousoura et al., 2012).

3.6.5.2 Mental health problems in caregivers

Many disgruntled caregivers present an evaluator with allegations of unstable behaviour by the other caregiver (Deutsch & Clyman, 2016). These allegations range from their former spouse has been diagnosed as 'borderline' or a caregiver has read up on the Internet on 'psychopaths' and she firmly believes her former spouse has an antisocial personality disorder (Deutsch & Clyman, 2016). Children with personality-disordered parents are more likely to have emotional and behavioural problems and may suffer from disruptive behaviours, however, it is not clear how much a child's

emotional and behavioural outcome will be affected by such a caregiver (Deutsch & Clyman, 2016).

The *Diagnostic and Statistical Manual of Mental Disorders*, 5th edition, (2015) describes many mental illnesses, including depressive disorders, psychotic disorders, substance-related disorders, eating disorders and personality disorders (Dane & Rosen, 2016). These terms describe among others a diagnosable or clinically recognisable set of symptoms or behaviours that interfere with social, academic or occupational functioning (Dane & Rosen, 2016). The court system should be more concerned with the behaviour of caregivers and their treatment, than the name of the illness. It is the court's responsibility to assess whether that mental illness interferes with the caregiver's ability to parent (Dane & Rosen, 2016). The existence of a mental health illness does not in itself warrant a denial of care by the caregiver (Kearney & Trull, 2012). But, as Van Brunt, Zedginidze and Light (2016) argue, parents with a mental illness are quite vulnerable to losing care of their children.

Caregivers with eating disorders may limit the child's food intake while those with post traumatic stress disorder may be overly reactive to loud noises and have exaggerated startle reflexes (Van Brunt et al., 2016). A caregiver with a serious anxiety disorder may not want to leave the house or could become incapacitated during a panic attack, consequently inhibiting her ability to care of a very young child (Dane & Rosen, 2016). Friedman and Michels (2013) assert that caregivers with schizophrenia, bipolar disorder, substance abuse and dependence might present some challenges during parenting (Rihmer, Gonda, Rihmer & Fountoulakis, 2010; Friedman & Michels, 2013; Van Brunt et al., 2016). A caregiver with major depressive disorder is a potential risk as such a person may not be able to keep the

house clean or provide food to the children, or provide adequate supervision (Friedman & Michels, 2013; Van Brunt et al., 2016).

Conversely, many caregivers with such disorders receive proper treatment and care which allows them to be *exceptional* parents (Van Brunt et al., p. 25, 2016). A case in point is that of *P v P* (2007) 5 SA 94 SCA. Barrie (2011) argues that this case is unusual in that recommendations made by the family advocate, a psychiatrist, a social worker, a family counselor and two clinical psychologists that residency (care) be awarded to the father, Judge Chetty J awarded residency (care) to the father. However, Judge Chetty J refused the mother's appeal for leave to appeal, but the Supreme Court of Appeal granted her leave to appeal. The judges argued that the process of determining the child's best interests entailed that the court make a value judgement. The court did not seek the perfect parent, but aimed to find the least detrimental available alternative for safeguarding the child's growth and development. The Supreme Court of Appeal dismissed the appeal on the ground that the mother's parenting ability was not impacted by her depression and personality disorders, therefore it would be in the best interests of the children to continue to be in her care.

It is important to acknowledge that caregivers with lowered resistance to stress are able to manage a household and children with adequate support to keep their stress better managed (Van Brunt et al., 2016). Many caregivers with mental illness are familiar with stress and have extensive resources and adequate support that they access when in a state of heightened stress (Van Brunt et al., 2016).

According to Eddy (2009), the most common personality disorders in adults during high conflict and high levels of litigation include narcissistic personality

disorder, histrionic personality disorder, borderline personality disorder and antisocial personality disorder (Boyan & Termini, 2005; Kearney & Trull, 2012).

Eddy (2008) claims that parents with a narcissistic personality disorder are present in a large number of high-conflict divorces. They are high risk-takers and disdainful of others and believe they will achieve success in litigation. They are also generally oblivious of the consequences of their actions. Although they consider themselves to have a high self-esteem, they are triggered by anything that triggers their self-image (Eddy, 2008). Boyan & Termini (2005) aver that it is not unusual to find at least one narcissistic parent in a high-conflict family where this parent is unable to empathise with the other parent.

Boyan and Termini (2005) argue that most individuals suffering from borderline personality disorder engage in a distortion campaign due to their feelings of abandonment and anger. Loss evokes powerful feelings of anxiety, sadness, and fear of being abandoned (Johnston & Roseby, 1997). By arguing and fighting and maintaining the level of conflict, they are able to maintain contact with their partner. Boyan and Termini (2005) argue that these individuals have a fragile self-esteem and demonstrate a self-righteous air of angry superiority and entitlement and accuse their former spouses of being psychologically and morally inferior.

Such behaviours are a desperate effort to relieve their pain by whatever means they have at their disposal (Boyan & Termini, 2005). According to Boyan and Termini (2005), the mediator in the divorce process would most often encounter parents with borderline personality disorder in mediation. This parent exhibits patterns of behaviour to avoid real or imagined abandonment. Their moods would escalate between childlike and charming to full-blown rages when they are unable to get what they want. They are over critical, hostile, dramatic and blaming. Borderline

personality disordered people are linked to high conflict and divorces (Henig, 2013; Boyan & Termini, 2005).

Eddy (2010) maintains that individuals with antisocial personality disorder can be the most dangerous and uncaring. They can be highly manipulative and they often convince others to believe that they are the victims, when in fact they are the perpetrators of bad behaviour. Eddy (2010) argues that they view people as either powerful or as pushovers, who deserve what they get. These parents may flout court orders or withhold or deny children's contact with the other parent owing to their lack of moral conscience and irresponsible parenting. These parents are skilled at fooling neighbours, spouses, lawyers and mental health professionals. Unfortunately, many antisocial personality disorder parents are comfortable in bringing false claims to court (Eddy, 2010), as many professionals interviewed relayed incidents of false allegations of sexual abuse against their previous spouses.

Parents with personality disorder have difficulty resolving the conflict and drama they create, and the courts often turn to experts to assist in resolving various disputes. Such parents will reject expert recommendations if they do not agree to them. They would readily escalate costs in an attempt to find an expert who would agree with them, and return to court with a report with which they agree. Eddy (2008) argues that in the United States, most of the court cases are currently about interpersonal disputes. Parents that are divorced are usually able to move on after a period of about two years after the divorce. Where parents are still locked in battle in high-conflict cases after two years one or both may have personality disorders (Eddy, 2008). The sad reality for their children is that most of their childhood years are dominated by anger and legal conflict (Henig, 2013).

3.6.5.3 External factors

External factors that contribute to the hostility and high-conflict divorce are the contribution of attorneys and litigation to prolong disputes. Eddy (2010) and Henig (2013) aver that parents often seek an attorney based on how aggressive that attorney can deal with the other parent in advocating their own client. If the attorney is too conciliatory, these parents will look for more aggressive representation. Lebow and Newcomb Reckart (2007) maintain that the adversarial environment of the judicial system provides never-ending opportunities for confrontations. Johnston, Roseby and Kuehnle (2009) agree with the above statement and argue that attorneys contribute to rather than resolve disputes. The family advocates interviewed by the researcher stated that parents often report to them that their attorneys advised them to withhold contact from the other parent until the divorce is finalised. Attorneys may also become emotionally enmeshed with their clients and lose their professional objectivity in the process, according to Johnston and Campbell (1988). Stahl (2011) is of the opinion that attorneys provide limited encouragement in terms of problem solving and conflict resolution. Fasser (2014, p. 444) maintains that the legal system's *immense power* could easily overwhelm and influence the forensic investigator. Ney, Blank and Blank (2007) argue that the legal system should be viewed as the protagonists in the child care investigations.

Mental health professionals (psychologists and social workers) also play a part in promoting and maintaining conflict and disputes within these high-conflict divorces (Boyan & Termini, 2005). Care evaluators, through the nature of the assessment and investigation, frequently back or lend support to one parent over the other. Mental health professionals that only work with one parent, align themselves with that one parent, and only hear that one parents' side of the story (Whiteside & Becker, 2000). They fail to notice the interactional nature of the relationship of the parents. In

support of the so-called victim, the mental health professional may encourage an uncompromising and aggressive stance that results in lengthy disputes over post-divorce parenting of the children (Boyan & Termini, 2005). They often recommend and encourage avoidance and non-communication of the other parent in order to support their client's autonomy (Johnston & Campbell, 1988).

Unfortunately the blame is usually placed on the parents' shoulders as the mental health professionals' reports explain the situation in terms of the parents' individual psychopathology instead of a more complex marital dynamic and children are inclined to perceive and act toward their respective parents in accordance with these views. Johnston and Campbell (1988, p. 49) argue that mental health professionals become *highly prized allies in care disputes* as they wield considerable power by virtue of their status and authority as expert witness.

3.6.5.4 Substance abuse

Parental divorce affects risky behaviours in adolescents such as substance abuse, according to Arkes (2013), Barrett and Turner (2006), Hayatbakhsh, Najman, Jamrozik, Mamun and Alati (2006) and Thompson et al. (2013). Three factors underline the higher rates of substance abuse of adolescents after their parents' divorce, namely:

1. Two parents provide better control for the conduct of adolescents
2. Divorce leads to poor parent-child relationships and therefore adolescents are exposed to a larger group of peers
3. Substance use can also be a means of coping with the negative effects of the divorce according to Arkes (2013).

After the divorce, adolescents are more likely to experiment and engage in alcohol use, marijuana and other drug use to alleviate the effects of the divorce.

Ivanova, Veenstra and Mills (2011) argue that adolescents from divorced families progressed faster to first dating episodes than adolescents from intact families. Arkes's (2013, p. 296) study, states categorically that: ... *effects of the divorce process on youth substance use are not temporary.*

3.6.6 Effects of high-conflict divorce

Garber (2014, p 25) states that children *become triangulated into their parents' conflicts due to alienation, estrangement, and enmeshment*. Garber (2014) coined the phrase the 'chameleon child', as some children have an alliance with one parent while rejecting the other. When child is trapped in a polarised position within the high-conflict family (Garber, 2014; Dale 2014; Baker & Ben-Ami, 2011; Friedlander & Meier, 2010; Meier, 2010) she engages in short-term adaptive behaviour due to her innate need to adapt to different situations.

Parental alienation occurs in high-conflict families and it is the one parent's attempt to alienate the parent from the children to create a distance in the parent-child relationship (Moné & Biringen, 2012). Richard Gardner is regarded as the architect of parental alienation, positing the phrase parental alienation and parental alienation syndrome (Gardner, 1992).

Over the decades various authors have redefined alienation, namely: *pathological alignment* (Wallerstein & Kelly, 1980); *parental alienation syndrome* (Gardner, 1992); *the alienated child* (Kelly & Johnston, 2001) and *access resistance* (Stoltz & Ney, 2002). Alienation has been the source of much controversy and media attention and these cases are the most troublesome and worrying in courts (Dale, 2014; Papaleo, 2015). However, there is no single, simplistic and one-dimensional explanation that captures the essence of these highly complex cases. Parents can be equally alienating, boys and girls experience alienation at about the same levels

and adolescents are more likely to become alienated than young children, according to Papaleo (2015). Domestic violence survivors and children's advocates argue that the theory of alienation obscures legitimate aspects of estrangement between parents and children (Johnston & Kelly, 2004; Nichols, 2014).

Wallerstein and Kelly (1976, 1980) were the first researchers to identify the child's unhealthy alignment with the one parent and rejection of the other parent. There is a pathological alignment between the angry and alienating parent and the child against the targeted parent. Gardner (1992) invented the parental alienation syndrome based on the interpretation of his clinical experience that child sexual abuse allegations were rampant in care litigation and that 90% of children in care litigation suffered from parental alienation syndrome (Gardner, 1992).

Unfortunately the term parental alienation syndrome lacks empirical basis or objective merit, according to Meier (2009); however, Johnston (2005) notes a more balanced and grounded nature in her research of parental alienation. Gardner (1992) states that the majority of child sexual abuse claims is false and stem from angry mothers who suffer from mental illness. Unfortunately, according to Meier (2009), Gardner (1992) did not state how courts could determine whether these allegations of abuse were fabricated or bona fide. These allegations often surface during the divorce process (after the legal proceedings have begun) where the child is almost always a girl of approximately 8 years old (Dale, 2014). There is usually an absence of fear or anxiety towards the alleged perpetrator and the child 'discloses' to the mother first (Van Rensburg, Vorster & Burke, 2009). The mother will take the child for an expert opinion and report, and often to several experts until a report is obtained that confirms the allegations (Van Rensburg, Vorster & Burke, 2009).

According to Kelly and Johnston (2001), to explain a child's behaviour in the context

of the family using the terminology of a medical syndrome engenders controversy among mental health professionals. They render a family system formulation regarding the alienated child. Furthermore, they are of the opinion that the courts place too much emphasis on the contributions of the favoured parent and not enough emphasis on other factors (Kelly & Johnston, 2001). Others have elaborated this model by introducing the term *hybrid* for cases that identify a combination of both parents contributing to the children's alienation (Friedlander & Walters, 2010; Warshak, 2015). The alienated child, according to Kelly and Johnston (2001) is a child who expresses freely and persistently unreasonable negative feelings toward the targeted parent significantly disproportionate to the child's actual experience with that parent.

It is critical to differentiate between the alienated child (who refuses and rejects the targeted parent due to unrealistic negative views and feelings) and the child who resists contact with apparent due to a variety of developmental and realistic reasons (Garber, 2015). The child may resist contact with the other parent due to separation anxiety, fear in coping with the high conflict from her parents, resistance to a parent's parenting style (rigidity, anger, and insensitivity to the child), or the child's concern of leaving the other parent on their own (Baker & Chambers, 2011; Dale, 2015).

Alienation is linked with children's adjustment problems, behaviour problems and school performance (Papaleo, 2015). There is currently no measurement device to measure parental alienation. The rejected parent often has characteristics that contribute to child alienation, but it is important to note that their behaviour do not warrant the disproportionately angry response from the child nor the refusal to have any contact with the parent (Henig, 2013; Dale, 2014). Some rejected parents withdraw in the face of the high conflict and cease all attempts to contact the child;

some parents become angry and affronted if the child rejects them and they counter reject the alienated child (Garber, 2009).

Sometimes the targeted parent has a harsh and rigid parenting style and demonstrated a lack of empathy towards the child (Henig, 2013). Another contribution of rejected parents may be a self-centered and immature parent, where the child observes that this parent put his or her needs ahead of the child in the family (Garber, 2009; Baker & Chambers, 2011).

Gardner (1987) provides eight exemplars to describe children's responses to parental alienation syndrome (PAS), namely a campaign of denigration, weak or absurd rationalisations, and lack of ambivalence, reflexive support of the alienating parent, 'independent thinker' phenomena, presence of borrowed scenarios, absence of guilt over cruelty to and exploitation of the alienated parent and a spread of animosity towards friends and family of the alienated parent (Gardner, 1987).

Garber (2014) argues that the child's rejection of one parent and the alliance with the other parent is seldom the result of only one parent's actions. In a high-conflict situation many complex and destructive dynamics are at work to the detriment of the child, such as alienation, estrangement and enmeshment between children and their parents. He distinguishes between three parties in the dynamics, namely Parent A, Parent B and the child. Each one serves as a cause and effect of its internal dynamics, creating patterns of enmeshment, alienation and estrangement. Garber (2014) concludes that there is neither a guilty nor an innocent party, and neither a perpetrator nor victim in the complexity of the family system (Garber, 2014).

Parental alienation is likely to result in a diminished self-concept in children. Parental alienation is a mental condition where children align with one parent,

namely the preferred parent, and it usually occurs during high-conflict divorces and rejects a relationship with the alienated parent (Henig, 2013; Bernet & Baker, 2010). Baker and Ben-Ami (2011) illustrate that parents who exhibit parental alienation strategies are guilty of abuse towards their children. Consequently, their children feel worthless, flawed, and unloved and of value only in meeting other' needs. The preferred parent displays a lack of empathy and inability to recognise the child's separate needs and perceptions (Baker & Ben-Ami, 2011; Papaleo, 2015).

The main symptom of this disorder is the child's refusal to have contact with the alienated parent. The child believes that the alienated parent is all bad and the preferred parent is all good. The child may manifest in borrowed scenarios and will automatically take the preferred parents' side in all disagreements. These children are at risk for emotional distress and adjustment difficulties (Gardner, 2002).

Unfortunately, in parental alienation, one parent often targets and criticises the other. There is usually a kernel of truth in the parents' criticisms, but due to the strategies of parental alienation, the flaws are usually blown up disproportionately. The child may manifest in borrowed scenarios and will automatically take the side of the preferred parent in all disagreements (Garber, 2015). This behaviour by the alienating parent conveys an underlying message to the child is that the targeted parent is unsafe, unloving and unavailable (Drozd & Olesen, 2004). The opportunities of the targeted parent to counteract these messages are limited by the alienating parent. The child's self-esteem suffers, as the message that the child receives from the alienating parent is that she is unlovable by the targeted parent (Dale, 2014). Children are inherently egocentric, and perceive it as their fault that the alienating parent rejects them, they believe they have done something wrong (Drozd & Olesen, 2004; Henig, 2013; Garber, 2015).

The literature of high-conflict divorce is consumed with defining the dynamics that causes a child to become triangulated into adult conflict, and reject one parent and align with the other (Drozd & Olesen, 2004; Garber, 2015). The child's polarised position within the conflicted family is the result of a hybrid constellation of the relationship conflicts and pressures within the family. Attachment theory describes how children change their behaviour to maximise safety for the opportunity for nurturance in their environment, and this adaptation of behaviour moving between two conflicting parents can be overwhelming for them. Not only does the child move her physical location from house to house, but also moves her emotional landscape (Drozd & Olesen, 2004; Garber, 2015).

According to Dunne and Askew (2013), the chameleon-child needs to adapt to the conflicting environments, which is known as a phenomenon called social referencing. Social referencing describes the child's ability to take cues from a proximal caregiver's behaviour, emotions and physiological state. It is a complex task for the professional to evaluate the child who aligns with the one parent and rejects the other (Henig, 2013; Garber, 2015).

The refusal of a child to spend time with the one parent is not a linear process but an assembly of converging factors (Papaleo, 2015). Garber (2011) describes alienation as unjustifiable and disproportionate negative reactions directed to the targeted parent. However, when these negative reactions are defensible and proportionate to the targeted parent's real threat, the same behaviour consists of estrangement. There are degrees of alienation, and it depends on the magnitude and intransigence of the child's rejection of the targeted parent (Fidler & Bala, 2010).

Unfortunately, grandparents and extended family often exacerbate these problems by engaging in hostile behaviour for control of the children (Jaffe,

Ashbourne & Mamo, 2010). Where there is a breakdown in the healthy interfamilial and intergenerational boundaries, there is often associated parent-child enmeshment. The parentifying adult enlists the child to fulfill her need to be cared for, and children often fill this void and become overburdened children (Papaleo, 2015).

Mothers are more likely to parentify than fathers, according to Garber (2011). This often happens with an absent father after the divorce when the son takes a supportive role while the daughter becomes the mother's confidante. Parentified children often suffer from depression, suicidal feelings, shame, excessive guilt, worry, social isolation and psychosomatic problems. These children comfort parents concerning adult distress rather than their own distress (Garber, 2015).

An adultified child adopts the role of a parent's friend, a situation similar to a parentified child (Garber, 2011). It is a form of role corruption by a parent's enlistment of a child to be the adult's peer or partner-like role. The child becomes the parent's ally, friend and confidante. The adultified child is often the first-born or only child, and may be verbally or socially precocious (Garber, 2011). These children often develop anxiety, depression and anger (Papaleo, 2015).

The third dynamic is where the aligned parent does not tolerate the child's growth toward healthy independence (Garber, 2011). This parent needs to be needed and feels threatened by acts of independence from the child. This infantilised child may be home schooled and when schooled may often be chronically truant. The child is often forbidden to take part in any age appropriate activities and is discouraged to have friends (Papaleo, 2015). A tragic extreme is where the child is diagnosed with Factitious Disorder by Proxy (previously Munchausen's Syndrome by Proxy) (Garber, 2011; Drodz & Olesen, 2004).

The notion that divorcing parents force a child to choose sides with one parent against the other parent is hardly a new concept, according to Meier (2009) and Warshak (2010). It is one of the most common and active undermining strategies against the targeted parent that undermines that parent's competencies and authority. Kelly and Johnston (2001) propose that alienation can only be established after assessing the multiple and interrelated factors influencing the child's response during and after divorce. There are systemic processes that potentiate alienation and the child is triangulated in the intense marital conflict (Meier, 2009). Alienation often occurs during bitter and protracted legal proceedings, unsubstantiated allegations of physical and sexual abuse towards the child, and where the child suffers neglect (Warshak, 2010). Often professionals themselves become polarised and the situation is framed in highly litigated and inflammatory language, and supporting their clients with rigid viewpoints (Kelly & Johnston, 2001).

The campaign of denigration includes the avoidance of the alienated parent, and expressing her hatred of the alienated parent (Baker & Ben-Ami, 2011). Alienating behaviours from a parent directed to a child leads to more negative outcomes that can be seen across children's life span (Baker & Ben-Ami 2011). The unfortunate outcome of parental alienation is the intentional interference to undermine the child's relationship with the other parent (Papaleo, 2015).

Baker and Ben-Ami (2011) state that parental alienation can be considered as psychologically maltreating children and these children end up feeling worthless, unloved, unwanted and flawed. The aligned parent creates intolerable confusion for the child and Kelly and Johnston (2001) go so far as to name it emotional abuse towards the child. The alienating parent displays the inability to tolerate the child's separate needs and this is the foundation for the maltreatment of the child (Kelly & Johnston, 2001).

These strategies have the result of a diminished self-esteem in children. The parent conveys the message to the child that the targeted parent is unsafe, unloving and unavailable and the alienating parent limits the opportunities the targeted parent has to counter these allegations (Baker & Ben-Ami, 2011). The child begins to feel that she is unlovable, as the targeted parent does not love her, according to the alienating parent. The child concludes that if the one parent is 'no good', then the child is also 'no good' (Garber, 2015).

The alienating parent is also conveying the message to the child that the parent's love is contingent on the child's acceptance of the alienating parent, the child has to badmouth and reject the targeted parent to be worthy of the alienating parent's love and acceptance (Papaleo, 2015). Unfortunately patterns of excessive dependency between the child and the alienating parent also exist. Alienating parents do not encourage independent thinking and self-determination in the child, but reinforces compliance, obedience and adherence to their point of view for approval and acceptance (Drodz & Olesen, 2004).

The child's reduced self-esteem may lead to depression and subsequent alcohol abuse during the adolescent years. Baker and Ben-Ami (2011) conclude that the greater number and frequency of alienated strategies the children are exposed to correlates directly with a lower self-esteem. Mental health professionals should be trained in recognising signs of parental alienation so that they can make recommendations and be informed when working with these families (Baker & Ben-Ami, 2011).

In the context of family law alienation is a problem that has to be managed from a legal point of view, firstly through a court order, thereafter by planning an intervention (Garber, 2015). According to Warshak (2015), some children are able to

perform well academically, participate in extracurricular activities, avoid drugs and act polite while at the same time sustain significant psychological impairment. Moreover, the psychological processes *that accompany irrational rejection and cruel treatment of a parent bleed into other relationships* (Warshak, 2015, p242).

Alienated children will often, when in conflict with their friends, cut off contact with them, show contempt for those who see things differently and feelings of entitlement in personal relationships (Kelly & Johnston, 2001; Friedlander & Walters, 2010; Warshak, 2015). Furthermore, alienated children's relationships with the favoured parent may seem ideal and there seems to be an absence of conflict and frustration (Friedlander & Walters, 2010). However, this superficial harmony comes at the cost of normal parent-child relationships (Warshak, 2015). In a shift from the usual roles in a family, some alienated children feel responsible for their favoured parent's emotional wellbeing (Warshak, 1992; Friedlander & Walters, 2010). They comfort distressed parents, serve as confidantes, and reassure parents of their allegiance (Friedlander & Walters, 2010; Warshak, 2015).

Often in these cases the alienated parent will refuse to bring the child to therapy or for contact with the targeted parent, and the child will also refuse any attempt at contact with the targeted parent. It is only through a court order that there can be a measure of success (Kelly & Johnston, 2001). Psychological intervention, according to Papaleo (2015) is reliant upon *clear, direct, immutable, judicial direction and control*. Psychological treatment of the alienated child and parent as well as rebuilding the relationship with the targeted parent is reliant upon a court order. If such intervention is not court ordered, the alienated parent can easily frustrate the process. The emotional and financial costs exacted by severe alienation, and the obstacles to its alleviation, highlight the importance of directing resources and efforts to early screening, identification, and protection of children at risk and to preventing

the entrenchment of severe alienation (Warshak, 2015). The fundamental consideration according to Papaleo (2015) is that it is not normal for a child not to want to see his parents.

The theory of parental alienation has become ubiquitous in family courts worldwide, even though there is a lack of scientific basis. Gardner's (1992) term parental alienating syndrome has shifted to parental alienation or the alienated child. Johnston and Kelly (2004) argue that parental alienation syndrome does not exist, and Gardner's (1992) term of parental alienation syndrome is overly simplistic and tautological and it is not a syndrome. They speak (Johnston & Kelly, 2004) of parental alienation or the alienated child as valid concepts that describes a real phenomenon experienced by children in the care context. Johnston and Kelly (2004) describe the concept of allied children where children develop an alliance with one parent, and they express a consistent preference for one parent and only want limited contact with the other parent after separation or divorce. Such alliances might arise from intense marital conflict and flawed marital dynamics and where the child is old enough to rationalise and judge which parent caused the divorce (Baker & Ben-Ami, 2011; Papaleo, 2015; Garber, 2015).

3.6.7 Proponents of the view that divorce has little or no negative impact on children

Some researchers propose that divorce does not have negative effects on children. Lansford (2006) reviewed behaviour, social relationships, academic achievement, age, sex, income, parenting practices, genetic effects and concluded that most children do not suffer long-term effects from their parents' divorce. Hetherington and Kelly (2002) established in their study of 1 400 families that approximately 80% of the children of divorced families, continue to develop into well-adjusted children after the initial period of adjustment. Hetherington and Kelly (2002)

conclude that the traditional point of departure should be that every person is unique, holds in this regard as well. Therefore, the factors that contribute to children's problems should also be studied as well as the factors that promote adjustment.

Halligan, Chang & Knox (2014) interviewed 336 undergraduates in their study published in 2014 and established that positive outcomes for children after the divorce of their parents are also evident. The child is able to lead a healthy lifestyle depending on the family functioning and level of co-parenting from the parents. Wallerstein et al. (2013) found in their study that a third of the children in their study had good relationships with their parents and were doing well.

Amato (2000) argues that studies have indicated that children from divorced families tend to have lower academic achievement, lower self-esteem, difficulties with social relationships, more behaviour problems and early school dropout, however, these studies have shown a minimal difference between children of divorced parents and intact families. In 2007 Amato contends that the impact of the divorce per se of children was minimal. However, the child's wellbeing is affected negatively by the conflict after the divorce. Children from intact families with conflict in the home also suffer from the above negative effects, according to Amato (2000).

However, Amato (2001) indicates that children from divorced families performed more poorly as adults than children from intact families. They were more prone to depression, reported lower life satisfaction, poorer psychological health, lower marital quality and higher rates of divorce, lower educational levels achieved, poorer physical health and lower income and occupational range. Amato (1994) points out that the reasons for all the problems might have been present before the divorce occurred.

3.7 CONCLUSION

Wallerstein and Lewis (2004) established that children from divorced families tend to demonstrate a variety of problems in functioning in their lives. According to Amato (2003), Wallerstein's (1976; 1980; 1989; 2003; 2004) work has had a profound impact on scholarly work, clinical practice, social policy and the general public's view of divorce.

Amato (2003) agrees with Wallerstein and Blakeslee (2004) that divorce is a risk factor for psychological problems in adulthood for the children. In their groundbreaking study (A meta-analysis in parental divorce and adult wellbeing) Amato and Keith (1991) established that parental divorce negatively affects the wellbeing of children, however, the estimated effects are generally weak. Amato (2003) also supports the notion from Wallerstein and Blakeslee (2004) that children from divorced parents have more problems with forming and maintaining happy and intimate relationships as adults. The children feel less close to their parents with weaker ties to parents than children from intact families.

Amato (2003) discusses Wallerstein's claims that divorce has profound negative effects on children, continuing into their adult lives, and highlights the criticism on this research for her reliance on a nonrandom sample, no comparison groups in her design and her impressionistic approach when analysing and reporting data. However, Amato (2003) agrees that children from divorced families reach adulthood with lower levels of psychological wellbeing and a greater likelihood of their own marriages ending up in divorce and weaker ties and relationships with parents, especially fathers.

According to Amato (2003), Wallerstein generalises in her research and findings such as in Wallerstein and Blakeslee (1989; 2003; 2004) state that children feel

intensely rejected by their parents during a divorce and children receive far less nurturing and protection today than a few decades ago. Amato (2003) also criticises Wallerstein's use of words such as "doom, panic, tragedy, terror and cruel" in describing the effects of divorce in children.

From the above it would appear that divorce has profound effects on children, but the extent of the effects differs according to various researchers. Wallerstein (1980; 1989; 2003; 2004) provided an extensive base of research and knowledge in the 1980's with her research, indicating severe negative effects for children after their parents' divorce with long term consequences such as depression, possible drug and alcohol abuse, juvenile delinquency and suicide attempts among these children.

Later research from Amato (1991, 2000, 2006, 2010) and Amato & Keith (1991) indicated that there is usually only a short-term negative impact on children after their parents of the effects differs according to various researchers. Wallerstein (1980, 1989, 2003, 2004) provided extensive methodologies as well as developing scientific methods of research (Wallerstein & Kelly, 1976, 1980; Wallerstein & Blakeslee 1989, 2003; Wallerstein & Lewis, 2004) to enable the refinement of research on effects of divorce on children and concluded that the effects on children are not always negative in the long run (Amato, 1991, 2010). The exception to the above is in cases of protracted litigation and hostility between parents, where a strong link is indicated between divorce and long-term negative effects on children.

The purpose of this chapter was to provide and discuss the conceptual framework and the theoretical framework that are fundamental to this study. Attachment theory, the wellbeing of children, the developmental stages of Erikson and systemic thinking underpin the study in the best interests of the child in the divorce mediation process.

From the discussion it is evident that Erikson's developmental stages should be addressed during the mediation process, as adequate knowledge about the child's developmental stage is crucial in order to make the best decisions in residency and contact for the child. Attachment theory describes the type of attachment the child has to the caregivers, and is just as relevant as the child's developmental stage. The best interests of the child is supported by the attachment of the child to the caregivers, and the child's best interests cannot be considered without understanding the type of attachment the child has in relation to the caregivers.

The wellbeing of the child underpins the best interests of the child, as the best interests of the child and the wellbeing of the child are concepts that are closely related, as the best interests cannot be considered without knowledge about the wellbeing of the child. Systemic thinking lends itself well in understanding the dynamics and interactions of both parents and children in the context of the best interests of the child.

In Chapter 4 the research design, research process, methodology and research tools used in the overall study are elucidated. The research processes as well as the process of analysis and interpretation are outlined.

CHAPTER 4

RESEARCH DESIGN AND METHODOLOGY

4.1 INTRODUCTION

Chapter 4 focuses firstly on the research design of the study. A qualitative, descriptive and interpretive design is applied to understand the decision of using a qualitative approach. The population (judges, advocates, attorneys, psychologists and social workers) was conversed and purposive and non-probability sampling was done to select the sample. The data-collection approach is discussed in detail. The use of semi-structured interviews is elaborated upon and data analysis in specific content analysis and thematic analysis and the verification of data are conferred. The trustworthiness of the study and ethical considerations are discussed. Secondly, the research methodology or process of research followed in this study is presented, explicating the procedures, namely data collection, data analysis, literature study, sampling and interpretation (Mouton, 2008).

4.2 RESEARCH PARADIGM

It is important to select a paradigm that underpins the study, namely the frame of reference the researcher used to organise her observations. Paradigms are perspectives or worldviews that are often not questioned or empirically tested (Delport, Fouché & Schurink, 2011). The research paradigm refers to a set of general philosophical assumptions about the world (ontology) and how we can understand it (epistemology) (Maxwell, 2005). This study was conducted within the interpretivist paradigm (Delport, et al., 2011).

Ontologically, the interpretivist paradigm reflects how people view the world, namely that they socially construct meanings through their interaction with the world

around them (Donald, Lazarus & Lolwana, 2013). The researcher's ontology is the development of the research from a research question to a specific research design within where participants can truthfully answer the research questions Delport et al., 2011). This implies that individuals who participate in the mediation process are viewed as active agents who make meaning of their lives within and through their social context (Donald, et al., 2013).

Epistemologically (or theories of knowledge and perception), the participants are regarded as co-creators of knowledge (Babbie & Mouton, 2012). Interpretivists maintain that research in the field of social sciences is different from that of natural sciences Delport et al., 2011). Therefore, a different methodology is required to reach an interpretative understanding, which would assist the researchers' *appreciation of the subjective meaning of social action* (Delport et al., 2011, p. 309). Reality is therefore interpreted through the meaning that participants give to their world. Interpretivist findings enable the advancement of a new interpretation of findings (Mouton, 2008). Babbie and Mouton (2012) concur, stating that the interpretivist or phenomenological paradigm is based on the centrality of human consciousness.

4.3 RESEARCH DESIGN

In this study a qualitative, interpretive descriptive design (Thorne, 2008) is applied. Grinell and Unrau (2011) explain that a qualitative research approach is based on the interpretive perspective, which states that reality is defined by the research participants' interpretations of their own realities. The research design addresses the questions of the study (Thorne, 2008). Qualitative methodology recognises that scientific research will always be subject to the researcher's subjectivity, which guides everything from the choice of the topic, to selecting methodology, and analysing the data (Grinell & Unrau, 2011).

The researcher interpreted what she saw, heard and understood; therefore her interpretations are subjective and cannot be separated from her own background and context (Creswell, 2007). Subjectivity in qualitative research refers to the way the researcher is shaped by her own perspectives and interests (Creswell, 2007). The inherent subjectivity of research can be dealt with a wide variety of ways (Creswell, 2007). On the one end of the spectrum in the search of objectivity, methods such as triangulation are used, and at the other end are researchers who, rather than avoid subjectivity, make it a central part of their analysis (Babbie & Mouton, 2012). Such researchers engage in reflexivity where the researcher reflects on her own subjectivity and how it might shape each aspect of the research (Drapeau, 2002; Creswell, 2007). Information was collected from different sources (as discussed later in this chapter), and the results were also compared with that of other studies (Drapeau, 2002; Creswell, 2007). However, subjectivism states that the researcher's subjectivity enables her to comprehend the world as it exists in itself (Drapeau, 2002).

Interpretive descriptive design is a research method applied in the social sciences that accounts for the constructed and contextual nature of human experiences while simultaneously allowing for shared realities (Thorne, 2008). Interpretive descriptive design allows for meanings and explanations to be generated from the narrative, and entails constant comparisons of pieces of data within and across the interviews and documents noting similarities and differences (Thorne, 2000). Sound interpretive description contributes to our understanding of how people experience and make meaning of their lives (Thorne, et al., 2004). Interpretive descriptive design provides a foundation for the links that become apparent in locating a particular phenomenon within the general (Thorne, et al., 1997).

The foundation of interpretive descriptive design is a qualitative investigation of a clinical phenomenon for the purpose of capturing themes and generating an interpretive description (Thorne, 2008). As in this study, interpretive descriptive design is informed by relatively small samples, using data collection as interviews and document analysis (Thorne, 2008). Interpretive descriptive design entails multiple data collection strategies to avoid naïve overemphasis and provides a better understanding of complex experiential phenomena (Carlander et al., 2013). Interpretive descriptive design borrows from grounded theory, ethnography and phenomenology when presenting designs, samples, data collection and analysis (Carlander et al., 2013). The influence from grounded theory is apparent by the use of questions such as 'What is happening here?' and 'What am I learning about this?' In this design, interpretive descriptive design depends on the subjective experiences of the participants while learning from the broader patterns within the phenomenon that is being studied (Thorne, 2008).

Data collection is influenced by the experiences and priorities of the research participants, rather than being collected by predetermined and/or highly structured and/or standardised measurement instruments (Grinell & Unrau, 2011). Meaning is drawn from the data using processes that are more natural and familiar than those used in a quantitative method (Grinell & Unrau, 2011). The researcher is therefore more concerned to understand concepts and data rather than explanation, with naturalistic observation rather than measurement (Babbie & Mouton, 2012). The perspective is that of an insider rather than that of an outsider as in quantitative design (Creswell, 2007).

Descriptive design, according to Bless et al. (2013, p. 390) is, *social research with the primary aim of describing (rather than explaining) a particular phenomenon*. Descriptive design describes the situations and events in the study – the major

purpose of many social scientific studies, as many qualitative studies aim in any case primarily at description (Babbie & Mouton, 2012). Where scientific observations are careful and deliberate, scientific descriptions are more accurate and precise. The goal of descriptive design is to provide an accurate description of the phenomenon of the best interests of the child in the divorce mediation process (Bless et al., 2013).

Descriptive design is used when a researcher sets out to determine the opinions of a group of people towards a particular issue at a particular time. The greater part of data collected in descriptive design is qualitative. The more diverse and relevant questions in the in-depth interviews are posed, the better the study is likely to be (Bless et al., 2013).

Significant patterns are presented in the existing data during the descriptive design, according to Mouton (2008). The researcher observes and after the observations, describes the observations (Babbie, 2013). Interviews where professionals could confide freely and share their knowledge and information are especially useful in descriptive research (Mouton, 2008).

Descriptive design presents a picture of the details of a social setting or relationship, and asks questions such as 'How?' and 'Why?' (Fouchè & De Vos, 2011). Descriptive design entails the intensive examination of phenomena and their deeper meanings that will ultimately lead to thicker descriptions (Fouchè & De Vos, 2011).

The researcher conducted the study by reading the texts (reports, assessments, parenting plans, judgements, and transcribed interviews) in an attempt to uncover the meaning embedded therein. She took cognisance of the fact that she brought her own subjective reality into the reading of the texts. A deep understanding was

created of how the parts of the texts related to the whole. The texts included the conversation or interviews that were transcribed into text format. True meaning is rarely simple, and in this case the researcher was able to reach the true meaning only by reading and rereading the texts, making a detailed study of the texts, and seeking the connections between the parts. The interviews and the field notes compiled directly after the interviews were transcribed and studied in detail to gain a sense of the non-verbal communication (Neuman, 2003). It was important for the researcher to highlight the relevance of the meaning that the participants hold about the problem of the best interests of the child, and to disregard the meaning the researcher bring to the research (Creswell, 2007).

4.4 RESEARCH METHODOLOGY

The research methodology is presented in terms of two consecutive phases of data collection, namely Phase 1 document analysis and Phase 2 semi-structured interviews. The data-collection methods for each phase are discussed separately.

4.4.1 Research methodology – Phase 1 Document analysis

4.4.1.1 Selection of documents for analysis

Document analysis was conducted in Phase 1. The documents were selected from reported cases that are open for public viewing; reports by professionals involved in forensic assessments for residence, care and contact and parenting plans with the assistance from judges, advocates, social workers, attorneys and psychologists. Despite the fact that these official documents were open to public scrutiny (reported cases) and therefore accessible to the public, the researcher obtained the consent of the professionals involved as suggested by Strydom & Delport (2011). She also applied the ethical principle of anonymity and confidentiality by removing all the information that identified the families involved in the reported cases.

The criteria for the selection of parenting plans were that these plans had to be registered with the Office of the Family Advocate or made an Order of Court. The reports were selected with the specific aim of having a representative sample of cases that differ in content and purpose, reflecting the range of types of activities in which legal and mental health professionals engage during the course of conducting evaluations for primary residence. The children included in the reports, cases and parenting plans are younger than 18 years. The documents included public documents such as court orders, procedural documents (forensic reports, assessments and parenting plans) and reports written by professionals, interviews with professionals, reported cases, case law, relevant acts and judgements.

4.4.1.2 Data analysis

The purpose of the data **analysis** from these **documents** was to answer the question:

What did previous mediation processes that involved the development of parenting plans entail?

The researcher coded 20 reports (parenting plans, court orders, evaluations, forensic assessments and judgements) in order to obtain themes from these reports.

Content analysis is described by Babbie (2013, p. 295) as the *study of recorded human communication such as books, websites, paintings and law*. Content analysis is an unobtrusive method that allows the researcher to study the items produced within the field (Hesse-Biber & Leavy, 2011). During content analysis the researcher refined the conceptual framework and developed specific methods for observation relating to that framework. Content analysis is a coding operation in which communication and raw data is coded or classified into categories according to a

conceptual framework (Babbie, 2013). For the purposes of this study, content analysis is appropriate for the analysis of case law, the relevant acts, assessments, parenting plans and reports. Content analysis is well suited for this study of communication and to answer the question of *who says what, to whom, why, how, and with what effect?* (Babbie, 2013, p 296). Coding implies that the data will be transformed into standardised forms for analysis (Babbie, 2013).

Content is coded in two ways, namely coding the manifest or visible content and coding the latent content or the underlying meaning. Manifest content is the visible or surface features such as counting how many times the statement “the best interests of the child”, “joint parental responsibilities and rights”, “what methods were used to require information in reports and assessments” or “shared residency” occur in a report or judgement.

Latent coding is the process whereby the researcher views a unit of analysis, such as a paragraph, and makes a subjective assessment on the content of the paragraph. Latent coding is the coding in terms of the underlying meaning where the researcher makes an overall assessment after a specific paragraph of the reports and judgements (Babbie & Mouton, 2012; Babbie, 2013).

Babbie (2013) and Babbie and Mouton (2012) recommend that both methods of coding be utilised for reliability and specificity. The raw data is transformed into categories based on a conceptual scheme through the process of coding (Babbie, 2013). When coding the documents, the researcher should ascertain who completed the documents, what the reason behind compiling them was and what methods were used to acquire the information in the documents. Inductive analysis begins with specific observations and moves towards general patterns. The focus of analysis is on the words, context, internal consistency, frequency and specificity of comments

(Greeff, 2011). The researcher developed operational definitions of the variables in the study. The researcher should also review the key categories and concepts used in the reports and judgements to organise the information and determine what theoretical issues, patterns and debates the reports and judgements cast light on (Babbie, 2013). The researcher described the situations and meanings connected to the situations, rather than investigating structural relationships among pre-established variables or testing formal hypotheses (Babbie, 2013).

4.4.2 Research methodology: Phase 2 Semi-structured interviews

The primary aim of the semi-structured interviews was in-depth descriptions of the events of divorce mediation with the researcher as the main instrument in the research (Babbie & Mouton, 2012). The research process is inductive, resulting in the generation of new theory (Babbie & Mouton, 2012).

4.4.2.1 Selection of participants: purposive sampling

The population for this study include Judges of the High Court; Advocates at the Bar; Attorneys from the South African Law Society; Registered social workers from the South African Association of Social Workers in Private Practice; registered clinical and counseling psychologists, registered with the Health Professions Council of South Africa (HPCSA), Family Advocates from the Office of the Family Advocate as well as mediators registered with the South African Association of Mediators (SAAM) and/or the Arbitration Foundation of South Africa (AFSA).

The participants for this study were purposefully selected from the population described above (Babbie & Mouton, 2012). The main purpose of utilising purposive sampling technique is to collect rich data (Creswell, 2007; Babbie, 2013). In purposive sampling the researcher thinks critically about the parameters of the population and thereafter chooses the sampling accordingly where typical cases are

sought and selected (Strydom & Delport, 2011). The samples are composed of elements that are most representative of the population (Strydom & Delport, 2011; Babbie, 2013).

The researcher therefore identified individuals who had been active in the mediation process with extensive experience and who trained in this field. The researcher's main criterion in selecting participants was to ascertain who would be able to provide the most useful information. In the case of this study, according to Babbie (2013), it is appropriate to select a sample based on the knowledge of a population and the purpose of the study. The criteria for sampling are sufficiency, meaning that saturation occurs when the researcher hears the same information repeatedly from the participants and sufficiency was to ensure that others outside the sample could connect to the experience of the participants included in the sample (Greeff, 2011).

The sample included a group of family advocates, advocates, attorneys, judges, social workers and psychologists.

The following criteria applied to all the participants in the research:

- Participants had to be resident citizens of the Republic of South Africa
- Participants had to specialise and have extensive knowledge (had to have extensive experience in their field and in the case of social workers and psychologists, a postgraduate qualification on the level of a Master's Degree in their field of expertise) in the field of divorce and children (family law), mediation, parenting plans and the *Children's Act, 38 of 2005*
- Social workers and psychologists who participate in this study had to be registered with the South African Association of Mediators.

Additional criteria for each participant included the following:

- Advocates had to be members of the Society of Advocates of the Bar
- Attorneys had to be members of the members of the South African Law Society
- Social workers had to be suitably qualified and registered with the South African Association of Social Workers in Private Practice
- Psychologists had to be suitably qualified and registered with the Health Professions Council of South Africa (HPCSA).

4.4.3 Data collection

Semi-structured interviews were used to gather information. The interview is described as a social interaction between participants and the researcher (Greeff, 2011; Babbie & Mouton, 2012). The intention with these interviews was to gain detailed information about the participants' beliefs and perceptions of the best interests of the child principle during the divorce mediation process. A semi-structured interview encompasses the development of a set of predetermined questions that are used to guide rather than dictated by the questions.

Open-ended questions were developed from the research question. Neuman (2003) states that open-ended questions may be best if the researcher wants to learn how the participant thinks and to discover what it is truly important. The questions developed by the researcher allowed her to glean a range of professional views obtained from the participants. The researcher prepared main questions in relation to the child's best interests in the divorce mediation process. The questions were prepared to inform the study and to obtain in-depth information about the issues in mediation for the drafting of parenting plans and the child's best interests. The questions were redesigned throughout the research, and questions were added from valuable information gained from the participants.

The researcher developed an interview schedule – a questionnaire written to guide the interviews (Babbie & Mouton, 2012, Greeff, 2011). The interview schedule was used as an appropriate instrument to engage the participants. The researcher conducted a literature study to guide the process of developing appropriate questions for this study.

The method of semi-structured interviews allowed for more flexibility than structured interviews and therefore provided the researcher with a richer and fuller picture of the phenomenon being studied. During the semi-structured interviews, the participants were perceived as the experts. The researcher was guided by the participants and did not stick to the list of questions rigidly, and not every question was asked. The interview questions were used to ensure that the same basic lines of inquiry were followed with each participant (Patton, 2003).

Twelve participants were interviewed. These professionals are considered as the experts in their fields, namely a retired judge, a senior advocate, two family advocates, two advocates, three clinical psychologists, one counseling psychologist and two social workers. The interviews were recorded on a tablet with the participant's consent. The researcher placed the tablet on the participant's desk, turned it on and locked the screen when the interview commenced. This way it remained unobtrusive and inconspicuous during the interview, showing only a blank screen. The recorded interviews provided a more comprehensive record than the researcher's notes taken during the interviews would have.

Immediately after the interviews, the researcher wrote detailed field notes and impressions emanating from the interviews, to ensure rich data. Field notes are the written account of what the researcher heard, saw, experienced and thought about during the interview.

The researcher utilised Greeff's (2011) guidelines, namely to transcribe and analyse the interviews while they were still fresh in her mind. She then transcribed the interviews and attempted preliminary analysis that entailed continued rereading of the interviews and field notes in order to develop themes (Greeff, 2011).

The richness of the themes was explored, rather than reducing the responses to quantitative categories. Interviews are a way of obtaining large amounts of in depth data quickly and effectively. The role of the researcher was not a therapeutic role, but that of a listener. The researcher used the words, the context, internal consistency, frequency of comments and the extensiveness of comments in analysing the data (Greeff, 2011). Through the rereading of the transcribed interviews, the researcher formed a detailed thematic coding scheme.

4.4.3.1 Research procedure

The research procedure entailed obtaining consent, determining place, ensuring rapport with the participant and using questions and various interviewing techniques to gather information, discussed in more detail below.

(a) Consent for the interview

The researcher first called all participants by telephone in preparation for the interview, requesting their permission for the interview and informing them that the interview will be recorded. A time was arranged, also the place, namely the participants' office or chambers. Furthermore, written consent was obtained from the participants by submitting Appendix A electronically to ease their minds and to ensure a comfortable interview and also to confirm the appointment.

(b) Place

The decision to conduct the interviews in the participants' own environment was made for various reasons:

It would be more comfortable and non-threatening, and also less intrusive and disruptive for them as busy professionals, moreover all declined remuneration.

(c) Rapport

Babbie (2013) states that rapport between researcher and the participants is essential in qualitative research, especially when using semi-structured interviews with the participants. A rapport is defined as an *open and trusting relationship* (Babbie 2013, p. 345). The researcher is involved in divorce mediation and could therefore relate to the participants' contexts and understand their position. Participants responded to the request for interviews without hesitancy. She also experienced openness and a willingness to share their experiences with her.

(d) Recording method

The researcher explained that she would record the interviews on her tablet. The participants were familiar with this interview method and agreed to the recording of the interviews.

(e) Participant engagement

Greeff (2011) and Babbie (2013) propose that a researcher who conducts an interview in the qualitative field of research should be engaged with the participants. The goal of the researcher was to get the participants to express their opinions freely and comfortably. The researcher initiated the interview with the goal of understanding the topic, to make associations and verify assumptions and to understand the topic from the participant's perspective. The researcher used a semi-structured one-to-one

interview (Greeff, 2011; Babbie, 2013) to enable the researcher to explore rich data presented by the participants during the interviews.

(f) Questions used as prompts

The researcher developed an interview schedule with open-ended questions (Appendix A to D), and added questions as the interviews progressed and new themes emerged. The questions guided the researcher, rather than the researcher being dictated by the questions. The questions explored the best interests of the child during the divorce mediation process. They were not based on a set of standardised questions, but a set of topics that were explored with the participants (Babbie, 2013).

The first few questions were asked to guide the participants and to ensure that the experience was a pleasant one for them and that the researcher was not there to question their knowledge but to gain form their experience and knowledge:

- How many cases do you see per week/month? (Parenting plans, recommendations for parenting plans, judgements)
- What are the problems you experience? Can you give me some examples?

The following questions were then used as prompts during the interviews:

- How do you understand the concept of the best interests of the child?
- How do you ensure that the best interests of the child are applied in your assessment?
- What processes do you follow in the development of a parenting plan?
- How do you canvass the views of the child?
- How do you establish the best interests of the child?
- What criteria can be used to determine the best interests of the child?

- Is the construct of the best interests of the child relevant during the divorce mediation process?
- Based on your experience, how do you perceive the current position of the child during this process?
- What knowledge and skills do professionals need to have to promote and establish the best interests of the child during divorce mediation?
- After the first few interviews, the following questions were added to the subsequent interviews with professionals:
- What do you base your decision on the recommendation of handovers between parents of children?
- Is there a need for more in-depth reports concerning forensic assessments and residency evaluations?
- Is there a need for guidelines on the specific child's interests?
- Information gained from the background information, was it helpful? Why do you require background information?
- What guidelines do you recommend for the child's best interests?
- What information do you hope to obtain by collecting collateral information?
What information do you require?
 - Do you ever discuss the child/children during the initial parent interview?
 - Why do you require all the information from the parents? Is it in the child's best interests?
 - When you recommend shared residency, what is your criteria for this recommendation?

(g) Interviewing techniques

The following techniques were used during the interviews. The researcher:

- Allowed participants to do most of the talking

- Dressed similar to participants, as dress and grooming is regarded as the person's attitudes and orientations, according to Greeff (2011) and Babbie (2013)
- Was careful to ask one question at a time, asked clear and brief questions
- Avoided sensitive questions that may cause unease
- Asked questions about experience and behaviour before questions about opinion and belief
- Followed the pattern of asking general questions to specific and broad to narrow and avoided asking leading questions
- Attempted to maintain control at all times while still allowing free reign
- Returned to incomplete information throughout the interviews, asking questions such as "Tell me more" and "What do you think?"
- Remained sensitive not to interrupt participants and explored laughter in the interviews
- Attempted to redirect the interview where the professionals' attention drifted and ended the interviews at reasonable times to avoid an unwarranted imposition
- Left the tablet to record the entire interview without turning it on and off during the interview, and transcribed afterwards

The researcher was cognisant that even when the tablet was turned off and shut down at the termination of the interview; the interview was not necessarily over (Greeff, 2011; Babbie, 2013).

4.4.3.2 Data analysis

Thematic analysis is a method for analysing and reporting themes with the data collected from the interviews. This was applied in the second phase of the study in

order to report the experiences, meanings and realities of the participants (Brandt et al., 2004), therefore reflecting reality.

Thematic analysis in this study was completed in six phases:

1. Familiarising with the data
2. Generating initial codes
3. Searching for themes
4. Reviewing themes
5. Defining and naming themes
6. Producing the report (Braun & Clark, 2006).

Themes were identified using an inductive approach, meaning the themes were linked to the data. Inductive analysis is a process of coding data without trying to *fit into a pre-existing coding frame* (Braun & Clark, 2006, p.12). It was a data-driven approach.

These interviews were transcribed and the process of coding was initiated to obtain various themes arising from these interviews. Furthermore, the researcher used thematic analysis at the latent level, meaning going beyond the semantic where themes are identified through explicit or surface meanings of data (Braun & Clark, 2006).

The researcher analysed the data through thematic analysis where key themes were identified in the text and develop coding to represent the identified themes. The primary focus in thematic analysis is the content of the interviews (Agee, 2009; Creswell, Hanson, Clark & Morales, 2007).

Thematic analysis is flexible in that it allowed the researcher to determine the themes in a number of ways. Rich thematic descriptions of the data provide the important themes. The researcher's theoretical interests in the topic did not drive the themes identified, but the coding of the data is a process of coding the data without fitting into an existing coding frame. The themes were identified around a central idea or concept (Braun & Clarke, 2006). This form of thematic analysis is data-driven. Verbal data of the interviews was transcribed into written form to conduct a thematic analysis (Braun & Clarke, 2006).

Themes identified captured something about the data relating to the research question and represented a *patterned response* (Braun & Clarke, 2006, p. 10). The researcher used her own judgement to identify themes where this data captured information in relation to the research question.

4.4.3.3 Coding as a measure of qualitative data processing of the recorded interview

The researcher used the key process of coding to classify and categorise the individual pieces of data in the recorded interviews as well as the reports and judgements, with an associated retrieval system of the coded information (Babbie & Mouton, 2012). This allowed the researcher to discover the patterns among the data that point to the theoretical understanding of the study (Babbie, 2013).

The researcher manually coded sentences, phrases and paragraphs. The paragraphs were coded using different coloured and felt-tip pens for easy reference, as some paragraphs had more than one code per paragraph (Babbie, 2013).

Linking codes to the key concepts of and the title of the study generated the code categories (Babbie & Mouton, 2012). Open coding was used as the researcher opened up the text and exposed the thoughts, ideas and meanings of the texts. The

ideas, meanings and thoughts were exposed to uncover and name the concepts (Babbie & Mouton, 2012). The data was broken into parts and compared with similarities and differences. Similar phrases and sentences that were found to be conceptually similar or related in meaning were termed categories, according to Babbie (2013).

The next step was axial coding where the core concepts were identified using the results of the open coding (Babbie, 2013). Axial coding utilises the results of open coding involving the regrouping of the data searching for concepts that are more analytic (Babbie, 2013). Selecting coding is the next step the researcher undertook to identify the central codes in the study (Babbie, 2013).

4.4.4 TRUSTWORTHINESS OF THE STUDY

The application of rich rigour, self-reflectivity, credibility, dependability, and confirmability as criteria ensure quality of research (Creswell, 2009). Lincoln and Guba (1985) posit that trustworthiness of a research study is important to evaluating its worth. Trustworthiness involves establishing:

- Credibility - confidence in the 'truth' of the findings
- Transferability - showing that the findings have applicability in other contexts
- Dependability - showing that the findings are consistent and could be repeated
- Confirmability - a degree of neutrality or the extent to which the findings of a study are shaped by the respondents and not researcher bias, motivation, or interest (Lincoln & Guba, 1985).

The researcher complied as follows:

4.4.4.1 Rich rigour

The researcher ensured **rich rigour** in the process by collecting data that was sufficient, appropriate and complex enough to contribute to the field of divorce mediation (Creswell, 2009).

4.4.4.2 Self-reflectivity

The sincerity of the data was ensured by the researcher's self-reflection about the biases and inclination of the research on the grounds of her involvement in the divorce mediation process (Creswell, 2009). Therefore, the researcher, who acted as the main instrument in the study, constantly reflected on psychological, sociocultural, academic, career-related or any other personal characteristics that might influence data assumption about participants (Creswell, 2009). Furthermore, the methods of data collection as well as the challenges faced in the process of obtaining the documents and identifying appropriate participants was described clearly (Lincoln & Guba, 1985).

4.4.4.3 Credibility

Thirdly, **credibility** – reflecting the trustworthiness and plausibility of the findings – was ensured through thick descriptions of the data and the application of the principles of crystallisation in each of the two phases of the study. Thick descriptions entailed showing the data to the reader *without telling them what to think* (Creswell, 2009, p.843). Techniques for establishing credibility according to Lincoln and Guba (1985) are prolonged engagement, persistent observation, triangulation, peer debriefing, negative case analysis, referential adequacy and member checking.

Credibility was achieved by the following procedures:

- (a) The researcher stayed in the field until data saturation occurred; interpretations were consistently pursued in different ways
- (b) Information was collected from different points of view (triangulation) to elicit divergent constructions of reality
- (c) The materials available to document findings, namely that for this study the researcher recorded the interviews
- (d) Peer debriefings with a colleague to review perceptions, analyses and insights and member checking where the researcher would go to the source of information and check the data and interpretation
- (e) The aim was to correct errors and provide additional volunteer information (Lincoln & Guba, 1985; Babbie & Mouton, 2012).

4.4.5 Transferability

Transferability refers to the extent to which the findings can be applied with other respondents or is applied in other contexts (Babbie & Mouton, 2012). Therefore, the qualitative researcher does not claim that knowledge gained will have relevance for the same context in another period (Babbie & Mouton, 2012).

The following strategies were applied to ensure transferability:

- (a) **Thick description:** The researcher collected detailed descriptions of data and reported the descriptions with sufficient detail and precision
- (b) **Purposive sampling:** The researcher used purposive sampling to maximise the range of information that was obtained by selecting locations and participants

- (c) **Dependability:** The researcher repeated the same information to the same or similar participants, to ascertain whether the findings would be similar (Lincoln & Guba, 1985).

Transferability refers to the potential for extrapolation. It relies on the reasoning that findings can be generalized or transferred to other settings or groups (Lincoln & Guba, 1985).

4.4.6 Dependability

If the study were to be repeated with the same or similar participants in the same context, the results would be similar. Lincoln and Guba (1985) aver that validity without reliability is not possible, neither is credibility without dependability. In order to address dependability, the process within the study was reported in detail to enable a future researcher to repeat the work, but not necessarily gain the same results (Shenton, 2004). Dependability refers to the stability of data over time and under different conditions (Polit & Beck, 2012).

4.4.7 Confirmability

It is important that the findings are the product of the focus of inquiry and not that of the researcher's biases (Polit & Beck, 2012). The intrusions of the researchers' biases were inevitable, and the researcher promoted confirmability within the role of triangulation to reduce the effect of investigator bias (Shenton, 2004). Lincoln and Guba (1985) refers to the conformability trial where the researcher reviewed at least six classes of data, namely,

- (a) Raw data (field notes, recordings, survey results)
- (b) Data reduction and analysis products (write-ups of field notes, summaries)
- (c) Data reconstruction and synthesis products (themes developed, findings and conclusions, final report)

(d) Process notes (methodological notes, audit trail notes, trustworthiness notes); material relating to intentions and dispositions (personal notes and expectations) and instrument development information (preliminary schedules and observation formats). The researcher remained cognisant of the “audit trail” whereby an observer can trace the course of the research step-by-step through the procedures that were described in the research (Lincoln & Guba, 1985; Shenton, 2004). Conformability refers to the objectivity, that is, the potential for congruence between two or more independent people about the data’s accuracy, relevance, or meaning (Lincoln & Guba, 1985; Polit & Beck, 2012).

4.4.8 Authenticity

Lincoln and Guba (1985) added a last criterion, namely, authenticity, and authenticity refers to the extent to which researchers show a range of realities (Lincoln & Guba, 1985; Polit & Beck, 2012).

4.4.9 Crystallisation

Crystallisation focuses on the complex dynamics of everyday relating, the complexities of relationship research (Ellingson, 2014).

Qualitative research consists of the collection of empirical materials that portray the meaning of individual lives. In order to make sense of the material presented, the researcher requires diverse interpretative practices for an accurate portrayal of her understanding of the phenomenon (Ellingson, 2009). Qualitative research approaches are varied, ranging from those who try to minimise subjectivity, namely the realists and postpositives to those who interrogate subjectivity, the poststructuralists (Cohen & Crabtree, 2006).

Ellingson's (2009) study on crystallisation in qualitative research is supported by the poststructuralists' perspective, therefore embracing and interrogating subjectivity in research. The relevance of the researcher's subjectivity is stressed in qualitative research, as the researcher is part of the study (Cohen & Crabtree, 2006). Crystallisation is a positive and valuable way of analysing data; it is a combined method of analysing pragmatic and strategic concerns (Ellingson, 2014).

Crystallisation is achieved in a single (integrated crystallisation) or in several (dendritic crystallisation) representations (Ellingson, 2014). An integrated (single) crystallisation comprises a single representation where multiple genres along the qualitative continuum are analysed, as is the case in this study (Ellingson, 2009). This strategy illuminates different angles of a phenomenon utilising the same representation. Ellingson (2009) argues that a social constructivist perspective underpins crystallisation, and the research process is a constructing and constructed perspective.

Cohen and Crabtree (2006) define crystallisation as the process of reflecting on the analysis experience of the data while at the same time temporarily suspending the process of examining or reading the data (immersion) to identify patterns or themes. Crystallisation is a framework for conducting qualitative research with complementing rigorous social science with artistic representations of data (Ellingson, 2014). A crystallisation framework enhances the conventional report genre and enhances it with complementary insights. Ellingson (2014) proposes that crystallisation's framework is supported by feminism and interpretivist methodological traditions. The crystal is viewed as an alternative metaphor to the two-dimensional triangle that forms the basis for methodological rigor and validity (Ellingson, 2014).

Crystallisation produces knowledge about a phenomenon through complex interpretation and it uses multiple forms of analysis across multiple points of the qualitative continuum (Cohen & Crabtree, 2006). Furthermore, crystallisation depends upon drawing upon multiple forms of ways of expressing findings and celebrates knowledge as situated, partial, constructed, multiple and embodied (Ellingson, 2009).

In this study, the following principles of crystallisation were applied in each of the phases as indicated below: (Ellingson, 2009):

Across phases: Using multiple data sources including documents relating to divorce mediation and the experiences of professionals involved in divorce mediation, as well as various methods of data collection, which in this case include document analysis and individual interviews.

Phase 1: (Document analysis) Using an independent coder who was able to provide a different lens and allowed for a more complex understanding of the documents

Phase 2: (Thematic analysis of Interviews) Including participants from a variety of contexts to ensure multivocality as their different viewpoints would be clearly heard without being influenced in any way.

Furthermore, crystallisation in each phase of the study included the following:

- Phase 1: The use of an independent coder who coded the documents of the study;
- Phase 2: The inclusion of the various participants who work in the field of divorce mediation ensured multivocality and a variety of opinions;

- Phase 2: Member-checking that entailed testing the data, analytical categories, interpretations and conclusions with members of the group from whom data was collected (Lincoln & Guba, 1985) to ensure the credibility of the findings.

4.5 ETHICAL CONSIDERATIONS

Grinell and Unrau (2011) argue that the need to protect the individual's participating in research studies can be tracked to 1947 with the Nuremberg Code. The code was developed by a military tribunal in order to provide standards for judging the inhumane medical experiments conducted on humans by the Nazi regime during World War II. The Nuremberg Code laid the groundwork for the principles underlying our practices today regarding the ethical conduct of research.

The framework for this study is the *Constitution of South Africa 1996*, 108 of 1996, approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 1997 (Juta's Statutes Editors, 2011). The study furthermore focuses on Chapter 2 of the *Constitution of South Africa 1996*, that deals with the Bill of Rights in terms of equality (Section 9), human dignity (Section 10), everyone has a right to life (Section 11), freedom and security of the person (Section 12), freedom of religion, belief and opinion (Section 15) and freedom of expression (Section 16). The emphasis of the proposed research also focused on Section 28, namely children's rights, specifically Section 28 (2): *A child's best interests are of paramount importance in every matter concerning the child* (Juta's Statutes Editors, 2011, p. 7).

The ethics of the study was typically associated with morality as it deals with matters of right and wrong with associated emphasis on human rights. The general agreement of the social scientific community in what is proper and improper in the

conduct of the scientific inquiry was part of this process (Babbie & Mouton, 2012)..

The following ethical principles were adhered to in this research:

4.5.1 No harm to participants

The fundamental ethical rule holds that there must be no harm to the participants (Babbie & Mouton, 2012). In the first phase of the study secondary data, including reports on completed mediation processes; assessment reports and parenting plans were used. The identities of the persons referred to in these documents were protected to ensure that no harm was inflicted. In the second phase of this study the participants involved are professionals, therefore limiting potential harm, as they are familiar with the mediation process (Babbie & Mouton, 2012). The study was structured in such a way that potential harm to the participants was avoided or minimised.

Rubin and Babbie (2011) state that research should never injure the participants in a study, regardless of whether they volunteered for it. The researcher followed the ethical guidelines in a number of codes of contact for psychological practice and research.

4.5.2 Informed consent

Participation in a study is a disruption in a person's life and his or her regular activities. It is therefore important that firstly, participants are well informed about the procedures and the expectations, and secondly, that participation is voluntary. The participants in this study were duly informed about the duration of the process, their involvement, procedures that will be followed, possible advantages and disadvantages as well as the credibility of the researcher to ensure the researcher had the informed consent of the participants (Strydom, 2011). From an ethical and methodological perspective, it was necessary to obtain the participants' informed

consent. The researcher did not deceive the participants in any way. The participants' right to refuse to be interviewed, their right to answer any questions or fill in any forms was respected. The participants were informed that there would be no benefit or reward system if they participate in the study. A consent form (Appendix A) was created for this study, that:

- Informed participants as to what they were required to do and for what purpose
- Informed the participants that they had the right to withdraw from the process and they had the right to review the material
- Informed the participants that they are under no obligation to answer all the questions
- Advised the participants of the approximate length of the interview
- Advised participants that their names would not be used in the study, nor the names of parents and children in the reports the participants provided
- Requested permission to audio record the interviews
- Provided the participants with the proposed questions
- Provided the participants with confirmation of the researcher's supervisor's contact details and the University of the North West's information
- Provided the participants with the ethics application, NWU-00060-12-S1 (H. Grobler) *Developing sustainable support to enhance quality of life and wellbeing for children, youth and families in South Africa: A trans-disciplinary approach. The panel is satisfied that the ethical aspects have been adequately addressed and ethical approval is recommended.*

4.5.3 Anonymity and confidentiality

The researcher considered participants' anonymity and confidentiality a priority throughout the research and ensured their identities were protected (Rubin & Babbie,

2011; Strydom, 2011). A participant is anonymous when the researcher is unable to identify a given response with a given subject. The management of confidentiality and anonymity was explained to the participants. To ensure confidentiality in phase 1 the names and addresses were removed from the reports and replaced by numbers. The same criteria of anonymity applied for the participants in phase two. The identities of the participants were concealed in all documents resulting from the research (Rubin & Babbie, 2011; Strydom, 2011). Participants were referred to in the study as psychologist, social worker, judge, advocate, attorney, family advocate and the information from the reports, the identifying families in the reports remained anonymous and were referred to as biological mother, biological father and child. The information will be deleted after seven years of completing of the study.

4.5.4 Deception of participants

Deception of participants entails the deliberate misrepresentation of facts in order to make another person believe what is not true, violating respect to which every person is entitled (Strydom, 2011). The researcher did not withhold any information neither did she provide incorrect information in order to ensure participants' participation.

4.5.5 Avoidance of harm

It is a fundamental ethical rule that research should not bring harm to any of the participants. The participants can be harmed emotionally and the researcher should ensure the participants' safety. The researcher has an ethical obligation to protect the participants within reasonable limits from any form of physical or emotional discomfort. To this end, the researcher informed participants beforehand of the study and the potential impact of the interviews. Participants were given the choice whether to withdraw from the study (Strydom, 2011; Babbie & Mouton, 2012).

4.5.6 Actions and competence of the research

Strydom (2011), Babbie (2013) and Grinell and Unrau (2011) propose that an ethical obligation rests with the researcher to ensure that she is competent and skilled to undertake the investigation. The researcher undertook this study under the supervision of a supervisor allocated by the University of the North West. The researcher is knowledgeable and able to conduct and facilitate the research study and ensured competency in undertaking this research project.

4.5.7 Voluntary participation

Participation was at all times voluntary and the participants could withdraw during any stage of the study (Strydom, 2011; Babbie & Mouton, 2012).

4.5.8 Release or publication of the findings

Strydom (2011) states that the report should be accurate, objective, clear and unambiguous and include all essential information. The shortcomings and errors of the study have been documented.

4.5.9 Code of ethics

The researcher will strive to maintain integrity in the analysis and reporting of data, and this includes ethical practices, appropriate authorship to a publication, no form of plagiarism and no secret or clandestine research. A professional code of ethics was adhered to at all times (Babbie & Mouton, 2012).

4.5.10 Data storage

According to new ethical guidelines, the reports obtained from professionals as well as the judgements were handed over to the NWU. These reports – (a) the recorded interviews with professionals, provided in disc format, and the recordings on the researcher's tablet were deleted subsequently; (b) the file with the

professionals' biographical information and their informed consent – will be kept in a locked cabinet at the NWU for 7 years. The researcher did not make any copies of professionals' information.

4.6 CONCLUSION

In this chapter, the research paradigm, research design and method was discussed as well as the ethics and trustworthiness of the study. Fundamental terminology such as the interpretative paradigm as well as the interpretive and descriptive design was discussed. Methods of data collection and data analysis that were applied in this study were explicated in order to establish themes that will be discussed in Chapters 5 and 6, to develop appropriate guidelines in chapter 7.

CHAPTER 5

RESEARCH RESULTS: PHASE 1

5.1 INTRODUCTION

The results obtained in Phase 1 of this study are reported in this chapter. The results were obtained by analysing reports requested as part of divorce mediation process that involved parenting plans. The reports assisted mental health professionals and lawyers to draw up parenting plans with the best interests of the child in mind or to give judgement in cases where there were disputes in terms of the best interests of the child. The question that guided the data analysis in this phase of the study was: *What do the reports reveal with reference to the application of the best interests of the child principle in the mediation processes?*

The first part of the chapter entails baseline information obtained from the documents. The second part of the chapter presents indicators of promoting the best interests of the child as noted in the documents as well as indicators that restrain the best interests of the child.

5.2 BASELINE INFORMATION OBTAINED FROM THE DOCUMENTS SELECTED FOR THIS STUDY

This part of the chapter includes baseline information pertaining to the types of reports used for the document analysis, the profiles of parents and children involved, and the key terms that were used in the reports with specific reference to the mediation process. The information is presented in the form of tables followed by a brief discussion.

5.2.1 Overview of document selected for analysis

Table 5.1 presents an overview of the types of reports as referred to in the *Children's Act, 38 of 2005* and the motivation for selecting these reports, assessments, judgements and investigations.

Table 5.1: Rationale and Sections of the *Children's Act, 38 of 2005* used in the documents

Report no	Type of report/judgement	Rationale for report
1.	Joint request from legal representatives of parents to conduct an assessment with specific reference to residency and contact of the minor children	Parental responsibilities and rights with specific reference to contact and residency of minor children
2.	Parenting Plan in terms of Section 33 of the <i>Children's Act, 38 of 2005</i>	Parenting Plan in terms of Section 33 of the <i>Children's Act, 38 of 2005</i>
3.	Order of Court to observe and assess the contact and relationship between the biological father and minor children to make written recommendations to the Court	Observe and assess contact and relationship between father and minor children to make recommendations to Court
4.	Full parental rights and responsibilities including guardianship in terms of section 18 (a) to (d) and 18(3) of the <i>Children's Act, 38 of 2005</i> . Section 18 and Section 18 (2) (a): to care for the child Attorney requested social worker to assess parents to determine whether it would be in the best interests of the child to remain residing with her father and whether he should be granted full parental rights and responsibilities in respect of the child	Launch an application to High Court to obtain full parental rights and responsibilities in terms of Section 18 (a) to (d) and 18 (3) of the <i>Children's Act, 38 of 2005</i>
5.	Parenting Plan in terms of Section 33 of the <i>Children's Act, 38 of 2005</i>	Parenting Plan in terms of Section 33 of the <i>Children's Act, 38 of 2005</i>
6.	Approached by attorney who requested that social worker investigates the matter and make recommendations that would be in the minor child's best interests with regard to their primary residence, care and contact Section 21 Parental responsibilities and rights of unmarried fathers Section 18 and 18 (2) (a): to care for the child	Launch an application in the High Court to obtain and formalise full parental rights and responsibilities in terms of Section 18 (a) to (d) and 18 (3) as well as Section 21 (1) (b) of the <i>Children's Act, 38 of 2005</i> that children reside permanently with applicant
7.	Investigation in terms of launching an application to the High Court in order to assign contact, care and guardianship of the three minor children Section 150 (1) (f) (g): Child in need of care and protection Form 36 in terms of Section 36: (1)(f): Lives in or is exposed to circumstances which may be seriously harm that child's physical, mental or social wellbeing Section 36: Presumptions of paternity in respect of child born out of wedlock Section 24: Assignment of guardianship by order of court Section 23: Assignment of contact and care to interested person by order of court	Application in terms of Section 23 and 24 of the <i>Children's Act, 38 of 2005</i> in order to be assigned contact, care and guardianship
8.	Assessment of parties and investigation into the care, contact and residence of the minor child	Assessment of care, contact and residence of minor child in terms of Court Order

Report no	Type of report/judgement	Rationale for report
9.	Biological mother approached High Court of South Africa (Gauteng Local Division), Johannesburg to obtain permission to remove minor child from South Africa. Psychological report recommending best interests of the child	Mother approached High Court to obtain permission to remove child from South Africa
10.	Retired judge appointed by Court to make a recommendation on the dispute after considering the case and interviewing any persons he deems necessary on relocation of child with parent Mother deceased	Parental rights and responsibilities: Mother deceased, stepfather and biological father both wants primary residence
11.	Family report: Assist with reconciliation with father and two minor children	Court Order: Assist with reconciliation of 2 minor children with their father
12.	Assess and evaluate minor children and express an opinion on advisability of joint residency, impact of joint residency, manner of joint residency to be implemented and recommended therapy	Assess and evaluate minor children – legal representative approached psychologist to compile a report after assessment
13.	Social work report in respect of biological parents and minor children Section 70: Family group conferences Section 71: Other lay-forums	Referred to social worker in terms of Section 70/71 of the <i>Children's Act</i> , 38 of 2005
14.	Approached by legal representatives of biological parents to assess and evaluate the minor children and express an opinion on the advisability of joint residency, impact of joint residency, manner joint residency to be implemented and recommended therapy Section 23: Assignment of contact and care to interested person by order of court	Parental responsibilities and rights, primary residence and guardianship
15.	Social work report in respect of minor child	Referred by family counselor from Family Advocate for an assessment
16.	<i>McCall v McCall</i> – best interests of child criteria 1994 (3) SA 201 (C)	Judgement: Application by non-custodian parent for variation of consent paper granting care of minor child to other parent. Factors to be considered in determining what is in the child's best interests in the context of care
17.	<i>Van der Linde v Van der Linde</i> 1996 3 SA 509 (O)	Judgement: Separation of siblings and maternal preference rule
18.	<i>P v P</i> 2007 (5) SA 94 (SCA) Care of two minor children respectively. Task of expert witnesses to assist the court in an objective manner Section 9 of the <i>Children's Act</i> , 38 of 2005: Best interests of the child of paramount Section 28 (2) of the <i>Constitution of South Africa</i> , 1996: Best interests of the child are of paramount importance. Courts are not bound by the recommendations of either the family advocate or expert witnesses	Judgement: Value of the recommendations made by the family advocate and evidence by expert witnesses in determining the best interests of the child
19.	Order of Divorce and settlement agreement Section 18 and 18 (2) (a): to care for the child: Parental responsibilities and rights	Mother claims father is a danger to himself, the children and herself. Mother claims father has frequent relations with sex workers. Requested supervised contact
20.	<i>Hummel v Hummel</i> 2012 JDR 1679 (GSJ) Parenting Plans: Application to confer decision making powers on a case manager to resolve disputes between parents who are both vested with full parental power Section 7 (1): Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors should be taken into	Application to confer decision making powers on a case manager to resolve disputes between parents who are both vested with full parental powers

Report no	Type of report/judgement	Rationale for report
	<p>consideration where relevant, namely -</p> <ul style="list-style-type: none"> • Section 33(5): A parenting plan that was made an order of court may be amended or terminated only by an order of court on application - • Section 33: Contents of parenting plan • Section 34: Formalities • Section 30 (3): Co-holders of parental responsibilities and rights: A co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights to another co-holder or person or allow the other co-holder or person to exercise any or all of those responsibilities and rights on his or her behalf. • Section 36: Presumption of paternity in respect of child born out of wedlock 	

The variety of these reports indicate the training and level of experience a mediator should have to navigate parents through a minefield of pre- and post-divorce issues. The following sections of the *Children's Act*, 38 of 2005 were applied to classify these reports, namely Section 7, Section 18, Section 21, Section 23, Section 24, Section 30, Section 33 and Section 70 and 71. The contribution in the understanding of the results is to highlight the variety of sections used in terms of the documents of the Act in Table 5.1.

5.2.2 Profile of families represented in reports, assessments and judgements

Table 5.2 presents an overview of the profiles of the families who are indicated in the document that were analysed. The profiles are representative of families who required mediation in the process of drawing up parenting plans.

Table 5.2: Profile of families represented in reports, assessments and judgements

Matters and reports	Years married	Age of mother	Age of father	Number of children	Gender of children	Age of children
1.	12 years	34 years	34 years	3	2 male (twins) 1 female	4 years 6 years
2.	12 years	30 years	33 years	1	Female	6 years
3.	12 years	38 years	40 years	3	1 male 2 females	3 years 7 years 9 years

Matters and reports	Years married	Age of mother	Age of father	Number of children	Gender of children	Age of children
4.	Co-habitation	Unknown (vagrant)	40 years	1	Female	14 years
5.	10 years	30 years	34 years	1	Female	7 years
6.	Mother deceased	Grandmother 68 years	49 years	2	Male (twins)	5 years
7.	Mother deceased	Father unavailable	Unknown	3	Males	4 years 10 years 12 years
8.	Co-habitation	25 years	40 years	1	Male	2 years
9.	Unknown	38 years	48 years	1	Female	12 years
10.	Divorced	Mother deceased	Unknown	1	Male	12 years
11.	Divorced	Unknown	Unknown	2	Male	16 years 14 years
12.	9 years	30 years	38 years	2	Female	7 years 9 years
13.	Co-habitation for three years	42 years	42 years	1	Male	4 years
14.	Co-habitation	23 years	24 years	1	Female	5 years
15.	Co-habitation for 2 years	Unknown	Unknown	1	Female	6 years
16.	17 years	50 years	55 years	1	Male	12 years
17.	Unknown	Unknown	Unknown	2	Male Female	14 years 9 years
18.	Divorced during 2004	Unknown	Unknown	2	Unknown	Unknown
19.	12 years	30 years	36 years	2	Male Female	4 years 2 years
20.	Divorced	Unknown	Unknown	1	Male	5 years

The documents selected for analysis indicate that 31 children were affected in the 20 cases reported in the documents. Of these 16 were boys and 13 girls, which correlates with the statistical reports on divorce and separation in the South African population (Statistics South Africa, 2012). The children were aged between 3 and 16 years, with the majority of the children younger than 12. The parents' ages were between 24 and 55 for the fathers and 25 and 50 for mothers, except in a case where the grandmother of 68 years old parented a grandchild.

5.2.3 Key terms referred to in the documents with reference to mediation process and the content of the parenting plans

Table 5.3 presents an overview of the key terms that were identified with reference to the mediation process and the content of the parenting plans. Coding these terms assisted the researcher to identify where the emphasis is placed during the mediation process.

Table 5.3: Key terms referred to in the documents

	Best interests of the child	Joint parental rights and responsibilities	Shared residency	Hostility between parents	Handovers of children	Protection orders and court orders
1.	1	4	4	91	8	2
2.	2	2	0	0	1	0
3.	1	1	0	77	7	6
4.	1	1	1	13	1	1
5.	2	4	0	0	7	0
6.	10	3	0	56	13	1
7.	2	4 (both parents unfit – biological father has a chronic heroin addiction; biological mother is incapable of caring physically and financially for children. Guardianship and parental responsibilities granted to father's partner)	0	32	0	4
8.	2	6	3	104	12 Judge recommends handovers at police station	6
9.	1	3	0	48	4	3
10.	9	7	0	12	2	1
11.	2	6	11	0	9	4
12.	7	9	45	139	1	8
13.	3	1	0	51	2	1
14.	2	1	0	11 Mother dependent on drugs, especially cocaine; Father not available or present in child's life	0	1
15.	0	0	0	15	0	1
16.	7	0	0	2	1	4
17.	3	0	0	1	1	1
18.	3	0	0	1	0	2
19.	4	1	0	0	1	1
20.	1	1	0	1	0	1
Frequency of occurrence in reports	64	54	64	654	70	45

Indicators of hostility dominated in Table 5.3 above. The term ‘best interests of the child’ occurred a mere 64 times in 20 extensive reports and judgements, whereas indicators of hostility occurred 654 times. In report 12 alone, the best interests of the child is mentioned only 7 times, with 139 indicators of hostility in evidence. In report 15 the best interests of the child is not mentioned once, but hostility is mentioned 15 times. The researcher identified indicators that children in divorced families are exposed to high levels of conflict that makes them vulnerable and overwhelmed. In a sample of 20 reports and cases, 654 incidents of hostility between parents occurred.

High-conflict divorces have the following common characteristics, namely high rates of litigation, high degree of anger and distrust, incidents of verbal abuse, protection orders and intermittent physical aggression. Children develop loyalty conflicts and often situations of alignment with the one parent and the exclusion of the other parent occur. The child is overburdened and saddened, and many feel that if their parents can stop loving one another, they can also stop loving the child. They are also afraid to express their love for the one parent in front of the other parent. Polarised children and children who are contact-resistant with the one parent are often alienated and may feel they are unable to have a relationship with both parents due to the continuous elevated stress levels. High-conflict parents remain locked in deep-rooted conflict, and this plays out in court, in public and in front of the children.

Protection orders also fueled the conflict between parents, and the researcher established that in the sample of 20 reports and cases, in only two cases no protection orders were mentioned. Many of the parents had multiple protection orders, which exacerbated the conflict. Handovers of children also appear to be a problematic area, and fights often play out in front of already overwhelmed children. In one instance, in report 8, the judge went so far as to recommend handovers of the child at the police station. The participants interviewed mentioned that they would

often recommend that handovers take place at schools, to avoid parents facing one another and causing a scene in front of the child.

Shared parenting or shared residency as referred to in the *Children's Act*, 38 of 2005, is a concept that originated more than 30 years ago. Ricci (2006), who is affiliated to the Family and Conciliatory Court in San Francisco, asked the question in the late seventies why she and her erstwhile husband could not both be custodian parents to their children and both be holders of parental rights and responsibilities. She wrote the book *Mom's house, Dad's house* after her and her erstwhile husband's experience of shared residency (Ricci, 2006).

In the sample used for this study, five of the reports and cases recommended shared residency and the term shared residency is mentioned a total of 64 times in the five reports. Shared residency is the concept whereby children stay in two homes according to an age appropriate schedule that is revised on a yearly basis according to the developmental needs of the child. Shared residency does not necessarily imply that children reside with both parents 50 percent of the time; children can often reside 8 days in a 2-week period with the one parent and 6 days in a two week period with another parent. To obviate the disruption of packing bags and taking clothes, books and toiletries from one house to the other, both homes should be set up so that the children can reside comfortably in either home. However, the child's personality and temperament, age and development phases have to be considered before recommending shared residency, as well as factors such as the distance between the two parents' homes.

The lack of home visits by professionals is another area of concern. In judgements, no home visits are necessary and/or required, but in the 16 forensic reports that were analysed for this study, only six home visits were done.

5.3 INDICATORS OF PROMOTING THE BEST INTERESTS OF THE CHILD IN THE DOCUMENTS

In this section indicators of promoting the best interests of the child as noted in the documents are presented. Three indicators were identified as having a positive impact in terms of promoting the best interests of the child as described in the *Children's Act, 38 of 2005*, as set out in Figure 5.1:

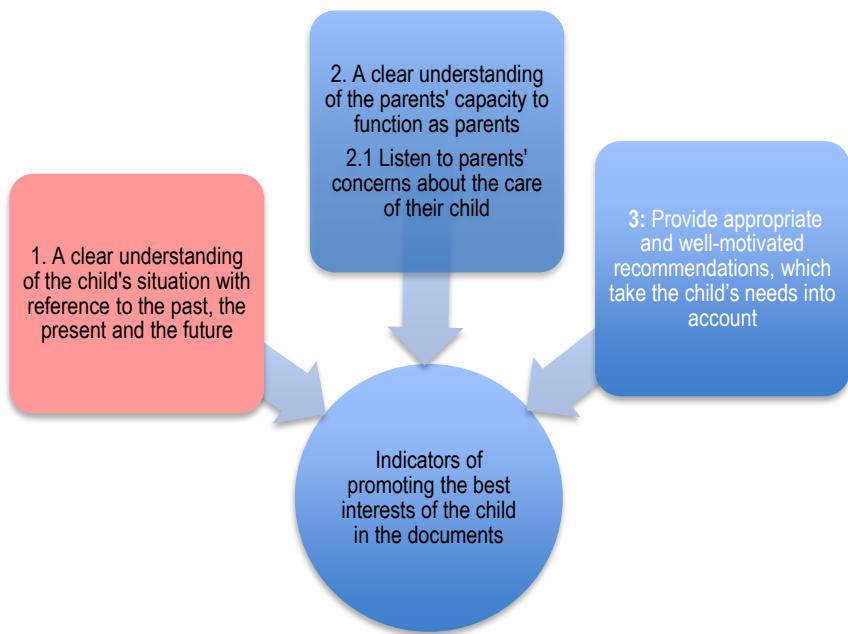


Figure 5.1: Indicators of promoting the best interests of the child in the documents

5.3.1 Indicator 1: Obtaining a clear understanding of the child's situation with reference to the past, present and future

The indicator refers to the actions taken by professionals to serve the best interests of the child that allowed them to obtain a clear understanding of the child(ren)'s situation as a basis for making decisions about the parenting plan.

The results suggest that the professionals who compiled the reports obtained a clear understanding by obtaining in-depth information of the child's history and developmental pathway as part of their assessment. In document 17, an example of

such an extensive history of the child' situation is provided, by the professional responsible for the report (see Appendix 2).

The professionals furthermore ensured that they obtain the child's perspective on his/her situation, and include that in the reports as indicated in document 15:

With regards to her family, the child sees her family unit as comprising of her mother, stepfather and her maternal grandparents. The child did not include her father or members of his family in her family drawing. The child experiences her mother as a warm nurturing figure to whom she can turn for protection. She cited her mother as the person who meets her emotional needs. She perceives her stepfather to be a kind, benevolent and trustworthy person. She reports that her stepfather spoils her. It is of concern that the child appears to have split her world into two – the positive part she attributes to her mother and the negative part she attributes to her father.

Another example of obtaining an understanding of the child's perspective is found in Document 9 where the professional had to deal with a dispute about relocation or what William (2016 (b), p. 32), names the relocation conundrum. This is an issue where the moving parent wants to improve the quality of her life and the nonmoving/nonresidential parent, in this case the biological father wants to protect his involvement and relationship quality with the child. In such a matter it is best practice to take a systematic approach with data collection and an analysis for making parenting plan recommendations to the court (William, 2016 (a)). William (2016, (b)), recommends a risk assessment model as a useful first step in relocation that provides a scientific grounding. A risk assessment model provides the risk and protection factors of such a proposed relocation. A complementary social capital approach is also a straightforward perspective (William, 2016 (a); William, 2015). The social capital approach has advantages in such a relocation approach, as the evaluator needs to provide visualisation what life will be like for the child in the proposed residential living arrangements in the parents' respective locations (William, 2016 (a), (b)). Unfortunately, according to William (2016 (b)), such forensic relocation evaluations often have double binds and complexities inherent in such relocation cases, such as lacking in quality. According to William (2016 (a)), relocation cases are highly complex and psychologists and social workers should show a greater command of the professional literature and understanding of family law. An evaluator is expected to provide accurate and

unbiased descriptions of the child's functioning and attachment in the family, according to Patel and Choate (2014).

Childcare evaluations are complicated and time consuming, as illustrated in the examples from the documents. The childcare evaluators (psychologist or social worker) are required to have:

- (a) In depth knowledge and familiarity with current research
- (b) Diversity of forensic assessment procedures that must be applied
- (c) Amount of material to be reviewed by the evaluator
- (d) Amount of data generated by the evaluator
- (e) Assessment of parents and children
- (f) Conducting home visits, and complex issues of allegations of harm to the child such as child sexual abuse
- (g) Intimate partner violence
- (h) Substance abuse and parental alienating behaviours (Zumbach & Koglin, 2015).

Such a forensic evaluation focuses on the best interests of the child, and as described in this study, it differs according to the system, culture and tradition and is challenging to implement (Zumbach & Koglin, 2015). However, the best interests of the child should be applied in every specific case, as in the example stated above, the father's concern for the child's health and schooling (Zumbach & Koglin, 2015). Establishing the best interests of the child makes a psychological evaluation both indispensable and challenging (William, 2015). The child's ultimate safety and wellbeing is the paramount concern when determining the best interests of the child (William, 2016 (a)). It is challenging for evaluators to establish the best interests of the child during highly charged parental conflicts (Zumbach & Koglin, 2015). It has become common practice in childcare evaluations to consult with social workers and

psychologists to establish the best interests of the child, however, the number of ethics complaints and malpractice suits have also increased accordingly (Zumbach & Koglin, 2015).

In Document 9 the situation is described with reference to the child's experience:

They (her and her mother) wish to go to a university in a different country. The child explained that she really wishes to go, as this is an opportunity for her to attend an international school. She explained that the problem is that her father loves her very much and he feels that her mother is dishonest. He feels that he can never trust her mother and that her mother uses everyone. Her father told her that her mother will take her to another country and will never bring her back to South Africa. The child explained that this does not make sense to her as her mother is the person who tells her to phone her father.

Another way to obtain clarity about the child's situation indicated in the document analysis was to conduct interviews with the extended family as indicated in Document 7:

I interviewed the children's grandmother at her home and I observed her interaction with the children on (date).

Also in Document 9:

I conducted collateral interviews with the child's brother... Mrs. ...– child's maternal grandmother; Mr. A – Mrs. B' partner; and Mrs. C – Mr. A's mother.

The professional also indicated that it was attempted to obtain further information on the children's situation from teachers, school principals and therapists.

I interviewed the children's teacher Mrs. E and their principal Mrs. F at their school on (date). Collateral information was obtained from the following persons: Mrs. G – ballet teacher from Gr R to Gr 5; Mrs. H– her class teacher; Mrs. I – International Social Services (Document 9) as well as school counselors (Document 7).

In only four of the reports it was mentioned that professionals had insight to the child's school reports. It is unfortunate, as a child's school report is a valuable indication of how the child is coping emotionally in the current arrangement between parents. (In an interview with one of the participants, she indicated that she requests school reports of the past five years of a child).

It is important that the voice of the child is heard, yet in only 15 reports and judgements the voice of the child was mentioned. Robinson (2010) concluded that mental health professionals predominantly interview children.

Table 5.4 presents an overview of data-collection methods aimed at gleaning insight into the children's respective situations. The data indicates that most professionals completed some form of parenting questionnaires, whether it was in written format or an interview. The judgements had no parenting interviews, as it was not a prerequisite. Eleven professionals conducted collateral interviews with the children's teachers and visited their schools. Four of the reports are judgements, and again, no collateral information was required. Furthermore, Document 9, a questionnaire (Table 5.4) that the parents had to complete, was included to learn more about the child's present situation from the parents' the point of view.

Table 5.4: Overview of information collection during assessments

	Parenting questionnaires	Collateral information teachers, therapists and case managers	Collateral information extended family, au pairs, housekeepers	Collateral information; School reports	Psychometric information	Interactional analysis	Interview with parents	Voice of the child	Home visits
1.	✓	✓	✓		✓	✓	✓	✓	✓
2.	✓						✓	✓	
3.	✓	✓	✓			✓	✓	✓	
4.	✓		✓				✓	✓	✓
5.	✓						✓	✓	
6.	✓	✓	✓	✓			✓	✓	✓
7.	✓	✓	✓	✓		✓	✓	✓	✓
8.	✓	✓	✓			✓	✓		✓
9.	✓		✓		✓	✓	✓	✓	✓
10.		✓	✓	✓			✓	✓	✓
11.		✓					✓	✓	
12.			✓		✓		✓	✓	✓
13.	✓	✓	✓	✓		✓	✓	✓	✓
14.							✓	✓	
15.					✓		✓	✓	
16.	Judgement (Cronjé & Heaton, 2004)						✓ Legal representatives	✓	
17.	Judgement Cronjé & Heaton, 2004)	✓					✓ Legal representatives		
18.	Judgement (Cronjé & Heaton, 2004)	✓					Legal representatives ✓		
19.	Order of divorce and settlement agreement						Legal representatives of parties ✓		
20.	Judgement	✓					Legal representatives of parties ✓		
Frequency of occurrence	10	11	10	4	4	6	20	15	6

The research literature confirms childcare evaluations are complicated and time consuming but that information on the child should be detailed and well organised with legible interview notes (Zumbach & Koglin, 2015). The psychologist or social worker should work from a thorough and ample dataset that is adequate to be interpreted (William, 2016 (a)). There should be sufficient information and data generated to support the recommendations (William, 2016 (a)). The childcare evaluators (psychologist or social worker) are required to have in depth knowledge and familiarity with current research; apply a diversity of forensic assessment procedures; be capable to assess parents and children; conduct home visits; and be aware of complex issues of allegations of harm to the child such as child sexual abuse, intimate partner violence, substance abuse and parental alienating behaviours (Zumbach & Koglin, 2015).

The *Children's Act*, 38 of 2005, clearly states that it is imperative that the child is included in this process, and that the child's voice is heard and the child's views are sought: *(4) A parenting plan must comply with the best interests of the child standard as set out in section 7.* According to Robinson (2010), a child-centered parenting plan can be constructed, taking into account the child's wishes and views and is in accordance with the child's best interests. Section 7 of The *Children's Act*, 38 of 2005, states the best interests of the child, and name the factors that should be taken into consideration where relevant. Section 9 states that the best interests of the child standard is paramount: *In all matters concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance, must be applied.* Social workers and psychologists should have a firm understanding of family law to understand the legal standard for the context of the case (William, 2016 (a)). *The nuances of the law can be complex* (William, 2016 (a), p. 39).

Cashmore and Parkinson (2009) question the extent to which a child should be engaged in the process of expressing her views and wishes and especially when the parents cannot agree. They state that these children can either be *allowed in the boxing ring or be given ringside seats to the boxing match*. They recommend utilising two rationales in taking the child's views and wishes into consideration, namely enlightenment and empowerment (Cashmore & Parkinson, 2009).

Section 31 deals with major decisions involving a child:

(1)(a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development. Article 12 of the Convention on the Rights of the Child (CRC) makes provision for a child to be heard through a representative in judicial or administrative proceedings.

Bagshaw (2007) argues that children's coping capacity improves when their views are respected. Byrnes (2011) asserts that the child's voice should be taken into account and her wishes and needs canvassed. However, the child's preference for one parent over the other can be influenced by a parent through parental alienation. This emphasises the importance of recognising parents' abnormal behaviour, which ultimately influences the best interests of the child. The weight given to the child's view and wishes, though, is a matter for a court to decide. The identifying criteria are the maturity of the child, the strength and duration of her wishes, the child's ability to appreciate the factors involved in the case as well as the long-term issues (Byrnes, 2011).

Article 12 determines as follows:

(1) State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the

child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Articles 4 and 7 of the African Charter on the Rights and Welfare of the child (ACRWC) also state that the child has a right to be heard, which implies that a child's views and wishes should be considered and in any matter affecting the child, the child has to be informed and consulted, taking into account the child's stage of development and level of maturity.

According to Mahlobogwane (2010), once children have voiced their wishes it would be harmful to engage them in a discussion which evinces that such wishes could not be met. A child is often also fearful that once he or she has spoken out, the other parent would show resentment to the child. When considering the child's voice, the following factors should also be taken into account: the child's age, subjective factors such as perceived maturity and capacity to make reasoned decisions, the child's level of cognitive and emotional functioning and the child's relationship with each parent, and vulnerability to parental pressures as well as parental alienation (Mahlobogwane, 2010).

Currently no guidelines are available on whether a child should express her views through family reports, through an interview with the judge, through the lawyer, directly in the courtroom or through the mediator, social worker or psychologist. Family reports in South Africa are the most common way for the child's voice to be heard through the Office of the Family Advocate, psychologists and social workers. These reports and investigations are often extremely costly for parents, and there is regrettably no guarantee that they would serve the best interests of the child

(Mahlobogwane, 2010). The legal role of the Family Advocate is in protecting the best interests of the children, for example by approving parenting plans (settlement agreements).

Doogue (2006) asserts that the child's views should be canvassed through an expert, who should consider the child's age, gender, ethnicity, culture, personality, cognitive development and verbal capacity. The expert should also consider whether the child has been subject to alienation and trauma and whether she has any special psychological, educational or medical needs.

Mahlobogwane (2010) argues that it amounts to window dressing to inform the child his or her views and wishes will be included and respected whilst knowing the child's preferences may not be considered. Children can also be manipulated by adult agendas, therefore it is difficult to provide guidelines on the weight the child's wishes should carry. However, as Mahlobogwane (2010) states, decisions concerning children's future in care matters concern the children, and they should be consulted, as they are the ones who ultimately live with those decisions. The child should be engaged in a sensitive manner, and not be manipulated or pressured. The evaluator should build a relationship with the child, and to assess a child in one session is not adequate. The child should also be assessed in the context of her school and peers, as well as the interaction and attachment with her parents and her home environment.

5.3.2 Indicator 2: Obtaining a clear understanding of the parent(s) capacity to function as a parent

Indicator 2 refers to the emphasis that those professionals who compiled the reports placed on obtaining information regarding the parents' capacity to function as a parent. They applied various strategies to gain insight into the parents' capacity.

Document 1, provides an example of a rating scale in which parents rate themselves and are then rated by the other parent with reference to attunement, consistency, routine, communication and conflict management and negotiation.

Table 5.5: Document 1: Functioning in terms of parenting ability

	Mother	Father
Attunement	Rates herself as an attuned and sensitive parent	Rates her as a attuned to her own needs
Consistency	Rates herself as a consistent parent	Rates her as an inconsistent and disorganised parent
Routine	Rates herself as rigid in implementing routine	Rates her as viewing routine as a problem and an infringement
Communication	Rates her communication with the children as good	Rates her as inconsistent in her communication with the children
Conflict management and negotiations	Does not rate herself	Rates her as frequently allowing conflict and negotiations with the children to get out of control conflict and negotiations frequently gets out of control

This information in this document was triangulated through psychometric testing, collateral interviews, home visits and an interactional analysis to assess the child's attachment with the mother and father.

Attachment is the *lasting psychological connectedness between human beings* (Bowlby, 1969, p. 194). Attachment essentially refers to the nurturing bond of physical and emotional love and care formed between a parent and their child in the early years of development. Attachment can best be described as a *reciprocal, enduring emotional tie between an infant and a caregiver* (Papalia, Olds & Feldman, 2009, p. 189) (See Attachment Theory, p. 97). If the relationship goes well, there is associated joy and a sense of security and if it is threatened, there is jealousy and anger. With threats, grief and depression would usually manifest.

William (2015) avers that Attachment Theory is often misused to support the evaluators' (psychologist or social worker) recommendations. Such an evaluator

might indicate that there might be a presumed threat to the attachment relationship of the child with one specific parent, in for instance in relocation cases.

Document 13 indicates that parents were asked to list their strengths as parents:

When asked to list his strengths a parent, Mr. X said the following:

- *He is a very loving father*
- *He adores all three of his sons*
- *His children are his highest priority*
- *He relates to his children in a non-authoritarian respectful manner*
- *He has a lot of fun with his children*
- *He respects the children's individuality, choices and free will*
- When asked to list his weaknesses as a parent, he stated the following: *I think because I'm introverted and spend so much time on my own, I (at times) find it difficult (from a sensory perspective) to deal with the hecticness of kids.*

Essential to understanding the child's situation it is important to assess the child's experiences of herself in the context of the divorce between her parents. Reed (2014) contends that children often feel rejected and face a greater risk for depression, which can lead to anxiety, low self-esteem and an increased dependency on others. The parents' decisions have a negative influence on the children during and after the divorce (Amato, 2000). The instability in the family life, inter parental conflict and ineffective parenting can lead to children feeling overburdened and overwhelmed (Reed, 2014).

The assessment of the parents and their parenting abilities are described as follows in Document 4:

Interactional analysis with the child and each of her parents: When it came to choosing an activity to do together, Mrs. X chose the game for them to play. The child did not object to her mother's choice of game. I observed whilst painting a picture together, the child frequently deferred to her father for instruction and also for his opinion.

Another example of the parents and their parenting ability in Document 1:

Interactional analysis – the parents and children.

Task 1 requires the parent and child each to draw the child's world with their non-dominant hand and then to explain their drawings to one another.

Task 2 requires the parent to put lotion on the child

Task 3 requires the parent and child to play a familiar game.

Task 4 requires the parent to leave the room for a minute.

Task 5 requires the parent and child to complete a worksheet.

Task 6 requires the parent to teach the child something she does not know.

Miss X' capacity to provide for the needs of the children, including emotional and intellectual needs: The child becomes oppositional with her mother. She activates emotionally and refused to separate from her mother. This may be an indication that she experiences Miss X as inconsistent in her emotional availability. The child's attachment to her mother presents as insecure.

The professionals also listened to the parents' concerns about the care of their child. The following extract from Document 20 indicates that the person who conducted the interview allowed the parent to speak his mind about the concerns about his child's education:

He disapproves of it. Apparently because 30% of the children are gentiles and this together with the school's alleged faint-hearted commitment to proper Jewish norms will inhibit the moulding of his son to strictly adhere to the customs and practices of which the applicant approves.

In Document 3, the professional used observation to gain an understanding of the parents' capacity to function as a parent:

I observed that when Mr. X first entered the room with the child, mother and daughter appeared reserved and tentative towards one another. Each party waited for the other to make the first move. They hardly made eye contact with one another and they both seemed anxious. I observed the child constantly watched her mother's facial expressions whilst they were performing the required tasks. I observed that as the task progressed, Mrs. X praised the child's efforts and the tension between them seemed to dissipate.

Conflict in the divorce may result in long-lasting effects on children and may affect the parent's capacity to parent. Bing et al. (2009), Jolivet (2011) and Vousoura et al. (2012) concur that when children witness high levels of parental hostility and conflict, they could present symptoms such as conduct disorders, antisocial behaviours, difficulty relating to peers, difficulty with authority figures, depression, anxiety disorders, substance dependence, disruptive behaviour problems, somatic symptoms, attention and cognitive problems, impaired psycho-social functioning, impaired emotion regulation strategies, difficult temperament, insecure attachment, as well as academic and achievement problems (Amato, 2001; Portnoy, 2008). Three subsystems are evident within the family, namely the spouse subsystem, the parental subsystem and the sibling subsystem with appropriate boundaries between the different generations (Donald et al., 2010). Families consist of several coexisting subsystems; the husband and the wife dyad make up a subsystem, so do the mother-child; father-child and child-child-dyads. The subsystems can further be formed by generation (mother and father), gender (fathers and sons), interests (intellectual pursuits) or function (parental caregiver) (Nichols & Everett, 1986). In accordance with the Family Systems Theory, the husband and wife dyad is critical within this system, as any dysfunction in the system will reverberate throughout the family and often children are scapegoated alliances with one parent against the other (Minuchin, 1974).

Although there is no consensus among researchers about how children are affected by divorce, most agree that divorce has a negative effect on the child's wellbeing, according to Woods (2008). A common pitfall is that parents are often not given equal opportunities or equal time, or that only one of the parents' collateral sources are interviewed. This could be construed as bias according to Thompson (2012).

In order for the professional to make recommendations in terms of the child's best interests, he or she should ensure that the child feels safe, loved and nurtured by her parents. The professional can, through interactional analysis, establish the child's attachment to the parent. Attachment styles are not inherited; attachment security depends on patterns of interaction with each parent. Attachment experiences shape the way neurons are connecting up to each other from birth in the early years of life (Siegel in McIntosch, 2011). Bowlby (1988) proposes a hypothesis that the cause of a symbiosis in the mother-child relationship can be traced to the mother who grew up in an anxious-attached relationship and who turns her own child into her attachment figure. The child is burdened by caring for her mother, and may react by becoming anxious, guilty and possibly phobic. It is important that children should be evaluated in interaction with their parents. Although some researchers contend that these interactions are artificial and forced, it can provide valuable information for the assessment of the parent-child relationship (McIntosch, 2011). The purpose of these observation sessions is to help the evaluator to gain naturalistic information regarding the relationship between the parent and the child. The appropriateness of the parents' behaviour and the child's quality of the parent-child's relationship is the purpose of these observations. Home settings may provide additional information regarding the child's natural environment. An important factor to remember is that the relevant parties have to have equal opportunities (Thompson, 2012).

5.3.3 Indicator 3: Provide appropriate and well-motivated recommendations, which take the child's needs into account

The indicator refers to the appropriate and well-motivated nature of arrangements that take into account the child's needs that was made by professionals who compiled the reports.

In Document 8, it is evident that the professional involved based her recommendation on sound theoretical perspectives and through reflection on practice came to the recommendation of specific arrangements, as indicated in the excerpt below:

In order to co-create a secure attachment, the infant seeks closeness to the primary caregiver, who has to be subjectively perceived as predictable, consistent and emotionally available. A care-giving arrangement in this essential period that deprives the infant of this proximity, consistency and emotional availability will inhibit the development of the attachment system. Prolonged and repeated removal from the resulting primary caregiver not only deprives the child of an external coping mechanism, it also negatively impacts the ongoing maturation of the right brain. A shared residency of 50-50 split in the first two years is highly problematic, and will have negative long-term consequences. Taking into consideration the available information obtained in the above investigation the following recommendations are made: The child shall reside primarily with Mr. X.

The attachment system functions to help the child manage normal stress and reduce all types of fear. It is the infant's primary defense mechanism for regulating fear. The attachment relationship is the child's dominant mechanism for a long time until she can learn how to manage fear on her own (Schore & McIntosch, 2011). Neural integration is at the heart of health and the heart of secure attachments and impaired integration results in psychological rigidity or chaos (Siegel & McIntosch, 2011; Schore & McIntosch, 2011).

The recommendations furthermore took into account the child's context as evidenced in Document 7:

Residential care and contact: In order to safeguard the children's attachment to their grandmother whilst at the same time facilitating and accommodating their need to establish and strengthen a secure attachment to their father, the following residential care and contact is recommended: Phase 1 (for a period of three months): Commencing a week before schools starts in January, the children shall reside primarily with their father during the week as Mr. X lives closer to the school which is the school the Mr. X has enrolled them in. Phase 2 (for a period of two months) ... Phase 3 (for a period of two months) ... Phase 4 (for a period of two months)...

The researcher furthermore noted that the appropriate and well-motivated documents are future-oriented and nuanced concerning the child's situation on different levels, as evidenced in Document 3:

The parents undertake to: a) Encourage the child to pursue her educational interests and enthusiasms; (b) Support the child financially, morally, and emotionally; (c) Provide the most appropriate educational opportunities for the child; (d) Supervise and support homework, home study and practice. With regards to the final choice of the school, the parents agree that no commitment will be given to a decision prior to the completion of the consultative process. The parents agree that the child shall remain at ... school. It is agreed that she will attend ... school when she enters Grade R...

It is of vital importance to make detailed and specific recommendations in terms of the child's care, health, schooling, residency, and arrangements in terms of extra murals, handovers and specific times and places for handovers. This will prevent any uncertainty in terms of arrangements and will lessen conflict between the parents, as they will have a very detailed and structured plan to follow. All aspects of the child's arrangements should be clear to avoid any confusion that gives rise to hostility between parents. Moreover, it is important that evaluators should assess the child's resilience in the face of allegations from one or both parents (William, 2015). Although there is no consensus among researchers about how children are affected

by divorce, most agree that divorce has a negative effect on the child's wellbeing (Woods, 2008).

The child's stage of development needs to be taken into account. Erikson (1950) who conducted research on psycho-social human development, proposes that personality is influenced by society and develops through a series of resolving developmental challenges or not. Erikson's theory of development is a theoretical underpinning for the study, as the necessity to create a parenting plan that is in the best interests of a child, the child's age and stage of development should be considered.

Erikson's theory takes the social context into account (Donald, Lazarus & Lolwana, 2010). He proposes that at each stage of his theory a challenge or developmental tension exists between two opposites. Every person has a challenge at a specific stage, and when the experiences are predominantly negative for a person, developmental difficulties may arise (Donald et al., 2010). For example, if adolescents do not meet the challenge of developing an identity, they will not be able to establish intimate relationships as an adult and will become overly dependent on their parents as a source of identity (Louw & Louw, 2010). This developmental challenge has to be resolved satisfactorily for the child to move on to the next stage. Each stage therefore has the potential for progress or regression. The degree of progress and success or lack of resolution the child reaches at every stage has an effect on all the later stages (Louw & Louw, 2010). The successful outcome of every stage is the development of a virtue or strength. The early stages of development provide the foundation for the later stages. When children are able to deal with the obstacles easily, they are better equipped to handle later challenges (Erikson, 1950; 1963; 1968; 1977; 1982).

The first stage, in terms of the extract above, is the basic trust versus mistrust and commences at birth until 12 to 18 months (Donald et al., 2010). Infants develop a sense of whether the world is a good or bad place. The first stage centers on the caregiver meeting the infant's basic needs (Marcia & Josselson, 2013). The infant depends on her caregiver for food, sustenance and comfort. If the caregiver is available, and exposes the infant to warmth, regularity and affection, the infant's view will be one of trust. If the caregiver is not available and/or abusive, the infant learns mistrust. The successful outcome for this stage is the development of hope (Erikson, 1950; 1963; 1968; 1977; 1982). Some infants will experience more of the negative and others more of the positive experiences. It is of importance how the infant accommodates all the experiences, and if the infant has resolved the challenge, she will enter the second stage with a sense of hope. There are different strengths at every stage and the strength during this stage is trust (Capps, 2007; Donald et al., 2010; Marcia & Josselson, 2013).

It is imperative that the document is future-oriented, as the child will attend school, pre-school, primary and high school, extra murals, arrangements in terms of health, orthodontist and glasses or contact lenses. Provision must also be made for the child to have access to her extended family. However, social workers and psychologists rely on information from the child's past to make predictions in terms of the child's future, which is inherently speculative (Kushner, 2009). They need to recommend where the child is going to live for what period of time in terms of daily care, public holidays, holidays, birthdays, father's days and mother's days and weekends. Furthermore, various experts' opinions also often differ pertaining to the same family (Kushner, 2009).

In most cases parental guidance is vital after a divorce for parents to effectively co-parent without conflict and to assist the parents how to be a single parent. Phillip

Stahl (2005) argues that well-trained and competent evaluators are in a position to make recommendations to the court. These pertain to recommendations in areas such as parenting plans, conflict resolution, special needs children, domestic violence interventions, parental guidance and therapy (Stahl, 2005).

5.4 INDICATORS OF RESTRAINING THE BEST INTERESTS OF THE CHILD

In this section presents indicators where the best interests of the child were restrained as noted in the documents. Three indicators of restraints were identified that had a negative impact on the best interests of the child as described in the *Children's Act, 38 of 2005*, set out in Figure 5.2:

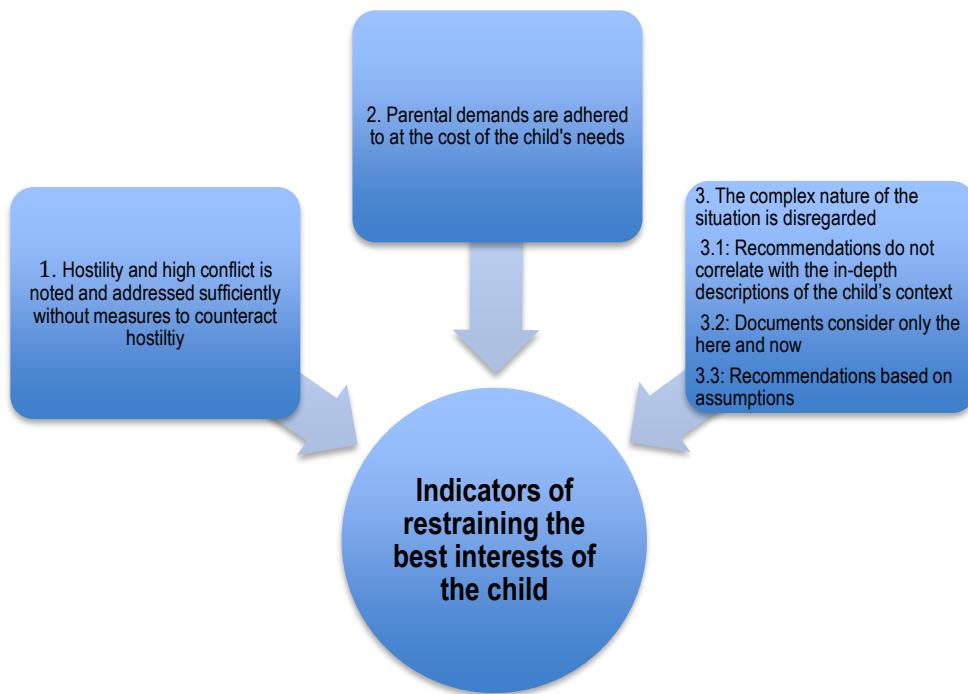


Figure 5.2: Indicators of restraining the best interests of the child

5.4.1 Indicator 1: Hostility and high conflict is noted but not addressed

The documents revealed that hostility and high levels of conflict between parents restrained the facilitation of the best interests of the child. In the 20 documents that have been studied for this study, 654 indicators of hostility were indicated. The

professionals certainly noted the hostility between the parents and discuss the examples of hostility in great detail.

The voluminous and detailed descriptions of the hostility between the parents can be found in Appendix 2, attached to this study. An extract from the honourable Judge Roland Sutherland's order in *Hummel v Hummel* Case No 2012/06274 South Gauteng High Court (Document 20) describes the hostility and conflict as follows:

The voluminous tirade of tasteless acrimony spewed forth in these papers, are, in the view I take of the matter, unnecessary to traverse. Thus, so it was contended, the ceaseless bickering of these two parents was injurious to their child and a deadlock breaker would handsomely reduce the risk of a plethora of litigation.

However, after a detailed discussion on the hostility between the parents, no recommendations or solutions are made to assist the parents. The conflict in the family often persists beyond the transition period and often leads to long-term detriments in the contact between family members. Poorer family relationships might also be associated with lower levels of wellbeing in children (Uphold-Carrier & Utz, 2012). Kushner (2008) questions whether somewhere within the overwhelming amount of reports, recommendations, assessments and rulings, the everyday needs of the child become evident. Continuing conflict between the parents is the greatest predictor of poor outcomes for children. Parents frequently have scant regard of the negative consequences and effect on their children when they continue their non-ending war in front of the children. The worst experiences for children is when they have to carry negative messages between the parents or are encouraged to think poorly of the other parent (Hetherington & Kelly, 2002).

The parents are blaming one another, an example of this found in Document 13, where the mother reports on the father's behaviour:

He has never taken the child on holiday or enquired into his holidays or volunteered to help to contribute financially. He has frequently been unreliable in exercising contact. Whenever he experiences friction or problems with her he fails to contact the child. Mr. X has forgotten to put on the child's nighttime nappy. Mr. X has verbally abused her in front of the child. Mr. X has watched violent movies in child's presence. He has also behaved aggressively and violently at times.

And further in the same document, Document 13, the father reports on the mother's behaviour:

Mr. X reports that pursuant to the breakup of their relationship, Mrs. X 'blocked' off all his contact with the child. He reports that he believes that her behaviour in this regard was simply a way of controlling the situation and punishing him at the same time. He reports that he experiences Mrs. X' behaviour towards him as being ruthless at times. Mrs. X can be too rigid and authoritarian at times. He said that the parties have been verbally abusive towards one another, which resulted in Mrs. X obtaining a Protection Order against him.

Bing, Nelson III and Wesolowski (2009) state that inter-parental hostility creates a negative and conflicted home environment to the detriment of the child. Children experience feelings of unhappiness, stress and feelings of being unsafe as a direct result of the hostility and conflict of their parents (Woods, 2008). If the hostility persists after the divorce, negative adjustment will not only continue but could possibly increase and intensify (Bing, Nelson III & Wesolowski, 2009).

In *McCall v McCall* 1994 3 SA 201 (C), the honourable Judge Chetty reported the following (Document 17):

In view of the unremitting enmity between the parties, it is as well to remind them that the Court is determining what is in the best interests of their child. The sadness is that this matter could not be settled on an amicable basis, resulting in this arduous and costly litigation to the detriment of the parties their already miserable relationship with each other and also the cause of great anguish and sorrow to the child.

The absence of healthy communication in the family creates a process in which children also find it difficult to express their feelings. According to Shifflett and Cummings (1999), inter-parental conflict is linked to children's adjustment problems and emotional wellbeing, whether they are in intact or divorced families. Inter-parental conflict does not necessarily subside with the granting of the divorce, and can consequently often escalate, with a consequent negative effect on the children's post-divorce adjustment (Uphold-Carrier & Utz, 2012).

Although the conflict between the parents is discussed in great detail in the documents, the conflict is not addressed in the recommendations that these professionals made. The impact on the family as a whole is therefore often not properly addressed. In Document 7, for example, an in depth discussion of the hostility between the parents is followed by one recommendation that reads as follows:

Taking the above factors into consideration, I recommend that the child's best interests will be served if parental responsibilities and rights are granted to Mrs. X, including guardianship and primary residence.

The above extract from Document 7 illustrates the definite need to address the conflict between the parents. It seems senseless to unpack the hostility in great depth and detail, only to make one recommendation that is of no use to the parent's conflict, and in so doing not alleviating the child's burden. Hostile interactions between parents range from explosive to brittle and emotionally detached behaviour, impacting the child's wellbeing negatively (Strohschein, 2012). These hostile interactions may result in long-lasting effects on children. Bing et al. (2009), Jolivet (2011) and Vousoura et al. (2012) concur that when children witness high levels of parental hostility and conflict, they could display conduct disorders, depression, anxiety disorders, substance dependence, disruptive behaviour problems, somatic symptoms, attention and cognitive problems, impaired psycho-social functioning,

impaired emotion regulation strategies, difficult temperament, insecure attachment, as well as academic and achievement problems. Anxiety, depression, aggression, delinquency and defiance towards authority figures are common among these children (Jolivet, 2008; Bing et al., 2009).

5.4.2 Indicator 2: Parental demands were adhered to at the cost of children's needs: Focus is on parents' needs

In some documents it is evident that although lengthy interviews were conducted with parents, the children's needs were not apparent. Document 12 serves as an example of this neglect of children's voices in the mediation process. The report consists of 130 pages, in which the first 39 pages were dedicated to reporting the parents' conflict and hostility. Thereafter, five pages were devoted to describing the children's interviews by merely relaying a question-and-answer scenario, for example:

On the question, If you could go to the moon, and you could take one person with you who would you take with you?, the child answered, "Dad".

On the question, What is the best thing that has ever happened to you?, the child answered, "I don't know".

On the question, What is the worst thing that ever happened to you?, the child answered, "Mom and Dad's divorce".

On the question, What makes you sad? the child answered, "I don't know".

These superficial questions elicited superficial answers from the child. While these questions could have been used more appropriately in relationship building, they are unsuitable for an intensive forensic assessment. Although the child clearly displayed resistance to the questioning, as well as a level of defiance and irritation, the professional failed to respect her answers.

On the question "What was the best thing that ever happened to you?" the child merely stated, *I don't know*. Further, in the same line of questioning, the child was

asked "What makes you angry?" Again the child responded by simply stating, *Nobody*.

Thereafter, in the same document, the parents' psychometric testing results were discussed and a discussion of the collateral interviews obtained. From page 80 to page 122 the document elaborates on a theoretical discussion of shared residency and relevant case law. The report concluded with a mere three recommendations, among those a parenting plan that had to be drafted for the family and a recommendation for shared residency – despite the levels of high conflict between the parents or how to manage the conflict. While the recommendations entailed a meager six typed lines, the professional's curriculum vitae that followed covered seven typed pages. Therefore, in total, the children's interviews were discussed in only five pages (4.2% of the total report), and the interviews with the two girls were superficial interviews based on a question and answer scenario.

Most importantly, the child's voice is not heard in the documents, as clearly demonstrated in Document 19, where the mediator did not see the children and neither mentioned the children by name in the document.

Mental health professionals (psychologists and social workers) play a part in promoting and maintaining conflict and disputes within high-conflict divorces (Boyan & Termini, 2005). Care evaluators, through the nature of the assessment and investigation, frequently lend support to one parent over the other (Bow & Quinnell, 2001). Mental health professionals that work with only one parent align themselves with that parent, and hear only that one parent's side of the story (Whiteside & Becker, 2000). They fail to notice the interactional nature of the relationship of the parents. In support of the so-called victim, the mental health professional may encourage an uncompromising and aggressive stance that results in lengthy

disputes over post-divorce parenting of the children (Boyan & Termini, 2005). They often recommend and encourage that their client avoid and cease communication with the other parent to support their client's autonomy (Johnston & Campbell, 1988; Bow & Quinnell, 2002; Bow & Quinnell, 2004).

In Document 8, it was recommended that the handover should take place at a police station.

Commencing on Monday 15th December 2014, the child will reside with the biological father until 18th December 2014, at 17h00 where the child be handed over to the biological mother at the ... police station. The child will reside with the biological mother from Thursday 18th December 2014, until the Saturday immediately thereafter, 20th December 2014, when the child will be handed over to the biological father at the ... police station.

The above arrangements clearly failed to consider the best interests of the child as it had the young child continuously moving from one home to the other every second day. The possible traumatic and negative impact of the handover at a police station on such a small child is yet to be assessed. This begs the question whether the child's best interests were considered taking into account the child's development phase (she was only 2 years old) or whether it was in the child's best interests to move from one home to the other as well as from one school to the other every second day.

The recommendation that the handovers should be at the police station was made with the intention to reduce conflict and hostility between the parents, but without considering the child's best interest. The shared residency schedule was implemented to placate the warring parents, however, it was not considered whether it would be in the child's best interests to move from one emotional landscape to the other every second day. Furthermore, the child was enrolled in two different day-care facilities, and had to move the two facilities.

Sanders (2007) argues that experiencing the conflict between the parents is the most toxic element for children. With a good and structured parenting plan, the transfers and handovers between the parents are of a primary concern. The majority of parents, according to Sanders (2007), struggle to use these handovers or transfers positively and these moments often become some of the worst times of a child's life post divorce. Children witness firsthand the animosity, tension, distrust and hostility between her parents.

Parenting plans and recommendations should strive to minimise the number of handovers between parents. Therefore, if there are fewer handovers, there will be fewer opportunities for a child to witness hostile behaviour from her parents (William, 2015). Transfers should be psychologically neutral, therefore never at a police station. Where heightened levels of distrust and hostility between parents exist, handovers are easier on children if they take place in the absence of the other parent, for instance at daycare or at school where the one parent drops off the child and the other collects her without meeting each other.

Sanders (2007) states that emotional hotspots are doorways to homes and living rooms. Intermediary persons such as grandparents or trusted daycare providers can also assist in being present at the handover. However, with very young children handovers cannot take place at school and the child has to be handed to the other parent (William, 2015).

The child not only moves from one parent to the other, but also from one emotional landscape to the other with very different atmospheres, sets of rules and ambience in both homes. This creates a continual adjustment for a child. Parents can assist children in creating a quiet transition time for the child when a handover has been made, to allow the child to adjust psychologically to the new environment

(Sanders, 2007). Parents should be sensitive to the child's developmental stage, for instance infants and toddlers may require a brief time with a parent where the parent reads a story to them and older children may require a period of time to settle into their room, adjust their belongings and relax (Sanders, 2007; Robinson, 2010).

5.4.3 Indicator 3: The complex nature of the situation is disregarded

The documents indicate that in some instances professionals write lengthy reports that describe the challenges parents face, but conclude with recommendations that fail to correlate with the complexity of the situation. Document 14 serves as an example of the above. The excerpt below describes the parent's situation:

Although she denies that she is presently using cocaine, the biological mother's current behaviour is cause for serious concern. I refer here to her recent disappearances that prompted the maternal grandparents to open a Missing Persons Case with the South African Police Services. As noted by Ms. X, she has not demonstrated sufficient "clean time" or level of responsibility to properly parent the minor child.

This situation is particularly complex as the mother is a drug addict, but although the document provides a lengthy and detailed discussion of the mother's drug abuse and history, the complexity of the situation was not considered in the recommendation, which read as if it is part of the discussion, and not a recommendation as such.

With a vulnerable 2-year old girl in the picture, the recommendations need to be tailored toward her best interests, including her protection and safety. Furthermore, the above extract does not appear to be a recommendation, even though it is the recommendation of the document.

When the evaluator does make recommendations on the placement question, that expert advice must be limited to the child's psychological best interests (Mason, 2015). Regarding a parenting plan, advice on parenting time and conflict resolution should be included (Amato, 2000; Stahl, 2005). In addressing identified problems, such as a parent's alcohol abuse and substance abuse, specific recommendations on treatment and therapy should be made (Mason, 2015). With regard to treatment, therapy for a parent or the child should be indicated in the recommendations (Mason, 2015). In terms of parenting skills and childcare capabilities, parenting classes should be recommended (Stahl, 2005; Mason, 2015).

The following is an extract of Document 14, where the complex nature of the situation was also disregarded:

... the biological father was a musician who had worked erratically and at night. Although he had initially assisted the domestic helper with the care of the minor child, he later became abusive and began drinking heavily. Indulging in binge drinking, he would disappear for days on end. She stated that she had begun to 'unravel' from the stress of a failed marriage, the responsibility of supporting the family both financially and emotionally as well as the physically exhaustion of caring for a baby at night. Her alcohol abuse escalated and he became physically violent. On one occasion, while the child was asleep in his care, he attacked his father who was living with the couple and assaulted him very badly, wrecking the house in the process. She reverted to the abuse of narcotics after having been clean for some two years. She confirmed that she used cocaine and began attending 'wild' parties. If regard is had for the short and long-term effects of cocaine abuse, it is apparent that the biological mother was not able to parent the minor child.

Despite the detailed description of the complexity of the situation, the particular document did not take into consideration the needs of the particular child. These recommendations should have been tailored toward her best interests, including her protection and safety. But, there is merely an indication that the biological mother is incapable of parenting the minor child and the biological father demonstrates a lack

of interest in the child. Yet, Sanders (2007) clearly states that impairment on the part of a parent by virtue of mental illness or substance abuse must be considered in the development of a parenting plan. Such impairments demand detailed schedules, decision making and considerations for the safety of the child (Bow & Quinnell, 2002; Bow & Quinnell, 2004).

According to William (2015), written reports should be submitted to the court and to each parent or legal representative. Such a report should consider the complexities of the case and make appropriate recommendations to remediate the situation. The following areas should be covered:

- (a) *Reason for referral*: A statement identifying the referral source, the parties (parents and children), and a brief explanation of why the family was referred for a mental health evaluation (William, 2015).
- (b) *List of interviews*: A list of all interviews and observations, including names, dates, and lengths of each (William, 2015).
- (c) *List of collateral sources*: A list of all collateral sources, including telephone contacts, face to face interviews, documents reviewed and school records (William, 2016 (a)).
- (d) *Background information*: For each parent or caregiver this section includes names, ages, present living situation, family (i.e. family of origin), education, history of employment, medical and mental health, relationship, substance abuse and criminal history. It also gives information about relevant parent/child variables, e.g., parent-child relationship and interactions, parental responsibilities, and child's preferences (Amato, 2000).

- (e) *Home visit*: This section describes the home environment and the interactions or observations that occurred during home visits (Thompson, 2012).
- (f) *Collateral information*: This section presents information collected from each collateral source (Thompson, 2012).
- (g) *Formal assessment instruments*: This section contains the findings of any testing done (Stahl, 2005).
- (h) *Recommendations*: It includes specific recommendations about care and contact: who is recommended as primary residential parent, and contact for the non-residential parent (Stahl, 2005; William, 2015; William, 2016 (a) & (b)).

5.4.3.1 Indicator 3.1: Recommendations do not correlate with the in depth descriptions of the child's context

The document analysis also revealed that in some instances the recommendations did not correlate with the in-depth description of the context of the child, for example in Document 6, as the in-depth description of the child's context did not correlate with the recommendations:

Mr. X and Mrs. X shall have unrestricted telephonic contact with the children at all reasonable times. Mr. X and Mrs. X shall at all times share information with regard to the children's health and wellbeing. Mr. X and Mrs. X will endeavour at all times to ensure that the children maintain their connections to and relationships with their extended family on both parents' sides of the family.

The heightened levels of conflict between the parents were not addressed nor were recommendations made to alleviate the problem. The level of conflict and hostility between the parents was however discussed in detail in the document, but the recommendations fall short in addressing the actual problems that have a negative impact on the child. According to Thompson (2012), psychologists and social workers offer recommendations that are often superficial, not taking into

account the complexity of the matter and without the support or appropriate consideration of the data gathered.

Psychological awareness is an important factor to promote wellbeing during adversity (Nelson & Prilleltensky, 2010), especially during heightened levels of conflict between parents that impact negatively on the child's wellbeing. For example, when a child is grieving for the loss of a family during the divorce, psychological mindfulness is important to create an understanding of the skill to promote awareness during this difficult time for the child (Prilleltensky & Prilleltensky, 2006). Unfortunately, and also due to their vulnerability and age group, children tend to be detached from the decision-making processes that directly affects their health and wellbeing. The underlying philosophy is therefore about recovery and validation of strengths, dignity and life-affirming struggles. Prilleltensky and Prilleltensky (2006) propose that instead of viewing the divorce in the child's life as a deficit, professionals should focus on the child's strengths, and on acquaintances, teachers and relatives who can support the child through the trauma of divorce.

Document 1 shows another example of the recommendations that do not correlate with the in-depth descriptions of the child's context:

The child becomes oppositional with her mother. She activates emotionally and refuses to separate from her mother. This may be an indication that she experiences her mother as inconsistent in her emotional availability. The child's attachment with his mother presents as insecure.

Focusing on the child's strengths during the parents' divorce provides positive assistance and support for the child and serves as an affirmation to the child that there is more to her than the divorce (Prilleltensky & Prilleltensky, 2006).

The compromised and hostile relationship between the parents is discussed in Document 1:

The relationship between the parents is compromised. There are low levels of trust between them. One of the factors that impacts significantly on the relationship between the parents is the mother's relationship with her new partner. The manner in which she introduced her new partner into the children and her husband's lives caused him hurt and concern. Whilst the parties still lived together and had not discussed separation or divorce, Miss. X invited her new partner into the family home.

In a 140-page document, the recommendations entail only one page. The compromised situation of the adultery and the resulting anger of the father, and the high levels of ongoing hostility were not addressed neither were any recommendations regarding how to overcome and address the issue. Another important issue that was informed in the document was the lack of parenting abilities of both parents, more so from the biological mother. No recommendations were made to either parent in terms of parenting skills and co-parenting. The idea that interparental conflict affects other family relationships is a central tenet of Family Systems Theory (Donald et al., 2010). There is a direct link between interpersonal conflict between the parents and maladjustment of the child (Grych, 2005).

5.4.3.2 Indicator 3.2: Documents consider only the here and now

Furthermore, some documents consider only the here and now of the parent's' context, especially in situations where parents disregard the parenting plans or disregard case managers' directives. This is clearly demonstrated in Document 19, featuring two children, aged 2 and 5. The document mentions the children only with regard to the recommendations, but not by name. By her own admission, the mediator had not seen the children. The recommendations were as follows:

The two minor children shall spend every Wednesday with their biological father. The two minor children shall spend every alternate weekend with their biological father from Friday after school until Sunday 18h00. The two minor children shall spend at least three hours with the biological father on his birthday. The parents shall share all school holidays equally.

The children's names are neither mentioned in the document, nor does it allow for a situation where the parents disagree on aspects of their parenting. Furthermore, no provision is made for the children's schooling and extra mural activities, neither for their medical and health-related issues. Moreover, the recommendations are non-specific to the developmental needs of the children. Sanders (2007) avers that although there is scant research on the actual impact of parenting plans on post-divorce parenting, however, t extensive and grounded research regarding the developmental needs of children has been conducted. Sanders (2007) argues that too often in parenting plans the specific developmental stage of the child is not taken into account. Many parenting plans do not include specific details, neither do they provide detailed guidelines, which usually leads to escalating conflict. Effective parenting plans are amended yearly to meet the evolving needs of the children according to their specific developmental stage (Stahl, 2005; Thompson, 2012).

Document 3 also considers only the here and now of the parents' context, where the child's compromised relationship with her mother is unpacked. Few recommendations are made on how to remediate the situation as well as how to alleviate the hostility between the parents:

The child has stated unequivocally that she wants to reside primarily with her father and she has given valid and cogent reasons for wanting to do so. A sudden change in residence would not be in her best interests as it could be emotionally harmful to her if her relationship with her father is abruptly disrupted. In order to address and mediate the problems that have developed between the child and her mother with the family system as a whole, a family focused intervention that includes all parties' needs to be adopted.

Parental rights and responsibilities should be jointly vested in both parents. The child shall continue to have regular and consistent contact with her mother. Based on information obtained from collateral sources it appears that there is no need for the father to be present when the child exercises contact with her mother.

According to Sanders (2007), the structure and recommendations are the crux of any parenting plan where the degree of structure in post divorce is defined to a large degree. Such a parenting plan will result in parent time with a child being either stable and structured or unstable and unsettled. Inevitably, post divorce families will run into schedule conflicts, therefore it is important to create clear and detailed parent time schedules in all cases (Sanders, 2007; Thompson, 2012; William, 2015).

5.4.3.3 Indicator 3.3: Recommendations based on assumptions

The recommendations are based on assumptions without foundation, especially in terms of attachment. This is demonstrated in *P v P 2007 (5) SA 94 (SCA)* (document 16), where the role of the expert witness in a complex and acrimonious family law case has been highlighted:

Chetty J pointed out that it is clear that the expert opinion is not mere conjecture, surmise or speculation of the expert; it is his judgment in a matter of fact. It is equally clear, that whilst many cases a court needs and benefit from an expert's opinion, the expert witness should not usurp the function of the court. The most telling of this example of this failure on the part of the expert witnesses was the acceptance of the allegations by appellant and Ms. Z that the latter was the children's primary caregiver. Supreme Court of Appeal: B J Van Heerden found that neither court misdirected itself in this regard. She stated that Chetty J did not question the special knowledge, training or experience of the various expert witnesses, but identified his main problem with such experts as their inability to draw a line between matters of fact and matters of value thereby distorting the judicial process by acting like judges.

The above extract is a clear example of experts that usurp the time of the court. To avoid superficial and subjective recommendations, towards the closure of the process the professional should make use of supervision in terms of employing a third party that functions as a neutral expert to listen with an objective ear to the recommendations, and to ensure that the recommendations are not based on assumptions. Recommendations must be specific and detailed in the reports and the

evaluation should be cognisant of the best interests of the child (Bow & Quinnell, 2004). Child care disputes are about the future of the child and litigation deals with the past. However, information about the past is relevant in child care disputes, but is not determinative (Firestone & Weinstein, 2004). Childcare evaluators and mediators may become overwhelmed when there is controversy over the latest research, for instance in recommending overnight care for very young children. Often in such matters the psychologists and social workers shy away from the latest research findings because of the lack of clarity in the research (Gould & Stahl, 2001).

From the extracts of reports discussed in the chapter, it is evident that superficial recommendations do not assist parents with ongoing hostility and litigation. The child suffers as a consequence of the parents' high levels of conflict. Although the professionals go to great lengths to unpack the hostility between the parents they fail to provide methods to remediate, or they attempt superficial recommendations. It is evident from the documents that the voice of the child is not heard, and when it is considered, the parents' interests weigh heavier than those of the child.

5.5 CONCLUSION

The feelings stirred up by divorce can be so intense that even rational parents find themselves saying and doing things they never did before, or saying and doing things they promised themselves and others they would never do again (Emery, 2004, p. 15).

Chapter 5 presented a discussion of the results obtained in Phase 1 of the study, from the content analysis of the 20 documents. The variety and intensity of the documents indicate the training and level of experience a mediator should have to navigate parents through the divorce process.

Two sets of indicators were identified following the content analysis. Firstly, indicators of promoting the best interests of the child in the documents, including a

clear understanding of the child's situation with reference to the past, present and the future. A clear understanding of the parent's capacity to function as parents and listen to the parents' concerns about the care of their children, also detailed arrangements in parenting plans with the child's voice in mind and well-deliberated recommendations were indicated.

Secondly, indicators of restraining the best interests of the child. Hostility and high conflict are noted and addressed sufficiently without measures to counteract hostility; where the focus is on the parents' needs and parental demands are adhered to at the cost of the children's needs. The complex nature of the situation is disregarded, recommendations do not correlate with the in-depth descriptions of the child's context, documents only consider the here and now and lastly, the recommendations in the documents are based on assumptions.

The research results for the second phase of the research will be discussed in Chapter 6.

CHAPTER 6

RESEARCH RESULTS: PHASE 2

6.1 INTRODUCTION

Chapter 6 presents and discusses the research results obtained from the thematic analysis during the second phase of the study. The data was collected by conducting 12 semi-structured interviews with purposively selected participants who have extensive experience in the field of divorce mediation in the South African context. The main themes identified in terms of the application of the best interests of the child principle in their practices are discussed. Verbatim excerpts from the interviews is presented as evidence and relevant research literature is integrated into the discussion of the results presented in this chapter as a way to establish the extent to which the results concur or deter from existing research in this field.

6.2 RESEARCH RESULTS

The research results from the interviews with the participants are reported with reference to six themes. The themes indicate what the participants who are considered as experienced in the field of divorce mediation consider as to the facilitation of the best interests of the child principle as applied in the mediation process. The six themes, which will each be discussed with reference to the participants' statements and relevant literature, are:

1. The facilitation of the best interests of the child principle in practice
2. Hostility and high conflict between parents
3. Parental alienation
4. Assessment as part of the mediation process
5. Recognition of the child's voice and the protection of his rights.

6. Requirements for divorce mediators in cases where children are involved

6.2.1 Theme 1: Facilitating the best interests of the child in practice

The theme refers to the participants' experiences, perceptions and opinions of the application of the best interests of the child principle in their practice as legal and mental health professionals. The sub-themes identified are presented in Table 6.1 below.

Table 6.1: Subthemes for Theme 1: Facilitating the best interests of the child principle in practice

Sub-theme 1.1	Lack of clarity on what the best interests of the child encompasses
Sub-theme 1.2	Suggested criteria for facilitating the best interests of the child
Sub-theme 1.3	Suggestions for structuring the development of parenting plans

6.2.1.1 Sub-theme 1: Lack of clarity on what the best interests of the child encompasses

The participants acknowledged the indicators presented in the *Children's Act*, 38 of 2005, section 7, yet they seemingly agree on the lack of clarity on what the facilitation of the best interests of the child principle should encompass.

Participant 2 ascribed this lack of clarity to the fact that the best interests of the child is an open-ended and undefined term and therefore open for various interpretations, which in this case implies a focus on healthy relationships:

Well, it is a very open-ended undefined kind of term. And I think it is open for various interpretations, so what I might consider the best interests of the child; someone else might not. But I work on the premise that all children should and need good and healthy relationships with both parents provided that there is no domestic violence or alcohol abuse or abuse perpetrated by one of the parents. But for that, they should have an equal and healthy relationship with both parents. They should be encouraged in the best interests of the child to have a relationship with both parents.

Participant 5 argued that the focus on the best interests of the child is mainly used in the courts to refer to the basic needs while the psychological impact is not considered:

I think the concept is very wide; it is an overused concept in court reports. On a basic level of housing, food, clothes, education and security, that is the basic level. What I think the courts do not have an understanding of. Both parents are able to provide in the above-mentioned basic requirements in the cases in my practice. They are able to provide food, clothes, and schooling and maybe Dad has a three-bedroomed house and at Mom's house the children have to share a bedroom or something like that. However, the children are taken care of in both homes. I think the problem that we have with the concept of the best interests of the child is that the courts do not have the capacity to understand the nuances of the psychological impact.

Participant 4 responded in a more skeptical manner to the possibility of achieving the best interests of the child based on his years of experience:

You know, it is the least harmful alternative. It is the least harmful of all the alternatives available. I mean you can never achieve the ideal situation for most children. There is always difference; there are always difficulties that are inherent in their situation, which means they can never have it ideally. So I would say the least harmful alternative. Because they are with their parent, I mean you can't take them away from a parent, normally. This is their parent, so the least harmful is another way of looking at it and that is a more realistic way of looking at it rather than to say what is in the best interests of the child. And actually what also works in practice.

Participant 2 was equally skeptical:

The construct of the best interests of the child is undefined, and I think that is where the difficulty is, only three people in the mediation, the two parents and the mediator, and each person have a different view of what the best interests of the child is. Obviously one would aspire to only act in the best interests of the child, but it is just too vague. The best interests of the child is subjective; it is not an objective measure. And the attorneys do not take attachment theory, and they do not take developmental needs, parenting ability and co-parenting capacity into consideration. In some instances it is the most powerful attorney

that wins the day, not necessarily the child's best interests. The child's voice gets lost in the litigation.

The research literature confirms that determining the best interests of the child principle is often an acrimonious and adversarial process between parents (Stoner, Perry, Marcum, 2011). Kushner (2008) argues that the term “best interests of the child” is often ill-defined and vague, and that professionals interpret it to suit their own needs when drawing up parenting plans. Consequently, the focus often shifts to the reduction of the conflict between the parents. The child’s wishes are not directly heard and might therefore be overshadowed by the parents’ wishes. In some instances the parents might even use the child’s best interests as a weapon in asserting their own self-interest. In such cases references to the child’s best interests in the parenting plan is a mere slogan and the child becomes the formal subject of the discussion and not the real object of the discussion (Ryrstedt, 2012). Archard and Skineves (2009) found a real problem in understanding how to apply the best interests of the child principle as its application is paternalistic in that the child’s best interests are explicated from the adults’ point of view.

Bonthuys (2006, p. 23) maintains the criticism of the best interests of the child principle is *a question no less ultimate than the purposes and values of life itself*. The judicial discretion of what constitutes the best interests of the child can easily lead to prejudice and discrimination. Each case should be decided on its own merits to establish the best interests of the child (Bonthuys, 2006). However, in the South African Courts an extent of confusion and disagreement is apparent in the application of the principle (Bonthuys, 2012). High Courts use this principle in different ways and some ignore its existence as a *constitutional rather than common law principle* (Bonthuys, 2006, p. 39). However, the best interests of the child remains the necessary link between policy and practice (Kushner, 2008). This principle allows the mental health professionals (social workers and psychologists) and lawyers to be

creative in responding to the everyday needs of the child (Kushner, 2008; Dias, 2014).

Barrie (2013), Lapsatis (2012) and Kushner (2008) state that no objective or absolute standard exists for determining what is in any child's best interest. The term 'best interests' is often ill defined, vague and interpreted to suit the needs of professionals who develop the parenting plans pertaining to care. According to Reed (2014), the best interests of the child principle appears to fulfill the goal of the standard, but only on paper. Reed (2014, p. 150) names it *the façade of the best interests of the child principle*. Kushner (2008, p. 71) questions whether the best interests of the child are just a *catchall phrase to plug potholes in the court system*. Kanavy (2013, p. 1081) argues that under the *amorphous best interests of child principle* judges have ordered parents to take their children to church, but also refrained them from bringing their intimate partners near their children. Pruett, HoganBruen and Jackson (2008) aver that the child's best interest connotes a myriad definitions and implications for children and parents. The decisions after a divorce in where the child should reside has an enormous impact on the child, not only in the short term, but long term as well (Mahlobogwane, 2005). Mahlobogwane (2005) argues that what may be in the best interest of one child may not be applicable to another, and furthermore, what is best for a specific child cannot be determined with absolute certainty. There is no simple and practical way of establishing a child's best interests (Mahlobogwane, 2005; Dias, 2014).

There is significant divergence amongst lawyers and mental health professionals in the application of the best interests of the child principle, and this conclusion is often reached on ambiguous and unstandardised criteria (Pruett et al., 2008). The definition of the best interests of the child differs markedly between children and parents on the one hand, and legal practitioners on the other (Pruett et al., 2008).

While judges focus on parental deficits when determining the best interests of the child, parents define the best interests of the child in terms of their own needs and their children's needs, as well as their own capacities as parents to meet such needs (Pruett, et al., 2008).

6.2.1.2 Sub-theme 2: Suggested criteria for facilitating the best interests of the child

Participants expressed concern about the fact that there was no clarity regarding the application of the principle of the best interests of the child, and recommended that specific criteria be set for facilitating the best interests of the child.

Participant 2 stated that the basic premise for determining the best interests of the child is a healthy relationship with both parents. She applied an extensive assessment procedure to ensure that she had determined the best possible scenario for the child, as described below:

Well, first of all, assessing the parents' capacity to parent their child, the capacity to co-parent, and to hear the child's voice. One must hear the child's voice and one must also take into consideration the child's attachment figures, because it is very damaging to tamper with the child's attachment.

There is a number of factors that come into play, before they all would combine and add up what would be in the child's best interests, there is not a single factor, one has to look at all of these factors and combinations. With regards to the parents, I have three different parenting questionnaires that I ask them to complete. I take extensive parenting histories from both parents, and collateral information from various sources, reliable sources, unbiased sources, and I also use Garber's parenting screening.

To assess the child's views, I do an interactional analysis between the child and each parent. I use the Marchak intervention method, in my interactional analysis with the parent and the child. I also do home visits with both parents independently in their home, so it is structured and an unstructured observation and I also get collateral from teachers how they are doing at school, which parent comes to school, is the child always having lunchboxes, etc. at school. I

always have a child interview, a structured interview that I use for hearing the voice of the child.

Participant 1 applied the criteria in terms of Section 7 of the *Children's Act*, 38 of 2005 as a basis to determine what is in the best interests of the child and interpret these factors from a psychological perspective:

So, you have to take into account all the factors mentioned in section 7, what is the relationship between the child and both parents, what are the parents' attitudes and responsibilities, what is the parents' capacity to provide care for the children, what is the needs of the child, what is the age of the child and maturity of the child, the child's right to be part of a family, family violence and you go through the checklist to ensure that you take all those factors into account.

So, you as the mental health professional, what is the real relationship between the child and the parent, in other words in psychological terms you have to describe the attachment between the parents and the child. And you have to have more than one source of information, for instance something like violence, you have your intake interview where violence manifests, then in the grid questionnaire is an indication of a lack of emotional attunement, then your interview with the child and you have three points of reference, and in three different times this problem presented itself.

Conversely, Participant 10, did consider the best interests of the child as a guide to make decisions about what would best contribute to the child's happiness and emphasise the subjective nature of this endeavour:

Once parents get divorced, you are compromising the best interests of the child. If I must be perfectly honest with you, it is probably the best we have got to guide what we should look at when we make decisions for children that we have to make. The best interests of the child is a tool, it is formalisation and it is rather difficult to quantify, so we try to be general with it. Some things make some kids happy and other things make other kids happy. There is subjectivity around in what makes every child happy.

Carter (2015) avers that it is impossible to set standard criteria for what encompasses the best interests of the child. There are no customised

recommendations for all families, neither is there an ideal fit for every family. An important factor in parenting plans concerning the best interests of the child is to minimise loss and maximise relationships, and to protect the child's feelings. Barrie (2013) avers that there is no objective standard for determining the child's best interests. Barrie (2013) states, as one of the participants agreed with, that the court should not look for the child's best interests or the perfect parent, but the least harmful or detrimental alternative for the child.

Lapsatis (2012) maintains that the best interests of the child standard is deliberately broad, and the law leaves it in the judge's discretion to create and modify the general rules. However, it has created a situation of in the interests of no one, as judges can place a child with a parent and can remove the child from the same parent where the judge exercises unrestrained discretion through an indefinite standard. Mahlobogwane (2010) argues that there is no easy way to determine the best interests of a child, and furthermore, what is best for a child cannot be determined with absolute certainty. Mahlobogwane (2010) claims that the best interests of a child can only be ascertained if the child is seen as a real person with her own identity.

Barrie (2011) states that the standards laid down in *McCall v McCall* continue to be relevant and the United Nations conventions and the relevant African Charter must also be taken into consideration. The child's views and preferences where the child is mature enough should be considered and the courts should view the placement of the child as the least detrimental alternative and not the perfect parent. The child's best interests, according to Barrie (2011), have to be determined by the facts and circumstances of every case and should take preference over the interests of the parents.

Couzens (2010) advocates that the criteria for the best interests of the child need to be adequately developed. Judges encroach upon the most intimate complexities of family life when parents divorce (Kanavy, 2013), whereas the best interests of the child principle is vague and difficult to apply, which encourages parents to litigate (Kanavy, 2013).

6.2.1.3 Sub-theme 3: Suggestions for structure in the development of parenting plans

In response to their concern about the effective facilitation of the best interests of the child, the participants suggested that the development of parenting plans should encompass a more structured process.

Participant 1 referred to a study of 100 families conducted through the Office of the Family Advocate, which indicated that the main issues with reference to the development of a parenting plan seems to be the similar in most cases. She indicated that the agenda for mediation could therefore encompass basic elements, including guidelines for the communication, contact, residence and dealing with external factors as stated in the excerpt below:

When we started with the project we realised that the agenda for every family in mediation is the same. The first category of problems is the relationship between the parents, in other words, the communication between the parents. Then you have your disputes around contact, or residence and contact. Then you have the external factors such as a new partner or grandparents, it is that extended family stuff that plays a role, but it is the exception.

Participant 1 indicated that the solution to the above problems might be to follow a more structured mediation process:

...it is a very structured process that gives the parents an opportunity to realise what exactly are going to be discussed in the sessions, as they are already

very anxious, and by doing that you control the process and heightens the trust between you and the parents.

Sanders (2007) and Robinson (2010) propose that the overarching philosophy and aspirational statements by the parents should be attended to by the professional in creating the parenting plan. This implies that both parents must be dedicated to the welfare of the child and the child's needs must be a priority. The parents must also be committed to follow the details of the parenting plan. Parenting time schedules are the heart of parenting plans, according to Sanders (2007) and these schedules define the structure of the post-divorce life. A good parenting plan should consider that transfers between parents are often the most toxic element of divorce and should be recognised as a primary concern (Sanders, 2007).

Participant 7 indicated that she always commenced with the collection of the standard information:

I always start with the current situation – where are the children now, are they with their father or mother? For how long? Sometimes they are with the one parent for two years, and they are used to these arrangements, and the mother is the attachment figure and the father suddenly now wants primary residence. You realise very soon in the process whether it is due to financial issues in such an investigation. The father desires primary residence as that implies that he does not have to pay maintenance any more. You can see the white elephant in the room. And that is very sad. Then I would also like to know, how many bedrooms at Mom's house, how many at Dad's house. But we also realise that money does not make you a better parent.

Various researchers agree that it is crucial to assess the attachment between a child and her parents, or reciprocal connectedness (Gould & Stahl, 2001; Lamb & Kelly, 2001; Solomon & Biringen, 2001). The parenting plan should resemble the pre-separation distribution of time between the parents as closely as possible. The practitioner should therefore investigate the parenting history and the relevant dynamics of the family (Gould & Stahl, 2001; Robb, 2012; Sanders, 2007). The

child's age and temperament should also be considered as there should be a good fit between the parent and the child. The practitioner should furthermore consider the child's temperament, as the child might require a stable and consistent routine (Gould & Stahl, 2001; Sanders, 2007; Robb, 2012).

Participant 3 indicated that the parenting plan should be one that the whole family can use. Furthermore, it should be user-friendly and serve as a reference when there are any doubts:

In my opinion the parenting plan needs to be a plan that can be referred to on a daily basis to reduce conflict. In homes where the parents are not divorced, there are rules to a certain extent; this is what we do during holidays, how late we go to bed, how late we eat, etc. Even if it is unwritten rules, there are rules, and in divorced homes the need for written and concrete rules are important. It provides the child with a sense of safety.

A static parenting plan does not consider the child's developmental needs, according to Hartson (2010). It is important to investigate communication between parents, as there has to be some measure built in the parenting plan for sharing information. The professional should explore how the parents communicate, and educate them and make appropriate recommendations (Gould & Stahl, 2001).

Participant 6 was of the opinion that the parenting plans are too detailed and they should not deal with matters like maintenance:

Parenting plans are too detailed; they should not deal with things like maintenance. All those things, just stick to what you have basically been asked to stick to. Just tell me what the child wants. Every need of the child, but not what they should pay by way of maintenance. That is just totally out of the question. It should be in the agreement, things like maintenance.

To implement a consistent schedule is important to the wellbeing of especially a small child (Pruett, Ebling & Insabella, 2004). Gould and Stahl (2001) and Kushner

(2008) aver that in the drafting of a parenting plan, the emphasis should be on the parents' strengths, namely the resources that they have, support systems and capabilities. Parents also have different strengths and weaknesses in their parenting abilities (Gould and Stahl, 2001). Parenting plans should be developmentally appropriate to the child's age and stage of development and said parenting plans should change from infant to adolescence.

6.2.2 Theme 2: Hostility and high conflict between parents

The theme refers to the hostility and high conflict that according to the participants in this study present serious challenges to the facilitation of the best interests of the child. The extent of the challenge was evident in the first phase of the study. In the documents that were analysed in Phase 1 of the study, 654 references occurred to hostility between the parents. In report 12 alone there were 139 references to hostility (see Appendix 2).

The sub-themes are indicated in Table 6.2 below:

Table 6.2: Sub-themes for Theme 2: Hostility and high conflict between parents

Sub-theme 2.1	Manifestations of high conflict and hostility
Sub-theme 2.2	Possible reasons for hostility and high conflict between parents
Sub-theme 2.3	Impact of hostility and high conflict on the children
Sub-theme 2.4	Ways to deal proactively with conflict between parents

6.2.2.1 Sub-theme 1: Manifestations of high conflict and hostility

The participants' descriptions of the manifestations of high conflict and hostility during the mediation period emphasise the way in which this jeopardises the facilitation of the best interests of the child.

Participant 1 emphasised that due to hostility and high conflict the parties cannot even keep to basic rules:

So I have to say that with the high-conflict situations... people almost go out of their way to make it as hard as possible, it is as if they cannot even agree on the basic rules. So when you send them the terms and conditions, they seem to fear that you will take someone else's side and therefore will not even agree on the basics. They do not want to copy their ex-partners in e-mails, and I have to remind them that the process is transparent; you have to copy everybody in on all mails.

Participant 3 experienced that some parents do not even want to be in the same room with their appointments, and therefore she needs to make separate appointments, especially when people are remarried:

A big problem is that many of the parents do not want to be in the same room. That becomes a problem, as now you have to see them separately, especially people that are remarried. The new partners are scared that their partners are going to rekindle their relationships with their ex-partners. This creates a situation of a broken telephone, as you have to inform the parents separately, and they reply with different information, which complicates all the issues.

According to (Brandt et al., 2004), the parents' inability to separate their interpersonal conflict and difficulties from their parenting decisions about their children, and the amount of bitterness and anger between parents, are definite challenges to the application of the best interests of the child.

Amato (2000) found that children from divorced families tend to have lower academic achievement, lower self-esteem, and difficulties with social relationships, more behaviour problems and early school dropout. However, Amato (2000) contends that these studies have not shown a significant difference between and effect on children from divorced families in comparison to children from intact

families. It is the conflict between parents after the divorce that affects children's wellbeing negatively and not the divorce *per se*.

Baris et al. (2001) argue that parents remain entrenched in battles and the themes are usually one of the following, namely: mistrust of their ex-partner's parenting skills, and this might include allegations of abuse and mistreatment, parenting time and access to the children, behavioural problems the children are displaying and also who is to blame as well as being disparaged by the other parent to the point of being convinced that the children are being 'brainwashed'. These fights are played out everywhere, in court, in public, and frequently in front of the overwhelmed and often anxious children. In some cases there might even be explosive violence, icy silence and messages being sent via the children.

Participants 7 and 8 found that as the conflict escalates, the problems reported by parents seem to intensify. They deliberated the possibility that the parents tend to report everything without holding back as the hostility and conflict escalates.

Participant 7 reported:

I would say that some people lose perspective; they would sit here and state that they only want the best for their child, but five minutes later the mother would say that everything is the father's fault, and shows a lack of insight. I do not understand that they are not able to see that. In the past, we had maybe alcohol abuse on the file, but these days it is sexual abuse, domestic violence, alcohol and drug abuse, you find the whole spectrum in one file, and even death threats and the problem is that it is escalating, the problems are intensifying or people are getting used to reporting everything without holding back.

Participant 8 stated:

Conflict is escalating. I have been here for three years, and it is getting worse. It feels strange, as sometimes I feel you cannot imagine all of this. It is mind-boggling.

Amato and Keith (1991) and Amato (2010) aver that high conflict between parents affects children negatively. Children's wellbeing is connected to the parents' conflict post-divorce; the higher the levels of conflict, the worse off the child is in terms of wellbeing. These children reported missing their fathers, feeling lonely, feeling torn between their parents and experienced holidays as stressful (Laumann-Billings & Emery, 2000).

Parents have the notion that divorce will free them from their partner. However, according to Baris et al. (2001) divorce represents trauma and loss. Divorce evokes feelings of helplessness, humiliation, shame and anger. It is an enormous task for parents to reorganise their lives as single parents and they face the task of disengaging from the marital relationship. Boyan and Termini (2009) go so far by stating that putting children central to their conflict constitutes as emotional abuse.

6.2.2.2 Sub-theme 2: Possible reasons for hostility and high conflict between parents

The participants stated the following as possible reasons for hostility and high-conflict in the divorce process: self-interest associated with dysfunctional behaviour, disputes about primary residency, associated with fathers' awareness that they can take up their rights and parents concerns about the safety of their children.

Participant 4 with reference to own experience states that:

Generally, in the high-conflict cases, the parents on both sides have some or other dysfunctionality on both sides. The parents only act in their self-interest, and they are fighting all the time.

The literature confirms that high-conflict cases involve a disproportionate number of people with personality disorders (disregard for authority, seeing oneself as a victim, blaming the other parent, little or no insight into the parent's own behaviour), mental health problems, substance abuse issues and these traits manifest themselves in ongoing litigation (Martinson, 2010; Symoens, Colman & Bracke, 2014).

In high-conflict divorces, there is no limit on how often an application can be made to the court, and there is no limit to the subject matter and cases can go on for months or years without judicial management. In many instances of high-conflict cases, there is a blatant disregard for court orders. Martinson (2010) claims that the reason for ongoing high-conflict cases is allegations of alienation.

If the court finds that a parent suffers from a mental illness (mental health problem, mental disorder, psychiatric disorder), the issue is whether the parent is fit and capable to parent the child and whether the disability interferes with the parent's ability to parent (Dane & Rosen, 2016). However, the presence of a mental health issue does not deny a parent care of the child. Criteria such as whether the parent is functioning in the community, participating in mental health treatment and taking medication should be considered when considering care and contact of a child (Dane & Rosen, 2016). Therefore, a parent with insight in his or her illness and who is responsible obtaining treatment may be able to take care of a child just as the healthy parent. There are several myths surrounding mental health and mental illness, such as a parent with a mental health illness is dangerous and violent, those with schizophrenia or bipolar disorder make for dangerous parents, the stress of parenting and child care increases the risk of violence, a parent who is hospitalised for a mental health illness has a higher risk for violence and if a parent is suicidal

there is no way to prevent that parent in future to kill themselves and putting the child at risk (Van Brunt, Zedginidze & Light, 2016).

With reference to the disputes about primary residency, Participant 5 indicated that this could be ascribed to the fact that fathers are more aware of their rights to have full access to their children:

The problems I experience as an advocate are the primary residence of children are often in dispute as men have realised that they have rights in terms of their children. Many of my clients these days are fathers where contact is in dispute. In the past men readily accepted the fact that primary residence or care has been awarded to the mother, despite specific circumstances such as alcohol or drug abuse. Due to this state of affairs women often respond in unacceptable ways by trying to limit the fathers' access rights.

High-conflict families are often in court with inconsequential issues (Baris et al., 2001). High-conflict parents often have a pattern that includes a perception of all-or-nothing thinking, extreme behaviours and blaming others. These defensive styles resemble or exacerbate personality disorders and the behaviour often stems from the parent being narcissistically vulnerable and having problems maintaining a positive self-image and a sense of self-identity. One of the parents is often unable to empathise and it is very difficult to impossible in seeing the other parent's perspective (Coates, 2015).

Participant 5 furthermore indicated that the hostility and high conflict might be associated with the concerns that parents have about the safety of their children:

The disadvantage of a divorce is that you become a member of parental Olympics, and you are put under a magnifying glass and you have to be the best parent and compete to be the primary caregiver. The hostility between the parents and the levels of anxiety are sky high. At times I thought people are going to die of heart attacks over fear of their children. You know, they feel

threatened, and they also love their children very much, but I think the dispute over where their children should reside adds to levels of heightened emotion.

Amato and Cheadle (2004) declare that parents continue the conflicted relationships due to losing contact with their children, continuing conflict with their ex-partners over child support, visitation and residency, loss of emotional support due to declining contact with in-laws, and other stressful life events such as moving from the family home into less expensive accommodation in a poorer neighbourhood. Cashmore and Parkinson (2011) state that the other parent's parenting style or capacity of the other parent, allegations of abuse or neglect, presence of new partners and the unsettling effect of the child who allegedly wants more or less contact with the other parent lead to higher levels of conflict in parents. Parents that are locked in hostile conflict throughout and after the divorce are often unable to resolve their difficulties (Emery, 2004; Bing et al., 2009).

6.2.2.3 Sub-theme 3: Impact of hostility and high conflict on the children

With reference to the effect that hostility and high conflict might have on the children, Participant 6 stated that hostility and conflict might lead to a sense of instability for the children involved:

The child basically is severely prejudiced and traumatised by the relationship between his parents. These children are suffering for most of the time from instability and I had basically children who were suffering from severe depression where they are incapable of functioning until the parents are actually taking control of the situation. That is really my major problem that they, parents only act in their self-interest, and they are fighting all the time and that is what I find most of the time. You know, children, I think, can cope with divorce if it is dealt in a mature and reasonable way so that they are not caught in the middle. And this is what I do not understand; there are matters, which have gone on for ten years, so I often think how do they make their money?

Research by Amato (2000, 2014), Emery (2004), Baker, Ben-Ami (2011), Baker and Brassard (2013), Friedlander and Walters (2010), Garber (2014), as well as Wallerstein and Blakeslee (2003) found that ongoing, high degrees of hostility and conflict between parents serve as one of the most significant threats to children's wellbeing. Greenberg, Gould, Schinder, Gould-Saltman and Martindale (2003) aver that the emotional and psychological risks for children during high-conflict divorce has led to an increasing high number of mental health professionals involved in this process. During high-conflict cases children also suffer from repeated disruptions as their parents interrupt therapy when they require a therapist that is more supportive of the parent's position.

Participant 2 experienced that children might take sides to avoid being caught in the middle, but that this might perpetuate their anxiety:

The higher the conflict between the parents the more anxious the children are and the symptoms we see in children are aggression, and also kids try to avoid taking sides in the conflict. They do not want to side with one parent against the other parent. They will often align themselves with one parent, not to get caught in the middle. This has serious consequences for the children. I see a lot of anxious behaviours in children, a lot of acting out behaviours.

Persistent conflict between parents following divorce and/or separation is a major stressor for children (Amato & Keith, 1991; Amato, 2000; Amato, 2006; Amato, 2010). Ongoing conflict can therefore compromise children's behaviour, sense of self and sense of reality. The child is caught in a polarised position within the high-conflict family and the child engages in short-term adaptive behaviour due to the child's innate need to adapt to the different situations (Zhylyevskyy, 2012; Garber, 2014). Therefore, some children will be burdened by continuing and intensified conflict (Wallerstein & Kelly, 1980; Kelly & Emery, 2003). The situation is even more destructive for children where parents use their children to express their anger where

the child witnesses the parents being verbally or physically aggressive towards the other parent. These parents create intolerable stress and loyalty conflicts in their children. Children from divorced families also suffer the loss of close friends, family and extended family and particularly one parent, often being the non-resident father (Wallerstein & Kelly, 1980; Marshak, 2000; Kelly & Emery, 2003; Bing et al., 2009).

According to Participant 6 children involved in high-conflict divorce cases might blame themselves, as she perceived in one of the cases she was involved in:

The little boy actually said, I think I am the cause of this divorce, you know. If I had not been so naughty, there would be no divorce. You know children take all the blame. And you know parents have not got the maturity to actually go to those children and make sure they do not take the blame, And it basically affects the rest of the child's life because he has these feelings of guilt.

The effects of the high conflict on the child are also visible later in the child's life, as the child is at risk in the area of relationship formation problems, mental health difficulties, higher levels of stress, academic difficulties and problems solving deficits (Roth, Harkins & Eng, 2014). Conflict affects every child differently during each stage, for instance a child between the ages of 7 to 9 years would experience conflict more intensely than a child in the 10 to 12-year old range, as older children have greater coping resources (Richmond & Stocker (2003); Roth et al., 2014).

6.2.2.4 Sub-theme 4: Ways to deal pro-actively with conflict between parents

Sub-theme 4 refers to ways in which professionals pro-actively deal with conflict between the parents.

Participant 3 stated that she works very structured with high conflict parents to try and minimise the potential conflict situations:

I try to be very firm that they understand even if the communication is separate, it is together, I keep it together, otherwise some of the information will get lost. I remind them that the sessions are transparent, if you want to say something that is confidential, and then I will not make any notes of it, but you have to inform me that it is confidential.

Boyan and Termini (2005) and Baris et al. (2001) propose a system of parent coordination that is a form of dispute resolution that goes beyond mediation, therapy and other family services in high-conflict cases. Parent coordination is for the parents who cannot assume any perspective but their own and are locked in continuous high conflict to the detriment of their children. The main goal of parent coordination is to protect children from the ongoing conflict (Boyan & Termini, 2005).

Participant 4 indicated that during case management after a divorce, especially in high-conflict matters, it works best when two case managers are appointed:

... in very high-conflict matters there should be two case managers, and it does not mean a doubling up of work because you can when one is not available you can delegate the work, so there is no double charge to the client.

Parent coordination is a child-centered and non-confidential process for parents where mediation is not advisable due to the high levels of conflict or domestic abuse between the parents. Parental coordinators are usually trained psychotherapists who are designated to work with high-conflict families. Parent coordination is specifically tailored when children are caught in the middle of high-conflict divorce or post-divorce conflict (Lund, 2015).

Participant 6 deals with the high conflict as follows:

I just find that the only way to deal with the issues is to be quite firm with the parent, does not matter if you are paying my bill or not. If you are using those kids you are going to have flak from me.

Greenberg et al. (2002) assert that lawyers are required to understand the competencies of mental health professionals involved during high-conflict divorce and to understand the professional and ethical standards to avoid situations where the mental health professionals create a higher level and intensity of the conflict. Parents would often state that the reason for their ongoing litigation is that it is the child's wishes (Cashmore & Parkinson, 2011). One of the ways to deal proactively with conflict between the parents is that there needs to be an understanding of how each parent sees the world and how each parent conceptualises the real or imagined dangerous behaviour of the other (Baris et al., 2001; Boyan & Termini, 2005).

6.2.3 Theme 3: Parental alienation

The theme refers to alienation of one parent as a challenge to the application of the best interests of the child principle. Gardner (1987) initially referred to alienation as a *pathological alignment*, thereafter named it *parental alienation syndrome* (Gardner, 1992). Later Stoltz and Ney (2002) used the term *access resistance* while Stoltz (2001) and Kelly and Johnston (2001) referred to it as *the alienated child*. Garber (2014) argued that the child's rejection of one parent and the alliance with the other parent is seldom the result of only one parent's actions.

The sub-themes identified with reference to this theme are as follows:

Table 6.3: Theme 3: Parental alienation

Sub-theme 3.1	The complex nature of alienation
Sub-theme 3.2	Manifestation of alienation in practice
Sub-theme 3.3	Circumstances that aggravate the alienation of one parent

6.2.3.1 Sub-theme 3.1: The complex nature of alienation

Participant 7 rightfully warned that allegations of alienation is deemed as very serious and should therefore be proven beyond doubt. The participants stated:

In certain cases there is a degree of alienation, but if you really claim parental alienation, it is very different than claiming that the mother has refused contact for two weekends in a row. There has to be a history if you are claiming alienation. I do not take it lightly where I have found signs of allegation, I would refer the family for a psychological investigation. We are not qualified; we will only do an interim report and refer the family. The problem is that we cannot write down that we have established that there is alienation in the family, as the parent's lawyer will challenge us and state that we are not qualified to assess for alienation.

In the case of alienation, the child would more often reject the non-residential parent, and it can be either the mother or father. Among high-conflict and high levels of litigation, the father is mostly the rejected parent (Warshak, 2010). The terms that are usually used interchangeably among mental health professionals and lawyers are ‘favoured parent’, ‘preferred’, ‘aligned’ or ‘alienated parent’, where the non-residential parent is referred to as ‘targeted’, ‘rejected’, ‘alienated’ or ‘non-preferred’ parent (Polak & Saini, 2015; Warshak, 2015).

Participant 5 specifically referred to allegations of sexual abuse associated with alienation:

The aspect of alienation and false allegations of sexual abuse is an astronomical field. I do not have one case where there are allegations of alienation and allegations of sexual abuse where my client is not the father. I have one case where the mother's influence on the child is astronomical.

A child’s refusal to spend time with the one parent is not a linear process but an assembly of converging factors (Papaleo, 2015), such as the child’s personality, inter-parental conflict and parenting dynamics post-separation (Polak & Saini, 2015).

It is therefore important to keep in mind that there is no single, simplistic and one-dimensional explanation that captures the essence of these highly complex cases. Papaleo (2015) states that parents can be equally alienating, boys and girls experience alienation at about the same levels and adolescents are more likely to become alienated than young children.

Participant 2 who specialises in the field of alienation and focuses on contact resistance and contact refusal, indicated how she approaches suspicions of alienation during the divorce mediation process:

If I feel there might have been any alienation I will administer the Baker Alienation questionnaire to determine whether in fact one parent or the other has influenced the child. If I do find evidence of alienation, I would explain to the parents what the risk would be, to continue with the alienation, or what the impact would be on the child, the child would be if they would lose a parent, what impact it would have on them going forward, any negative issues that might arise, and then I would build in measures to make sure that there is shared parenting, that it does not slant, that does not give the opportunity, or one parent the opportunity of preventing the other parent from having contact with the child. Now I make sure that there is telephonic contact, indirect contact as well. For the child and the parent.

One of the major controversies is how much weight should be given to the child's preferences and to what extend her views and wishes should be taken into consideration during the compilation of a parenting plan, especially when clear signs and symptoms of alienation are evident (Papaleo, 2015). There is no single definition for parental alienation or a child who resists or refuses parental contact. However, new constructs have been proposed to provide more accurate descriptive approaches to differentiate between the types of parent and child contact. Parent and child contact can be viewed diagnostically on a continuum from affinity to alienation. The parent and child contact can further be viewed from attitudes and behaviours regarding gatekeeping, from adaptive facilitative gatekeeping to maladaptive

restrictive gatekeeping, as showed in Figure 6.1 (Polak & Saini, 2015). The healthiest of the continuum is at the bottom of the table, where the child has a healthy relationship with both parents.

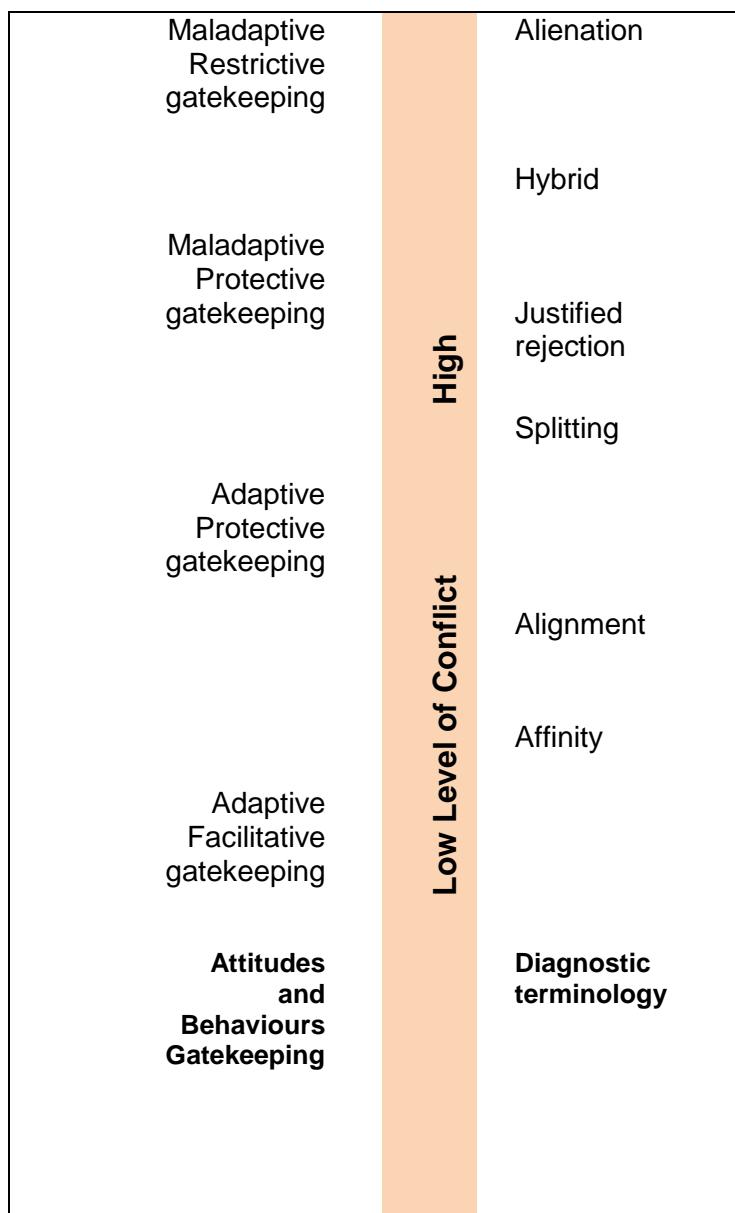


Figure 6.1: Adapted continuum of strained parent-child relationships (Polak & Saini, 2015, p. 223)

6.2.3.2 Sub-theme 3.2: Manifestation of alienation in practice

The participants' descriptions of the manifestations of alienation in practice indicated that alienation is very subtle in nature:

Participant 6 elaborated on parental alienation and contact refusal:

But that subtle indoctrination of the child is more prevalent than the courts would give credit for it...

Ellis (2008) and Ellis and Boyan (2010) aver that parental alienation continues to be a controversial issue. Kelly and Johnston (2001) indicate that many parents in high-conflict divorces are 'brainwashing' their children, however, only a small percentage of children become alienated. Kelly and Johnston (2001) refer to the term the 'alienated child' with the focus on the child while other professionals refer to 'parental alienation' or 'alienation'.

What is interesting with regard to alienation is that many fathers seem to alienate themselves from their children. Participant 8 reported that in some cases the fathers show a lack of interests toward their children:

...With fathers it is a total lack of interests in the child. They do not see the child for a year, and does not take any steps to see the child.

In some cases where there is an alienated child, the rejected parent – often the father – may feel immobilised by the hostility and ongoing litigation that he or she might withdraw in the face of the high conflict. Such a parent would cease attempts to call or contact the child and give up on attempts to reconcile with the child in therapy (Kelly & Johnston, 2001). They also withdraw due to a lack of financial resources and they feel immobilised and believe that the legal system is impotent to effect any change. Where the targeted parent feels that the alienated child is treating

him or her abusively, the parent might become highly affronted and offended by the lack of respect and react by rejecting the child (Kelly and Johnston, 2001).

A child, who rejects a parent, eliminates cognitive dissonance and confusion. The child is free of tense and hostile transitions; the child does not have to fear on how to share information and what information to share with each parent, or to figure out how to be loyal to both parents who despise each other. The child also does not have to worry about causing harm by being disloyal to the alienating parent, causing a very difficult dynamic to work with in a therapeutic context (Ellis & Boyan, 2010: Lowenstein, 2015).

Participant 10 highlighted the serious impact of alienation on children in the following excerpt, with specific reference to adults who have been alienated:

Children who have been thoroughly alienated, must be the most difficult to work with. Research showed that when they speak to these alienated children when they are adults they said they wished the mental health professionals had not taken them so seriously. That for me is frustrating. South African courts would not take the child away from the mother where there is alienation, in America they do.

Many factors are at work with parental alienation, namely high-conflict post-divorce, alienating parent's emotional distress, the need to placate and soothe the distressed parent, and the ineptness of the alienated parent's at parenting (Ellis, 2008). Ellis and Boyan (2010) maintain that the alienating parent usually manifests some symptoms of a personality disorder and the child develops an enmeshed relationship with the alienating parent. The child may have had a good relationship with the targeted parent in the past; but the child rejects and contradicts this.

Kelly and Johnston (2001) assert that alienation in a child occurs where a child freely and persistently expresses unreasonable negative feelings and beliefs toward

the other parent. The feelings and beliefs the child expresses toward the other parent are anger, hatred, fear and rejection (Baker & Chambers, 2011).

6.2.3.3 Sub-theme 3.3: Circumstances that aggravate the alienation of one parent

False allegations of sexual abuse might go hand in hand with efforts to alienate one parent. Participant 5 indicated that allegations of sexual abuse without any concrete evidence are problematic:

I think the aspect of false allegations of sexual abuse is an astronomical field. Often during this process is the mother's attempt to hinder the process with her conduct.

The findings of this study concur with Robinson's (2014) findings who indicated in her research that false allegations of sexual abuse during divorce proceedings is a real problem in South Africa and affect the family as a whole. The forensic evaluations are costly and such evaluations are complex and present as a contentious and social problem (Robinson, 2014; Black & Schweitzer, 2012).

Participant 6:

The mother alienated them from their father, they do not want to see their father because she has told them about the divorce, and that the divorce is ugly. And the fact that he has left the family home and the false reporting which causes manipulation and alienation. Disgraceful.

Bala, Mitncik, Trocme and Houston (2007) and Trocme and Bala (2005) aver that a proportion of child sexual abuse allegations are true that are made in the context of divorce or separation, but unfortunately there is a high rate of false allegations. Some cases of false reporting of sexual abuse are made in good faith, especially when the children are very young. Pre-existing mistrust or hostility is present in these cases, and these allegations are reported through a parent (Ellis, 2008). Robinson (2014) contends that some cases of false reporting of child sexual abuse may be the

product of emotional disturbance in the reporting parent. These parents may have a spectrum of psychopathology that might influence their judgements. Robinson (2014) further reports that these false allegations are made with vindictive intent, carrying serious consequences for the accused.

Participant 8 stated:

It often happens that mothers lay sexual abuse charges against the fathers and fathers lay charges against the mother's boyfriends. And then it is very difficult to distinguish whether this woman is being absurd or is she protecting her children.

False allegations of sexual abuse of children are disconcerting and have a devastating effect on the chances that the family has to move beyond their crisis. In such a situation the parties present with intense anger, which impacts negatively on the children (Janse van Rensburg, 2008). Allegations of child sexual abuse during divorce proceedings are complex, as it becomes an intricate process of intervention and it is not always easy to distinguish between false and true allegations, especially if the child is very young (Wakefield, 2006; Wakefiled & Underwagner, 2012). If the reporting parent is successful, the alleged parent can go to prison. If the reporting parent is moderately successful, supervised visits to the child will be awarded. This means they will never again spend quality time with the child. If the reporting parent is minimally successful, they would have at least disrupted the parent-child relationship and casting aspersions which may hang over that parent for years (Brock, 2000; Robinson, 2014).

Participant 7 continued:

And the problem is, you cannot ignore allegations of sexual abuse. You cannot state that the mother has made up stories; you have to consider every charge seriously. We refer the case back to the court for a full investigation. And if it was referred to the court already, we send it back to the appointment clerk to make another appointment.

The children get caught up in this destructive process of false allegations and the parents' hostility escalates due to the false reporting of sexual abuse. Robinson (2014) avers that the children are placed in the middle of a very confusing dynamic and the children end up not being able to see or have any contact with the other parent, leaving the children feeling guilty and anxious. Faller and Everson (2012) state that the children are unfortunately often indirectly coached and feel pressured to say what the reporting parent wants to hear. Mothers often use these false allegations as weapons in the fight for primary residence and to allow only supervised contact or no contact at all with the father (Jenkins, 2002; Robinson, 2014). False allegations of child sexual abuse in divorce proceedings are complicated and multi-faceted including various professionals in the process that makes it a costly experience for parents (Robinson, 2014).

Ultimately, the courts and mental health professionals, when faced with allegations of child sexual abuse, always act with caution and attempt not to generalise when the allegations are made in divorce proceedings. In order to protect the child, mental health professionals attempt to distinguish effectively whether the allegations are factual or false (Kuehnle & Connell, 2009).

The mere accusation of a parent is sufficient to strip the father of his rights to have access to the child and a criminal investigation is launched. There are no consequences to the reporting parent, and the reporting parent can report these false

allegations an indefinite number of times. Family Courts usually err on the side of caution and award primary residence to the mother (Brock, 2000; Robinson, 2014).

6.2.4 Theme 4: Assessment as part of the mediation process

The theme refers to the assessments associated with the mediation process. Professionals can conduct assessments based on:

- (a) A recommendation from the mediator
- (b) A court order, and where there is a dispute ranging from residency and contact to allegations from one parent to the other
- (c) Varying of court orders (for instance where the mother has primary care and the father wants primary care, where circumstances have changed or when either parent wants to relocate).

The participants agreed that proper assessment is required to ensure that some kind of standard can be set for the facilitation of a mediation process that has the child's best interests in mind. The following sub-themes were identified:

Table 6.4: Theme 4: Assessment as part of the mediation process

Sub-theme 4.1	The need for and affordability of assessments
Sub-theme 4.2	Content of the assessments

6.2.4.1 Sub-theme 4.1: The need for and affordability of assessments

The participants indicated that an assessment is required in order for the parents to move forward. They concurrently expressed their concerns about the limited access to professional assessments as well as the costs involved with assessments, and their concerns about parents not being able to afford such assessments.

Participant 5 referred to the extensive nature of assessments needed in cases where there are allegations of personality disorders in parents and suggest that the names of experienced people should be listed to facilitate the process.

It is necessary to complete psychometric assessments if there is an allegation of a personality disorder in a parent. With regards to the interviews with the children, only an experienced and knowledgeable person must conduct such interviews. Such interviews should be two to three half an hour sessions with the child. There should be a list of psychologists and social workers that are qualified and experienced who can conduct these evaluations in divorce disputes. There are unfortunately many people who are currently mediating parenting plans without any knowledge or skills, and that is concerning.

An assessment concluded as a forensic report yields a rich and in-depth understanding of the dynamics within a specific family (Demby, 2009). The recommendations in such a report can be refined for the family post-divorce. An in-depth evaluation of the family is required when making recommendations for relocation, residency and allegations of sex, drug and alcohol abuse as well as physical abuse. Unfortunately, these reports are often presented in a detached and intellectualised approach of the family and present a distorted and incomplete view to the court, as there is no emotion and motivation present in the report. Demby (2009) suggests that a vivid description should be provided to the court explaining the nature of the relationships within the family, especially the parent-parent relationship and how it affects the child and the proposed recommendations.

Participants stated that parents often could not afford any of the assessments suggested. According to participant 7 evaluations are often prohibitively costly:

...without recommending a psychological evaluation. We usually state that in the light of the following allegations, we recommend a full investigation and report. But it is not always possible due to the costs of the investigation.

Participant 1 referred to the fact that up to 10 mediation sessions are required and suggest a more cost effective approach:

You know, people cannot afford these assessments; there is simply not enough money for people to sit for six, seven, eight, nine, ten mediation sessions. You have to find a cost effective manner.

Assessments are costly, and not everybody has access to the costs involved of assessments (Robinson, 2014; Preller, 2014). Assessments often consume family resources as well adding to the costs of litigation, increased childcare as well as the cost of dividing households (Greenberg et al., 2002). The expense of care and contact evaluations was always high, according to Mart (2003) and has increased dramatically in the recent years. Due to far-reaching data collection, including home visits and observations, multiple interviews with family members, interviews with relatives, neighbours and teachers as well as therapists, this expense creates a situation in which these evaluations are often out of the financial reach of divorcing parents (Mart, 2003).

One of the most difficult issues that parents have to face after the divorce is the management of the finances, and the cost of litigation and assessments further add to the concerns (Frisby, Butterfield & Eickholt, 2014). Garber (2007) argues that there is a dilemma in the need to obtain valid and reliable information from children for assessments and reports. Young children are suggestible and interviewers can corrupt the data obtained from the children. Interviewer biases also need to be taken into consideration in formulating a scientific and objective assessment and report.

Participant 5 furthermore elaborated on the challenges relating to the investigations into cases of sexual abuse and alienation:

I think our biggest problem in dealing with allegations of alienation and allegations of sexual abuse is lack of funding. The Children's Act is an

excellent Act, however, our country cannot afford the implementation of the Act. For example, we require the services of at least a hundred thousand additional social workers to address the provisions of the Act. Only the affluent parents are able to afford the cost of psychological evaluations.

Deutsch (2008) contends that there are greater numbers of highly litigious and complex divorces with associated limited resources.

Divorce cases have evolved from who should be awarded care of the children to where the decision now is how to share parenting time and access to the children, involving legal and clinical interventions (Austin, 2008). As the *Children's Act*, 38 of 2005's focus is on the best interests of the child, and no longer parents' preference, it leaves courts with factors to consider and hearing the child's voice and the child's wishes. When parents disagree about the relationship with their children, time spent with their children, relationships between the children and extended family, their children's schooling and extra murals mental health professionals are appointed to provide evaluation, mediation or case management services (Faller, Cordisco-Steele & Nelson-Gardell, 2010; Jensen, Lombardi & Larson, 2015).

Sub-theme 4.2: Content of the assessments

According to the participants in this study the content of the assessments has to be specific and structured in order to ensure that the outcomes set in the best interests of the child are reached. Participant 1 shared her experience and indicated the need for a process-orientated approach that considers the wishes of all the parties involved:

Participant 1:

You have to populate the document, you have specific categories and you cannot have an unstructured process if you want to populate a structured document. That is what underpins the methodology that you need to follow a

certain process if you want to achieve a certain outcome, and the benefits for the parents are unbelievable. The structure is there and helps to settle the parents down and keeps them safe. You have to give due consideration to the parents' views and wishes, and you give due consideration to the child's wishes. Then you have to sign off, either form 9 or form 10, where you as the mediator state that this parenting plan is in the best interests of the child. I do an intake interview where I prepare the parents for mediation. I assess the relationship between the parents and the relationship between each parent and the child, the factors inherent to the child and the parenting capacity.

Participant 2 strongly emphasised that the assessment should include the child and that an integrated perspective should guide the final recommendations of reports:

I assess the parents' ability to parent their child, the capacity to co-parent and to hear the child's voice. One must hear the child's voice and one must also take into consideration the child's attachment figures, because it is very damaging to tamper with the child's attachment. There is not a single factor one has to look at; one has to include all these factors and combinations. Then, bearing all of those factors in mind, this would be in the child's best interest. The parent's capacity to parent and co-parent is established through extensive parenting questionnaires, extensive parenting histories, collateral information from various reliable and unbiased sources as well as Garber's parenting screening with 10 separate individual subtests.

The Association of Family and Conciliatory Courts (2006) has published model standards of practice for child care evaluation and model standards of practice for family and divorce mediation, which is a comprehensive guide that addresses the pitfalls of hostile parents and how to deal with high-conflict parents. They (AFCC, 2006) aver that the professional should bear in mind and recognise that mediation is based on the principle of self-determination by the parents. The parents should be empowered to make their own voluntary and informed decisions. The professional should remain impartial at all times and where there is a conflict of interest, the professional shall withdraw immediately (AFCC, 2006).

Assessments within a forensic report yield a rich and in-depth understanding of the dynamics within a specific family. The recommendations within such a report can be finely tuned for the family post-divorce. An in-depth evaluation and assessment of the family is essential when making recommendations for a forensic report (Demby, 2009). In the assessment, the focus should be on the child's right to a safe relationship with both parents. Mental health professionals should have a sound knowledge of substance abuse, child abuse and neglect, domestic abuse, alienation and remediation plans, child development, family dynamics and parenting plans in order to conduct a scientific and reliable assessment (Barnett, 2009). Garber (2009) proposes attachment theory as empirically rich and developmentally informed to inform these assessments, as the term 'best interests of the child' is not clearly defined.

6.2.5 Theme 5: Recognition of the children's voices and the protection of their rights

The theme refers to the fact that the children are recognised as an integral part of the mediation process to ensure that their best interests is considered in the development and execution of the parental plan. The recognition of children's voices and rights was emphasised by most participants, while two participants clearly stated that they do not see the children or even see the need to talk to the children. The following sub-themes were identified:

Table 6.5: Theme 5: Recognition of the child's voice and the protection of her rights

Sub-theme 5.1	Nature and extent of professional involvement with the child
Sub-theme 5.2	The capacity to understand and listen to the child

6.2.5.1 Sub-theme 1: The nature and extent of professional involvement with the child

The participants in this study had different opinions on the nature and extent of their engagement with the children that were part of the process.

Participant 3 felt strongly about involvement of the child:

I will never set up a parenting plan without seeing the children. I usually interview and assess the child for a few sessions and will view the child's emotional expression, how the child is feeling when moving between two homes, the attachment and relationships with the child and family members and the problems the child experiences. I would also inform the children of the contents of the parenting plan after their parents have agreed to the plan. I observed that often the parents did not inform the children why they are there or even that the parents are getting a divorce. I maintain a fine balance, as children are often traumatised and regressed by their parents' divorce as to not traumandise the children even more by allowing them to think that they have to choose between their parents.

Professionals dealing with disputes from divorcing parents require a special kind of knowledge, special type of personal stamina and a conceptualisation of the dynamics and the issues that the parents present. Professionals do more harm when they venture where they are not qualified and where they do not have the necessary skills (Baris et al., 2001; Boyan & Termini, 2005). According to Baris et al. (2001), more harm is done where the professional behaves 'as if' the professional is an expert in a particular field.

A family advocate (Participant 7) concurred and indicated that she commences her investigations by enquiring what the current situation is:

Where are the children currently residing and for how long. Then we establish the living conditions in both homes, how many bedrooms, do the children have their own bedrooms, etc. We use the services of a family counselor that specialises in interviewing smaller children. With children aged 15 or 16 years, we do the interviewing ourselves. During high-conflict cases, we are usually present during the child interviews. We prefer to sit in during interviews or to put our questions to the children themselves, and then I wonder why did you not ask that of the child? I sit in, because I like to get the information firsthand, and there are certain questions that I would like to ask, and then I am able to ask it. When I get the report from the family counselor, there is information that is not there that I require, that is why I like to sit in during the interviews. And language is obviously an issue; you have to have the interview in the child's home language.

Participant 5 is an advocate who does not see the children, but will refer to a person who is equipped to work with children:

It is immense. It trickles through to the children. I use the services of an expert such as a psychologist as it is not my field and I am not qualified to work with a child and address the trauma. The child is the victim, the child is not empowered, I do think few people in divorce, even highly intelligent people, have the ability to objectively state what in the child's best interests is. A legal representative can be appointed for a child aged 6 to 7 years. If you spend about 10 hours of consulting with a child, what is the guarantee that you could get inside his head? How do you understand what is going on at his home? I do not think there is a solution for it. The legal representatives' statements of the best interests of the child in the court documents is paying lip service, they have to state it and it also looks good. Sometimes the child is being indoctrinated by the mother and sometimes the child only wants the conflict to stop and will say anything.

Often when adults make decisions on behalf of children, they miss the mark and this results in unnecessary suffering for the child. Children have demonstrated through their behaviour and words that their burden becomes unbearable due to a

host of errors promulgated by parents, courts and society (Warshak, 2003). The norm used to be that children can see their fathers two to four nights a month, and through listening to children's voices researchers learned that this was insufficient to sustain meaningful parent-child relationships. Children profit when they are participating in the decision-making process and the end result is empowerment of the child. However, there are risks to their emotional welfare involved in listening to children's voices during the divorce process. Children do not always know what is best for them, and especially during the divorce where there is family turmoil; the child's thoughts and feelings are often temporary, transient and fluctuating (Wallerstein & Kelly, 1980). The child will often tell both parents what they want to hear at the time. Warshak (2003) cites the example of the child who witnessed an isolated physical altercation between her parents that was frightening for the child, followed by an absence of that parent, and that may have left an imprint on the child's thoughts and feelings.

The child or adolescent may also prefer to reside with her father and stepmother as there is no curfew, or the other parent allows the child to go to bed later. The child's living arrangements post-divorce, their perceptions of what constitutes a good divorce versus a bad divorce from the child's point of view remains insufficiently unstudied, according to Fabricius (2003).

During the transition from a married couple to a single parent, they have to discover their identity and gain confidence in their ability to live alone. However, to be able to thrive as a single parent, the parents need to let go of his or her old marital relationship (Boyan & Termini, 2005).

Divorce can be a humiliating experience, even for psychologically healthy people. Parents who have a fragile self-esteem are vulnerable during the high-

conflict divorce and reacts to the shame they experience of their marriages falling apart (Baris et al., 2001). Family separation and divorce starts a chain reaction of stressful events for parents and children. There is ongoing change, numerous losses and conflicting emotions. Boyan and Termini (2005) aver that in every family there is a set of roles, routines and rules. These rules, routines and roles no longer apply and parents must shift their ways of interacting with each other. Many rules may or may not be duplicated in the two family homes, and children experience two homes with two different sets of rules in many cases (Boyan & Termini, 2005).

However, arbitrary boundaries lead to power struggles between the warring parents. Children become anxious and overburdened and may walk on eggshells, waiting for the next explosion from their parents. Rigid boundaries on the other hand do not accommodate the interdependency of parenting and unexpected events and circumstances. Parental responsibilities should be specified and parents should firstly be clear about how much parenting they will share, and secondly, what they can and will accomplish on their own when the children are living with them (Boyan & Termini, 2005).

Preschoolers manifest with extraordinary distress in the face of their parents' high and ongoing conflict. They have a real sense of something is wrong and they panic and will often look distressed most of the time. Some children become withdrawn and others aggressive. Four-to-five-year olds are unable to understand their parents' arguments; their prime concern is whether their basic needs are being met. During conflict they would feel that it is their duty to soothe the parent (Baris et al., 2001).

They begin to doubt their own competency when they learn over time that they are unable to change the situation, and emotional disorganisation and confusion may

occur. They exhibit a loss of developmental accomplishments such as regressing (wetting their beds, returning to the bottle) and demonstrate their fear by becoming clingy and refusing to separate from their parents and might be angry and demonstrate this by yelling, hitting, throwing toys or appear listless and withdrawn (Baris et al., 2001; Boyan & Termini, 2005).

School-going children have a broader understanding of the conflict between their parents, but are unable to integrate the two different points of view. They can actually escalate the conflict between their parents by reporting the opposite to parents. Some of these children disconnect from their feelings and children become polarised between the two warring parents. Children who grow up with conflicted and hostile parents in ongoing disputes often have an undermining of moral growth due to differing realities presented by warring parents. Such parents would tend to oversimplify and distort information with a lack of foundation to maintain their own view. They may present with feelings of loss, guilt, sadness, rejection and fear. They may be preoccupied with the fear that a stepparent might replace them and perform academically poor. They might also develop somatic complaints and attempt to reunite their parents (Baris et al., 2001; Boyan & Termini, 2005).

6.2.5.2 Sub-theme 5.2: The need to understand and listen to children

The participants indicated that the need to understand and listen to children is critically important. Yet they were concerned that the current dispensation does not sufficiently address this need.

Participant 6 suggested that in some instances parents still have the stronger voice in particular where young children are involved:

When the Children's Act, 38 of 2005 was in its infancy the provisions of the Act was so draconian that it was time that the parents got the opportunity of

protecting themselves against the children and that is unfortunately still the case. I recommend using the provisions of section 10 and section 14 of the Act. So that you when you have a very vigorously opposed situation you appoint a curator ad litem for younger children so that they are heard through a curator and you appoint a legal representative for older children. I am very much in favour of that because the children have got to know that someone will stand up and have them heard in relation of what they wanted to say.

The concern is how to talk to children to understand and listen to them (Johnston, Breunig, Garrity & Baris, 1997). Moss, Bureau, St-Larent and Tarabulsky (2011) aver that the professional conducting the assessment are required to understand the child's process within the family and how the family process contribute to the different types of attachment and where there is a disorganised attachment between a parent and the child, the different subtypes of disorganised attachment (controlling-punitive, controlling-caregiver and behaviourally disorganised) as the attachment type will impact on the child's social, emotional as well as school adaptation.

Participant 4 indicated that children's voices are often restrained by their parents' conflict:

Often children are so caught up in the conflict that they can't be listened to. They are intensely aware of the conflict and merely talking about it in the conflict situation with a judge or the family advocate or somebody will cause them great discomfort and stress.

Wallerstein and Blakeslee (2004) identified through listening to children that children taught them how intolerable it was to be separated from their fathers after the divorce, indicating the importance to listen to children. The child responds to divorce through the developmental stage they are in, and professionals interviewing the child need to be aware of. It is accepted that the child has a right to be heard and for their wishes and feelings taken notice of according to Mantle, Leslie, Parsons,

Plenty & Shaffer (2006). However, the challenge for professionals is to find the balance between empowering the child and protecting the child. In this highly emotional and hostile environment, the child's voice must be sought. The mental health professional interviewing the child most often has to deal with the involvement of two parents, and these two sources of information are conflicted (Mantle et al., 2006).

Boyan and Termini (2005) and Wallerstein and Blakeslee (2004) state that the age of the child affects her reaction to divorce. Robinson (2010) argues that the child's needs and developmental stages should be represented in the parenting plan. Parenting plans should have a long-term focus, as many of the children where families are undergoing a divorce are very young, and therefore the parenting plan cannot be static and requires yearly amendment until the child is older. Robinson (2010) states that parenting plans should be sensitive to different developmental stages of children to ensure that their needs are met.

Clemente and Padilla-Racero (2015) pose the question whether children lie and whether parents can manipulate them. What is the truth (the reality) and what is the lie (the imaginary, the unreal) when children report to the mediator. Conceptually, the relativity of truth needs to be taken into account and the concept of false and borrowed memories also needs to be taken into account.

Mantle et al. (2006) propose that professionals interviewing the child should be aware of the office where the interview is taking place, as not to generate anxiety for the child. Confidentiality needs to be ensured and the professional needs to explain to the child that disclosures of harm are not covered by confidentiality. Play should be used, but there should be a purpose for play and the professional has to decide beforehand how guided play should be.

6.2.6 Theme 6: Requirements for divorce mediators in cases where children are involved

The theme refers to the participants' views on the requirements that need to be set for professionals who participate in mediation in South Africa. According to the data, such professionals should be experienced and trained in the field of mediation, equipped with specific knowledge and skills to understand the complexity of human behaviour involved in the process as well as the capacity to interact effectively with children. The sub-themes that have been identified within this theme are:

Table 6.6: Theme 6: Requirements for divorce mediators where a child is involved

Sub-theme 1	Experience as a pre-requisite to facilitate the mediation process
Sub-theme 2	Trained and equipped to mediate
Sub-theme 3	The capacity to deal with dysfunctional behaviour

6.2.6.1 Sub-theme 1: Experience as a pre-requisite to facilitate the mediation process

The family advocates expressed concern about the fact that some of the mental health professionals and lawyers do not have the necessary experience in working with children. This complicates issues and adds to frustration because judges tend to respond to recommendations that do not take the best interests of the children into consideration.

Participant 3 stated the following:

In such an interview you have to view the child's wishes, needs and interests, it demands very specific skills and training, it is very difficult to assess manipulation in a child. We have to view the trauma and conflict in the child's life. It is a specialisation area where only specialists can work. I feel you have to have 5 to 10 years' work experience to work with parents and children emotionally to understand this dynamic and you also have to complete some research in this field.

Austin (2009) found a paucity in research concerning whether child evaluators and judges succeed in ultimately act in accordance with the best interests of the child. Unless the parents continue to litigate, professionals do not follow these cases over time to investigate the impact of the recommendations and parenting plans on the child. Only when the parents litigate, does the professional obtain some feedback on the outcome of the parenting plan. Issues such as important data being missed, wrong methodology and bias point to a lack of experience in the professional (Austin, 2009).

Much skepticism has been voiced over the lack of empirical support when making recommendations for parents, the lack of experience and concerns about addressing the issues (Bow, Gottlieb & Gould-Saltman, 2011). Unfortunately, professionals often go beyond their knowledge, expertise and experience. It depends on the professionals' views, for instance about shared parenting, where one is a proponent of shared parenting, another might view the continuity of a primary caretaker and the child-bond as essential (Scott, 2014). To ensure quality mediation, ongoing training, assessments, unbiased approach, relevant experience and good professional credentials are required for professionals according to Raines, Hedeen and Barton (2011).

Based on the concern stated above, Participant 6 advocate that the experience that mediators have is critically important because of the skills required:

The years of experience is a very important aspect, as well as the skill to write a report that is correct and they need to be reliable, responsible and who has proven that they are truly independent. I believe that every legal practitioner, psychologist and social worker should have good common sense. But the position basically is that you have to be practical and okay don't come with ideas that are highfalutin. I mean just come down to grass roots and see what is going to work, and not what you hope may work. You know, how do I best give you an example of that, it does not help if you say these kids should go to-

boarding school and if there is no money for boarding school. You know, why do you want to make it more difficult to all parents than it already is. Let them go to the flippen local school and make the best you can with what you already got.

Participant 3 voiced the following concerns:

I have witnessed some professionals with sparsely equipped playrooms and they are unable to connect with children. At the end of the day, if you cannot access the child it becomes very difficult, it is a very difficult balance to maintain. As on the one level you have to play this professional role and be an expert witness in court and provide the court with a professional report and on the other hand you have to change into your comfortable clothes to play and interact with the child on their level, the four-year old. Lawyers lack the necessary skills and training to conduct interviews with children, and therefore I recommend that only mental health professionals should construct parenting plans. Parenting plans fall out of the ambit of scope of practice of lawyers. It is very seldom that lawyers defend both parents. And then you question their objectivity. And they are also unable to work with the child, so they refer the child, and it creates a danger of chaos that ensues. The Children's Act, 38 of 2005 should be reviewed that legal teams do not write the parenting plans, but only mental health professionals with the condition that they are required to be trained to work with children. The information gets lost in translation when the legal team appoints a social worker or psychologist to work with the child and report back to the legal team. The only exception is when there is a panel of experts working together and writing the report in a multi-disciplinary approach.

Mediation skills are based on listening, remaining connected with the parents, allowing the parents to voice their opinions and fears, being non-judgmental and trustworthy and treating the parents with dignity and respect (Preller, 2013). The mediator should take adequate time to identify the different perspectives and accept the parents' differences (O'Leary, 2014). The mediator should be able to ask open-ended questions, be curious and listen actively (Howieson & Priddis, 2015). The mediator is required to listen carefully to the parents' frame of narrative to reframe to encourage the parents to see things differently (O'Leary, 2014). The mediator should guide the parents into trying to stand in the child's shoes and imagine how the child

might be feeling and thinking. This will result in a more productive and meaningful mediation. The parents are encouraged to explore the child's best interests, their own interests and develop options for future cooperation. Mediators should have a thorough understanding of the underlying psychological interactions that take place during the mediation (Howieson & Priddis, 2015).

Austin (2009) avers that professionals' lack of experience is a concern during the construction of a parenting plan. These professionals are part of the legal team and deliver a service to the courts, and the quality of the parenting plan has a direct effect on the family. Judges look towards the *keepers of specialised knowledge*, indicating the enormity of the responsibility (Austin, 2009, p. 545). Participant 3 stated that a young professional could therefore not do mediation for a parenting plan:

You do not have the necessary work experience as well as life experience to deal with difficult and hostile conflict between parents. And I think you have to have a qualification on Master's level.

Participant 1 stated that specialised training is required:

I want to go so far as to state that to only be a mental health professional is not enough, you cannot be self-taught. You have to ensure that you have specialised training and it is dangerous to attempt this field of work without specialised training.

It is unclear what evaluation methodologies when conducting an evaluation South African social workers and psychologists use, what information is considered important, how this information is gathered and how this information is presented to the courts. It is also unknown whether psychologists' methodologies are being used and presented in accordance with the ethical, instructional and judicial guidelines presented in the literature. Numerous South African authors have noted a paucity of research into psychologists' custody evaluation practices in the South African context

(Brandt, Dawes, Africa, & Swartz, 2004). The limited research into South African psycho-legal custody practices has *inter alia* focused on issues and criteria that inform psychologists' decision making (Brandt et al., 2004) or criteria for the evaluation of parents in custody evaluations, or on a broader level, the psychologists' and lawyers' perceptions of psychologists' forensic work (Brandt et al., 2004). In addition, there is no formal accreditation, no or very limited training or peer review for psycho-legal assessment work for psychologists in South Africa while the majority of psychologists working in this field are primarily 'self-taught', either through reading, self-study, or attending conferences. The lack of guidance and standardisation for conducting a custody evaluation is a disservice to psychologists, the legal fraternity and the families who have to be served (Brandt et al., 2004; Howieson & Priddis, 2015).

According to Connell (2010), the question is whether professional organisations should promulgate rules of practice with the intent of establishing an ideal of highest level of practice, or with the ideal of establishing minimum threshold for adequate practice. The APA (2000) states that psychologists and social workers with a doctorate qualification need not be provided with a list of required behaviours, although it does not exclude any established ethics codes. *The Children's Act*, 38 of 2005, prescribes the contents of parenting plans and case law and the Act defines the best interests of the child. Furthermore, there are laws that regulate professional practice (Thompson, 2012).

The issue whether mediation is appropriate where there is allegations of intimate partner violence or allegations of any abuse are controversial (O'Leary, 2014). The issue during mediation is where the perpetrator is angry due to something that occurred during the mediation, the victim might be at risk for physical harm.

Perpetrators might intimidate victims into agreements that inadequately address their needs or interests (Rossi, Holzworth-Munroe & Applegate, 2015).

The Department of Justice and Constitutional Development submitted notice 598 of 2014 for the amendment of rules regulating the conduct of the proceedings of the magistrates' courts of South Africa. This was published in the Government Gazette, Republic of South Africa, Volume 590; Number 37883 dated 1 August 2014. The Department of Justice and Constitutional Development issued an invitation to submit comments on the accreditation norms and standards for mediators. The closing date for submissions was 28 August 2014. The Minister made the recommendation that mediators should undergo a minimum of 40 hours training which includes the following: theoretical component consisting of basic civil procedure, court-annexed mediation rules, role and function of the mediator, principles, stages and methodology of mediation, social-context and diversity awareness, conflict management, decision making, communication and diplomacy, ethics and professional conduct, negotiation and influence, conflict management, interpersonal relations, confidentiality, privacy and reporting obligations and neutrality and impartiality. Within the period of 40 hours a practical component should be included of role-play and mock mediation.

6.2.6.2 Sub-theme 3: The capacity to deal with dysfunctional behaviour

The capacity of professionals to deal with dysfunctional behaviour of parents was emphasised by the participants.

Participant 1 indicated that dysfunctional behaviour might lead to ongoing litigation:

There are serious personality disorders that lead to a litigious nature where the parent only wants to litigate. The parent does not want to mediate, only litigate.

It is litigation for its own sake; it is not litigation for bringing in to the best interests of the child. It is embedded in the personality.

Participant 4 indicated that there is a link between high-conflict divorces and dysfunctional behaviour:

Generally, in the high-conflict cases, the parents on both sides have some or other dysfunctionality on both sides. So for example, I mean I had one, which was long ongoing, the parents have not been married, the child was born without a marriage, and the father wanted access to the child. But from day one the mother alienated the child. And another one, where both parents in my view were also dysfunctional and impossible people.

Pruett et al. (2003) argue that the mental stability of the custodial parent determines how and to what extent a child is affected by her parents' divorce. Personality disorders are internal factors that often contribute to high-conflict divorce (Dane & Rosen, 2016). Robinson (2010) avers that the conflict post-divorce remains problematic as conflict reduction does not materialise, but rather escalates. One of the parents usually obtain a protection order against the other parent, limiting their ability to be together in the same place at the same time, including handovers at their children's schools. High-conflict parents become rigid in their perception of one another and deal with things in an extreme manner. Eddy (2010) claims that these parents are often self-sabotaging. They often fail to see their own contribution to their own problems, as they are responding to their own internal crises.

Eddy (2010) estimates that half to two thirds of divorces include one high-conflict parent and one reasonable parent, where the reasonable parent would have lived a cautious life, often in fear of the high-conflict partner. Eddy (2010) claims that the high-conflict person in a divorce may in all probability have a personality disorder. Stahl (2000, 2011) argues that personality traits such as narcissism, anger, anxiety, fear, a tendency to overreact, and paranoia are important contributing factors to the

source of conflict for parents who are continuously engaged in high conflict. Eddy (2009) further states that professionals should understand the dynamics of the high-conflict personality and develop a working theory in working with such a parent, or run the risk of being reported to the Health Professions Council of South Africa (HPCSA). According to the psychologists interviewed that is often the case.

Participant 5 and Participant 6 emphasised the destructive consequences of dysfunctional behaviour in parents:

But, the negative influence the mother had on the two boys was astronomical. The youngest one believes he is ill due to the mother's influence. She did not allow the father any contact with the boys, and up to this day there is no parenting plan. We are preparing an application for primary residence for the father. (Participant 5)

I have a case where there are two little boys, well they are not so little, they are 10 and 12, and they were completely alienated from their father, the mother alienated them from their father, they did not want to see the father. Because she has told them about the divorce, and that the divorce is ugly. (Participant 6)

Robinson (2010) argues that professionals should bear in mind that not all information from warring parents is necessarily truthful, as such parents often distort the truth and relay their own perception of the truth (Dane & Rosen, 2016). Robinson (2010) warns that professionals should be aware of this phenomenon and ensure that it does not confuse or distract them.

According to Vousoura et al. (2012), with more than 30 years of research on the effects of divorce on children and their development, studies have reported a link between parental divorce and depression. Vousoura et al. (2012) argue that depression is prevalent amongst children from divorced parents; however, parental depression may compound this effect.

A personality disorder is defined by the DSM-5 (2013, p. 645) as an enduring pattern of inner experience and behaviour, and such a person is inflexible and the onset is typically in adolescence or early adulthood. Boyan and Termini (2005) argue that the greatest number of parents that present in mediation after a divorce and are locked in ongoing conflict, display the characteristics of the immature type of personality disorders, namely, borderline, histrionic and narcissistic personality disorders. Children with personality-disordered parents are more likely to have emotional and behavioural problems and may suffer from disruptive behaviours, however, it is not clear how much a child's emotional and behavioural outcome will be affected by such a caregiver (Deutsch & Clyman, 2016).

6.3 SUMMARY

Six themes were identified through thematic analysis. The themes indicated that the participants still experienced a lack of clarity as to what the best interests of the child principle encompasses in practice. The participants suggested criteria for facilitating the best interests of the child and the development of parenting plans, based on their own experience in the field. Hostility and high conflict between the parents were highlighted with specific reference to the manifestations of high conflict and hostility, possible reasons for hostility and high conflict between parents, impact of hostility and high conflict on the children, and ways to deal proactively with conflict between parents. Parental alienation was indicated as a challenge, and discussed with reference to the complex nature of alienation, the manifestation of alienation in practice and the circumstances that aggravate the alienation of a parent.

The importance of efficient assessment as part of the mediation process was emphasised in terms of the need for and affordability of assessments and the content of assessments. The importance of recognising the child's voice and the protection of children's rights as well as the capacity to understand and listen to the child were

deliberated. Finally, the participants suggested requirements for divorce mediators in cases where a child is involved and parenting plans need to be developed. The guidelines for the facilitation of the divorce mediation process in which children are involved are presented in Chapter 7.

CHAPTER 7

GUIDELINES FOR FACILITATING THE BEST INTERESTS OF THE CHILD DURING THE DIVORCE MEDIATION PROCESS

7.1 INTRODUCTION

In this chapter guidelines are presented for the facilitation of the best interests of the child in the divorce mediation process and the development of parenting plans based on the existing research literature and empirical work that involved document analysis of relevant documents and interviews with 12 participants who have extensive experience in the field of divorce mediation.

7.2 THE DIVORCE MEDIATION PROCESS

The divorce mediation process is a complex psycho-legal process requiring consideration of both the legal and psychological aspects. Professionals, together with the parents and their children, interact with the aim of facilitating the best interests of the child in the situation in which the parents are at that stage of their lives. This takes place within a context of a legal system that presents the parameters for consideration in a case of divorce. Figure 7.1 over page presents a diagram of the mediation process.

Every year a significant number of children (28 295 in 2012) are affected by their parents' divorce (Statistics South Africa, 2012). According to Greyvensteyn, (SAAM Mediation Conference, 2014) during 2013 maintenance orders were issued for 13 million children in South Africa. These parents, as part of their parental obligation, are expected to take responsibility for their children's wellbeing throughout this process and thereafter. However, parents are often hostile and angry, and are unable to adhere effectively to this obligation, with a consequent detrimental effect on the child.

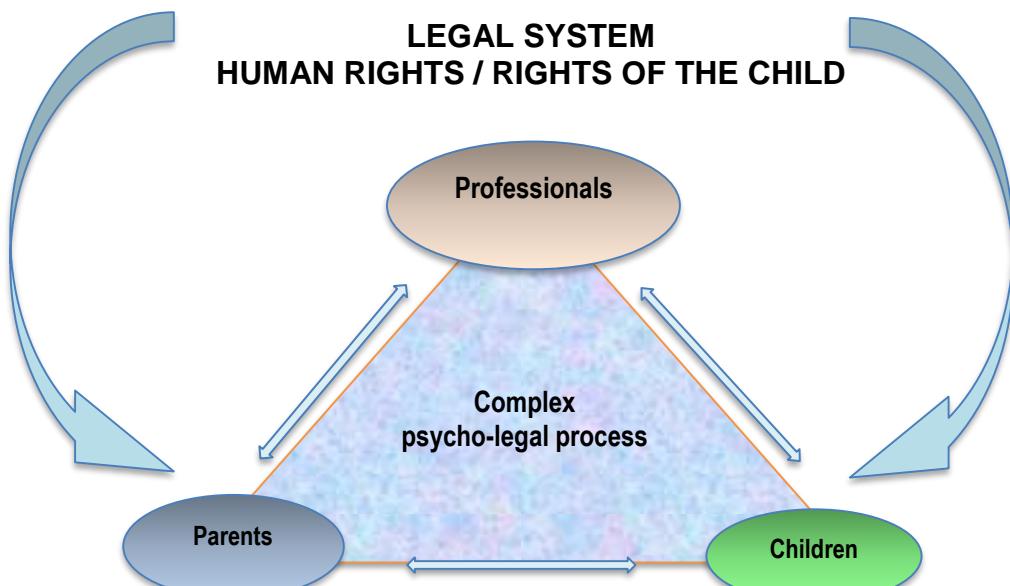


Figure 7.1: Complex process of divorce mediation

In response to the concern about parents' ability to act responsibly amidst the challenges associated with a divorce, parents may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child (Section 33(1) of the *Children's Act*, 38 of 2005). Research evidence suggest that when parenting plans are well organised, practical, child-centered and developmentally appropriate of the child's age and stage of development, and are representative of the family, the child can be protected to a great extent from the parents' hostility.

A parenting plan should serve the best interests of the child thus it is imperative that during its compilation, the professional interviews the child to obtain a clear indication of her views and wishes. In this regard the parents' wishes are considered to be secondary to that of the best interests of the child. The *Children's Act*, 38 of 2005, gives priority to the child's rights in terms of the parenting plan and the following rights of the child are vital in a parenting plan (Robinson, 2010): the child's right to parental care, the child's right to be protected, the child's right to legal representation and the child's best interest. These rights are enshrined in the

Constitution (108 of 1996) in section 28, and professionals should also be cognisant of the international legal instruments as previously stated in the research study, namely the United Nations Convention of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). The above instruments can be used as a guideline to establish the best interests of the child while Section 7 of the *Children's Act*, 38 of 2005, and the landmark case, *McCall v McCall* used as the foundation during mediation to ensure the child's best interests.

However, based on evidence in the research literature and the results of this study, the need for clear and comprehensive guidelines for professionals involved in divorce mediation were evident. In this chapter, the researcher presents such guidelines for professionals in the field of divorce mediation to facilitate the best interests of the child principle in their practice from a psychological perspective.

7.3 PROPOSED GUIDELINES FOR FACILITATING THE BEST INTERESTS OF THE CHILD IN THE DIVORCE MEDIATION PROCESS

The researcher proposes seven guidelines. The development of the guidelines considered the legal aspects of divorce mediation, but was mainly informed by the conceptual framework developed in Chapter 3 and the empirical work conducted in this study as reported in Chapters 5 and 6. Table 7.1 presents an overview of the guidelines. The last column indicated the focus of the specific guideline.

Table 7.1: Overview of suggested guidelines for professionals

Guideline	Description	Applies to...
1	Conduct extensive and responsible assessments to understand family's functioning	Individual mediators
2	Ensure safe and supportive spaces for the child throughout the mediation process	
3	Pro-actively address the challenges evident in the divorce mediation process	
4	Inform the parents involved in a divorce process on the implications of the process	
5	Apply a collaborative approach in the divorce mediation process	Mediation

Guideline	Description	Applies to...
6	Equip professionals involved in the mediation process for competent and ethical practice	practice in general
7	Implement an evaluation system to enhance the quality of divorce mediation	Systemic

7.3.1 Guideline 1: Conduct extensive and responsible assessments to understand the family's functioning

Evidence from literature (Amato, 2006; Thompson, 2012; Robinson, 2010; Henig, 2013; Amato & Anthony, 2014) clearly indicates the difference in quality between a parenting plan, based on extensive, responsible assessment of the child and both parents, and a plan based on mere observation and subjective information obtained in brief interviews with the parents. The latter resulted in superficial parenting plans that are ineffectual for parents during times of crisis and disagreement.

In order to ensure the responsible development of parenting plans in the South African context, extensive and responsible assessment should therefore be conducted as part of the divorce mediation process. A uniform assessment protocol has to be developed, and mediators need to be equipped to implement such a uniform assessment process. Based on the research conducted in this study it is suggested that the process include the assessment of the children involved, the assessment of the relationship between the parents and the children and the assessment of the parents.

7.3.1.1 Assessment of children

With reference to the assessment of the children involved in the process, it is suggested that professionals involved ascertain whether the child is able to relate to them before commencing with the assessment. The professionals should be knowledgeable about and sensitive towards alienation, manipulation and be able to

detect signs of a parent coaching a child. The professionals should consider the implementation of relevant factors in the assessment such as loyalty conflicts, the child's level of confidence, her developmental stage as well as her perception of the parents' conflict.

There is always a risk of creating a sense of omnipotence in a child by allowing her to choose where she wants to live, with whom and for how long. The professional should explain this process to the child, namely that she will not necessarily do what the child wishes, but will listen to the child and facilitate what is in the best interests of the child. The professional should assess the child and her relationship with both parents, and never ask compromising questions, which would require the child to choose between parents. According to Emery (1994, 2004), the dilemma in divorce is that children often bring a third perspective, which conflicts with the view of one or both parents. The children's needs are supposed to be of paramount importance, yet they are often forgotten in the parents' ongoing acrimony and hostility. The problem for children is not choosing the 'right side', but having to choose at all.

The child's assessment should be tailored to the child's stage of development with reference to all the aspects of her development as indicated in the developmental research and proposed by Vallabh at the SAAM Mediation Conference in 2014 (SAAM, 2014). The professional should therefore have requisite knowledge of early childhood development and the associated psychological theories that were discussed as part of the conceptual framework for this study in paragraph 2.1.

The professionals involved should be able to assess the child's emotional disposition at the time of the mediation and determine how she understands what is happening in the family. The professional should also establish where the child's safe

haven is, what activities she enjoys with whom, her routine and the parent's involvement in the routine.

It is important to note that when assessing young children, the information obtained from the child is limited as indicated in the literature (Sanchez & Kibler-Sanchez, 2004; Slovin, 2005; Robb, 2012; Taylor et al., 2015). Psychometric testing of the young child is even of less value and the questions should be directed in accordance to the child's capabilities. The assessment should be sensitive toward developmental delays and data should be reliable and relevant.

7.3.1.2 Assessment of the child's relationship with parents

The empirical evidence indicated the importance of an extensive assessment of the child's relationship with both parents. The professional involved should spent time to observe the interaction with each parent to ascertain whether the parent will be able to have a healthy relationship with the child.

Although the assessment of attachment is a complex and daunting task, attachment or the reciprocal connectedness with both parents is valuable and essential in assessing the young child's relationship with her parents. In terms of the application of assessment in practice, Robb (2012) warns that the professional should observe the type of attachment with the parents and the quality of the caregiver connectedness to the child rather than just stating in the assessment that the child has bonded with both parents, without qualifying how this bond was established.

Professionals should assess the child's relationship with both parents and determine whether the child demonstrates a healthy array of attachments. Studies (Kochanska & Kim, 2013; Warshak, 2014) have found that children with the most behaviour problems are those children with insecure attachments to both parents. On

the contrary, secure attachment to at least one of the parents is beneficial for the child's development.

Furthermore, the professional should ascertain whether the parents demonstrate a healthy array of soothing, reassuring and touching as well as empathic responses to the child. The professional should also assess whether the parent is able to maintain and set boundaries and redirect the child without being overly punitive, and whether the parent actively seeks out opportunities to interact with the child.

Warshak (2014) warns professionals not to assess the attachment with parents by using a template, but to consider the unique nature of each relationship. There is no template for 'six easy steps or tasks' to assess attachment. Only professional mediators, who have sufficient knowledge, training and qualifications to perform the task, should conduct assessments.

The professional has to build a rapport with the child, explain the ground rules about confidentiality and solicit her feelings and perceptions regarding the current parenting plan and proposed changes.

Professionals should also be cognisant of common themes. For example, inherently children want to please adults. The professional should be able to lead the child to understand that she is not the decision maker. Children also want to protect their parents. By applying training and instinct, the professional should be able to elicit knowledge that a child may hide to protect her parent(s). The professional should also be able to interpret information from the assessment, for example, a child may wish a contact schedule of shared residency, but may find it difficult to express such a desire to the parents.

7.3.1.3 Assessment of parents

It is recommended that professionals conduct an initial intake interview with each parent individually to ensure that optimal information could be obtained about their experiences of the current situation. Participants in the study used psychometric testing in cases where they were qualified to conduct such assessments. They also used parenting questionnaires. The questionnaires were designed by the participants and vary from detailed background information to extensive ratings of the parents' own ability and the ability of the other parent. Based on the value that is placed in the coherence of information presented to the courts, I suggest that these questionnaires should be standardised to avoid bias and confusion.

However, if one considers that the parents have to communicate with one another on a regular basis in the execution of a parenting plan, it is also recommended that professionals involved in the process, see the parents together to establish a working relationship before mediation commences. In cases of high conflict this might not be possible.

Professionals should furthermore take the responsibility to gather information from family members and the extended family to understand the family dynamics. Extended family might provide valuable information that can assist the facilitation of support for the child or the parents. Family members might also be able to clarify conflicting information obtained from the parents. Although valuable in many instances, the professional involved has to strictly adhere to the ethical consideration associated with the process to ensure that conflict is not triggered or escalated.

7.3.1.4 Affordability of assessments

The participants in this study questioned the affordability of assessments as part of the mediation process. Although proposed guidelines exist for mediation fees, such fees vary considerably among professionals in South Africa. In some cases

professionals charge exorbitant fees, effectively excluding the greater part of the population. The Office of the Family Advocate does offer mediation and subsequent parenting plans free of cost, however, they are understaffed and overworked throughout South Africa, as indicated in the interview with two family advocates. It is therefore recommended that a system should be created to ensure quality affordable assessment and mediation for all families in South Africa.

7.3.2 Guideline 2: Ensure safe and supportive spaces for the child throughout the mediation process

Research evidence clearly indicates that children are vulnerable during the divorce mediation process. On a psychological level, children experience the same stages of loss as adults after the divorce, namely, denial, anger, bargaining, depression and acceptance (Kübler-Ross, 2003). During the denial phase, children would often dream of their parents getting together again or getting married again. These phases can overlap; the child can move between the phases or return to a previous phase. Notably, in instances of high conflict the child may never reach the stage of acceptance. Children might experience their worst fears have been realised as their parents are separating because of something they did wrong. Moreover, as their parents stopped loving one another, they might also stop loving and caring for them.

Anger is a common emotion displayed by children, and parents often complain that their children are angry. Children respond in this manner, as they often feel betrayed by their parents. They also go through the stage of bargaining, where they might feel that by excelling in school, or by doing their chores and help around the house their parents will get back together again. Children grieve for the family they no longer have, for family holidays, traditions and routines.

It is therefore critically important that professionals involved in the mediation process accept responsibility to create a safe space for the child and to assume responsibility for the psychological wellbeing of the child throughout the process. In such a safe space, the child should be allowed to express feelings of confusion, anger and sadness and be assisted to share those feelings with her parents.

The child should furthermore be guided to understand the practicalities of living in two homes and deal with the continuous transitions. The child furthermore needs to be empowered in the mediation process through acknowledgement of her voice in the mediation process. Sanchez and Kibler-Sanchez (2004) and Schramm and Calix (2011) aver that children are empowered and benefit more if they can contribute to the process, when they are given information and by giving them a voice. They (Sanchez & Kibler-Sanchez, 2004, p. 556) state that children, just as parents, have a *fundamental interest* in protecting family relationships.

Schools can also play a significant role in this regard schools often becomes a 'safe' space due to the fact that the context and the people remain consistent and the predictability provides a sense of stability. Schools should therefore be equipped to become such safe spaces by training responsible adults in these contexts to assist with the safeguarding and supporting children whose parents are in a divorce process.

7.3.3 Guideline 3: Pro-actively address the challenges evident in the divorce mediation process

The guidelines address the concerns relating to two specific challenges identified in the research, namely high conflict and hostility and alienation of one parent. Due to the devastating impact of these challenges on the wellbeing of the children, it is suggested that professionals pro-actively address these challenges during the divorce mediation process.

7.3.3.1 Addressing hostility and high conflict

A plethora of authors as well as the researcher's own experience as a mediator registered with SAAM (South African Association of Mediators), AFSA (Arbitration Foundation of South Africa) and AFCC (Association of Family and Conciliation Courts) indicated ongoing conflict between parents as one of the most significant threats to the child's wellbeing. The hostility between parents was also highlighted in this study and clearly posed challenges to professionals when drafting parenting plans in the best interests of the child. Protection orders fueled the conflict between the parents, and in many cases multiple protection orders were filed. However, no recommendations were made to resolve the conflict, to the detriment of the child.

Currently, the parents appoint a case manager after the divorce as part of the divorce settlement or by mutual agreement by the parents. If the case manager is appointed by mutual agreement, there is a real risk that in the event of the case manager issuing a directive that does not find favour with one of the parents, that parent will either ignore the directive or dismiss the case manager.

The researcher witnessed many incidents where case managers refused a request upon referral claiming they do not manage cases any longer as it is exhausting, frustrating and overwhelming. Furthermore, many case managers resigning due to stress-related illnesses, which they claimed, was job related. The appointment of two parent coordinators would ameliorate this situation.

To address this gap, the researcher supports the implementation of a parent coordination process as suggested in the draft guidelines for parenting coordination in South Africa (Segal & Duchen, 2015) and supported by recommendations by Boyan & Termini (2005), Baris et al. (2001) and Fieldstone, Merlin and Karla (2015) and the Association of Family and Conciliation Courts (2005 & 2006).

According to Howe III and Scully (2015) this implies a system of redesigning the family law system to promote healthy families through a practice of peacemaking Mosten (2015a; 2015b). Peacemaking means creating a sense of harmony and mindfulness within the mediation process that improves the lives of the parents and their children and the prevention of future conflict (Daicoff, 2015). Peacemaking can be achieved through the support of an interdisciplinary team to support the family (Gamache, 2015; Burgess & Burgess, 2015). Boyan and Termini (2005) and Baris et al. (2001) propose the system of a parent coordination as a form of dispute resolution that goes beyond mediation, therapy and other family services in high-conflict cases.

Parent coordination is thus applicable in cases where parents cannot assume any perspective but their own and are locked in a profound mistrust of their ex-spouse's parenting skills, parenting time and access to the children that feeds continuous high conflict to the detriment of their children. They question the reason for children's behavioural problems and assign blame, and are often disparaged by the other parent to the point of being convinced that the children are being 'brainwashed'. These parents forget or fail to care about the children being overburdened as a result of their ongoing conflict. The main goal of parent coordination is to protect children from this ongoing conflict.

Parent coordination is a child-centered and non-confidential process for parents and parent coordinators should therefore be trained and skilled to work with high-conflict families. However, there is no legislation in South Africa for the appointment of a parent coordinator, however it was averred that the courts could refer high-conflict parents for parent coordination, and in the absence of agreement between the parents, it can be made an order of court. The staying power of the process can be entrenched by obtaining a court order. The parent coordinator is therefore less

exposed through the protection of the court order. The negative impact of the high-conflict and litigious parents on the child will be minimised.

The researcher suggests that in cases where high conflict and hostility prevail, parents should be encouraged to develop a parenting plan, with the assistance of a collaborative team, who can deal with their concerns on their behalf. It is recommended that there are two parent coordinators, as it can be exhausting, frustrating and overwhelming to deal with ongoing high levels of mistrust and lack of communication between the parents. These two parent coordinators should act as sounding boards and fulfill a supervisory function and supportive role for one another. The role of the parent coordinator should be to guide the parents in a handholding process to alleviate and ameliorate the conflict. The parent coordinators should meet the child, family, extended family and the child's teachers and therapists. The parent coordinator should hence be highly skilled, mature and trained to deal effectively with high-conflict parents. The process of involving two parent coordinators with specific instructions concerning parental guidance and conflict management should alleviate some of the conflict between the warring parents. When seeking immediate relief in a high-conflict situation, parents often contact the parent coordinators (currently case managers) at any time of day or night to deal with a perceived (real or imagined) crisis.

Parent coordinators should be appointed by the court and dismissed only through an application to court, to prevent parents from arbitrarily making rash decisions when matters turn unfavourable for them. The prohibitive costs of litigation should further prevent them to incur unnecessary costs. Parent coordinators can ensure that a psychologically healthy and holistic approach be followed in the decision-making process and assist healthy co-parenting in terms of the best interests of the child.

The guidelines for parent coordination are child-focused and parent coordination is a quasi-legal, mental health, dispute resolution process and combines assessment, conflict management, education, parental guidance, facilitation, case management, mediation and limited decision-making functions. Parent coordinators should be qualified and have training and experience in the following fields, namely, family systems theory, adult psychotherapy, developmental psychology, child and adult divorce recovery, parental alienation, gatekeeping, mediation and conflict resolution, communications theory, basic legal aspects of divorce, parenting plans and time-sharing options, domestic violence and substance abuse and psychotherapeutic interventions designed for high-conflict parents.

The parent coordinator should interview the family, gather information about the children (education, health, psychological health, safety, attachment, relationship with each parent), assess the family's overall functioning, teach parents anger management and communication skills and evaluate the child's emotional functioning as well as both parents' overall personal functioning. Furthermore, the parent coordinator should also intervene to assist parents in shifting their former roles as spouses to co-parents and identify the impasse in the relationship to effective communication.

The parent coordinator also has to assess the need for outside referrals where required and consult with all professionals involved in the family. The parent coordinator should educate the parents about child development, communication skills and family issues. The parent coordinator should further monitor parental compliance with the settlement or court orders and assess and maintain the children's emotional and physical safety and mediate where required (Baris et al., 2005; Boyan & Termini, 2005; Lund, 2015).

7.3.3.2 Addressing alienation

Another serious challenge identified in the research literature, and in the empirical work conducted in this study is the alienation of a parent after the divorce. It is wishful thinking to believe that alienation of a parent is a short-lived phenomenon after the divorce and the campaign of the favoured parent. Early screening, identification and protection of the child at risk for chronic parental alienation will prevent the parent from missing out on experiences with the child that can never be recovered. The professional who recognises the signs of early alienation can recommend more normal parent-child contacts while at the same time working to uncover the roots of the child's discomfort (Warshak, 2014). It is a lengthy and painful process to do reconstructive therapy with the family to reintroduce the alienated child to the targeted parent. Very few professionals have the required skills, specialised training and experience to deal with such families.

The treatment of alienated children is highly controversial. The child does not really fear the rejected parent, as the child's rejection of a parent is not solely internally generated. Contact with the rejected parent is essential in healing the damaged parent-child relationship. The child needs to experience care and nurturing from the rejected parent and ample time must be provided for this to take place. Warshak (2014) recommends that the jargon often used in assessments and evaluations should be challenged and the evocative jargon be unpacked, such as describing a child as being traumatised where the child is in fact unsettled.

New constructs have been proposed to provide descriptions for parent-child contact problems among separated and divorced families. Recent research as indicated by Polak and Saini (2015) depicts strained parent-child relationships on a continuum, as indicated in Chapter 6, Figure 6.1. This phenomenon is termed *gatekeeping* (Polak & Saini, 2015, p. 223). Gatekeeping can be both positive and

negative. The terms gate opening and facilitative gatekeeping are used interchangeably and refer to attitudes and behaviours that facilitate and encourage involvement and the relationship with the other parent. Gate-closing or restrictive gatekeeping refer to behaviours that inhibit involvement. Polak and Saini (2015) argue that gatekeeping can be either adaptive or maladaptive. Adaptive behaviours serve the best interests of the child. They promote safe parent-child relationships and protect the child from the other parent where protection is needed. Maladaptive gatekeeping does not consider the child's best interest. This type of gatekeeping behaviour is based on the parent's needs, and may be a type of revenge against the other parent, and can include potentially dangerous behaviour. Gatekeeping is not synonymous with alienation, where the behaviour of unjustified restrictive gatekeeping is similar to alienating behaviour, the behaviour is similar to alienation.

7.3.4 Guideline 4: Inform the parents involved in a divorce process on the implications of the process

The guideline speaks to the problem that parents are so caught up in the divorce process that they do not consider the implications of the divorce process on themselves and their children. The guideline therefore suggests that the parents receive relevant information of these implications at an early stage of the mediation process.

Parents who divorce have to deal with the loss of a partner as well as the loss for the hopes and dreams for the relationship. They also have to accept the challenges of being a single parent and have to become acquainted with the challenges of co-parenting. The parent has to acknowledge that he or she has to separate him or herself from the relationship and reclaim a new identity as a single parent, while resolving anger and disappointment in a healthy way. More importantly, they have to be able to move on and rebuild their respective lives as single parents. In this regard

it is therefore suggested that professionals who engage with them provide information that would enable the parents to gain better insight into their situation.

With regard to their children it is important that these parents are equipped with information that would assist them to understand how the children might experience the situation.

Parents have to be cognisant of the importance of consistent, predictable and frequent affectionate and sensitive behaviour towards their children that is key to forming meaningful and secure healthy child-parent relationships. If the child has at least one secure attachment with a parent, this will provide the child with enduring benefits and protection that prevents mental health risks of stress and adversity. Having a relationship with both parents increases the child's odds of developing two secure relationships, or at least one secure relationship.

The parents should be educated in the factors that affect the child after the divorce, pertaining to the child's specific developmental stage. Divorce is a process and not an idiosyncratic event and Amato (2000) proposes that there should be short-term and long-term strengthening coping strategies for parents and children relating to developmental stages of children. These safety measures should act as shock absorbers for the child during the mediation process.

Parents should also be guided on how the child perceives herself, her world and thoughts on divorce. Moreover, they should understand the various stages of the child and her developmental needs in the various stages of development. Designing a parenting plan should focus on four general major stages in the child's development, namely the infant and toddler stage (0 to 3 years), the preschool age (3 to 5 years), the elementary school age (6 to 10 years) and the preadolescent and

adolescent (11 to 18 years). Various developmental theories emphasise different elements of the child's development, but there is a general consensus regarding the basic important tasks of each phase of development. The task of the infant and toddler is to learn efficiently to seek and receive comfort, the preschooler's task is to experiment with independence, the elementary school stage requires that the child learn to relate to the larger world and the adolescent stage requires that the adolescent exercise healthily independence and experiment with identity.

Furthermore, parents should be equipped with positive parenting skills. It is viewed as a protective factor for the child during and after the divorce process. Positive parenting is important when dealing with vulnerable children, and it is a process in which parents can be guided and taught. Positive parenting includes the skills of being sensitive to the child's needs and the child's sense of security and stability in the parent-child relationship can be strengthened. The divorce process often leads to less sensitivity to the child's needs and distressed parents that impact negatively on the child. If the parent is supported and guided through the divorce, the parent in turn will be sensitive to the child's needs.

7.3.5 Guideline 5: Apply a collaborative approach in the divorce mediation process

The guideline is considered as a basis for the facilitation of the process, as it involves a paradigm shift from an individualistic focus to a more relational and holistic focus on the process of divorce mediation. In the current divorce mediation practice professionals often work as disparate individuals without consulting with one another. Consequently, parents are set up against one another and the various perspectives of the professionals are not integrated in a sensible manner. This might lead to delays and unforeseen expense for the divorcing parents, and unfortunately the involvement of lawyers seemingly escalates the conflict between the parents.

The researcher therefore proposes that professionals open themselves up to work in a more collaborative manner to address the barriers that prevent the parents from acting in the best interests of their children in the divorce mediation process, despite the situation in which they find themselves. The application of a more collaborative approach has implications for the way in which the professional person works with other professionals as well as for the way in which parents are guided to approach the process.

With reference to the professionals, a collaborative approach will encompass that the professionals involved with the two parents should engage with one another to ensure that the focus shifts from the conflict between parents to the facilitation of the best interests of the child in a team approach, in the compilation and application of the parenting plans.

Applying and advocating a collaborative approach therefore imply that professionals have to enable the parents to set their differences aside while discussing the proposed parenting plan. The parents should be assisted to focus on what would enable their children to develop their potential. The professional should therefore consider the parent as a partner in the process of developing the parenting plan and therefore avoid a prescriptive stance. The intention is to avoid the continuous and costly legal actions that these parents might take against one another and even against the professionals involved. In cases that involve high conflict the professionals should also advocate for the monitoring of the process even after the plan has been formalised to ensure that the high conflict does not disrupt the implementation of the plan.

A collaborative approach to divorce mediation in essence prioritises the child's best interests and consequently the wellbeing of the child and the family. The

approach will therefore encourage collaboration across the disciplines of law, social work and psychology with recognition for the strengths of each profession. This necessitates the development of an interdisciplinary team approach to the divorce mediation process that will enable professionals to co-construct a parenting plan that considers the complexity of the parents' situations.

In the USA, such an interdisciplinary team approach toward divorce mediation was born out of the collaborative law approach. According to Kopping-Pavars (2014), in this system of collaborative law, the first consultation with parents is referred to as a process interview. The lawyer screens the parents as to their suitability for the collaborative process. In the collaborative process all parties agree that they will not operate in the shadow of the court. The lawyers voluntarily agree that they will excuse themselves if either of the parents elects to go to court. The parents can however elect to go to court at any time, but not with their collaborative lawyers. This rules out the winning and losing mentality and the energy is shifted into getting an acceptable agreement for parents and children. During the process the parents work together with their lawyers, child psychologists, counselors and therapists. The positive aspects of collaborative law are that the parents are in control of this process and the parents are assisted to develop better communication and parenting skills (Counsel, 2012).

Lawyers limit the scope of their services to settlement by a signed agreement. The interdisciplinary collaborative practice comprises of a team of professionals where the resolution for legal issues will be out of court and the emotional, relational and behavioural problems will be supported toward finding an amicable solution (Gamache, 2015; Daicoff, 2015). In a collaborative interdisciplinary approach the focus shifts to peacemaking.

The underlying value of a collaborative system can, according to Daicoff (2015), be associated with the concept of *Ubuntu* as *Ubuntu*-style values embrace the values of divorce mediation, namely compassion, respect, human dignity and conciliation rather than confrontation. The collaborative approach is a faster process than litigation and experts are required to meet as a team only once, at most twice. Commitment is fundamental to collaborative law. Firstly, the lawyers' commitment to keep the matter out of court, and secondly parents' commitment by signing a participation agreement to stay out of court. It is a process where the clients or parents are in control to resolve negotiations. Progress notes are distributed after all meetings and parents are prepared before every meeting and debriefed afterwards, empowering them in the process.

The important factor in this process of collaborative law is that the lawyers work together to the benefit of the child, not against one another. Collaborative law is a form of lawyer-assisted family dispute resolution. However, collaborative law is not suited to parents with severe psychological or personality disorders and cases involving a history of domestic violence.

7.3.6 Guideline 6: Equip professionals involved in the mediation process for competent and ethical practice

The guideline speaks to the concern that not all professionals who are currently involved in divorce mediation and the development of parenting plans in the South African context are competent to deal with the complex challenges associated with the process. The participants interviewed indicated that the training that is required is a postgraduate qualification, as well as specialised and ongoing training. Yet, Section 33 of the *Children's Act*, 38 of 2005, states that mediation can be conducted by a social worker or "any other suitably qualified person, or other appropriate person contemplated in Section 33 (5) (b) to the effect that the plan was prepared after

mediation by such social worker or such person. Currently in South Africa, any person that is deemed to be *suitably qualified* (*Children's Act, 38 of 2005*) can be trained as a mediator through a training course of only 40 hours.

This situation unfortunately opens the door for unethical and incompetent practice where parenting plans are approved as part of the divorce settlement without any mediation. The parents often accept this *modus operandi* due to a fear of the cost implications that the mediation process might have.

To address this situation, the researcher suggests that the training requirements should be revisited and that training should encompass more than just one course consisting of 40 hours. A system of ongoing training combined with supervision is suggested. The Model standards set by the Association of Family and Conciliation Courts (AFCC) in USA could serve as guidelines for managing this process in the South African context.

According to this Model standards of practice for child care evaluation by the Association of Family and Conciliation Courts (2006), child care evaluators shall have the minimum of a master's degree level and training in the social, legal, familial and cultural issues involved in care and access decisions. The child care evaluator shall assess factors and variables pertinent to the evaluation and the evaluator shall strive to be fair, objective and accurate and shall use multiple data-gathering methods in order to increase accuracy and objectivity. The Association of Family and Conciliation Courts (2006) recommends a team approach to conducting child care evaluations. It is recommended that the same stringent standards be applied in the South African context for mediators.

A general notice was published in the Government Gazette, No. 37883 (3) on 1 August 2014, whereby an invitation in Notice 598 of 2014, is submitted for comments on the accreditation norms and standards for mediators. The Department of Justice and Constitutional Development submitted an invitation for comments on the amendment of rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa. The level of qualifications and standards and levels of qualifications are still only 40 hours as was the accepted training before the notice was submitted. The content of the course is set out and is quite substantive, however, 40 hours of training is not adequate as suggested by the participants interviewed.

The content of the course is firstly a theoretical component: basic civil procedure, study of court-annexed mediation rules, the role and function of a mediator, principles, stages and methodology of mediation, social-context and diversity awareness, conflict management, decision-making, community and diplomacy, ethics and professional conduct, negotiation and influence, interpersonal relations, confidentiality, privacy and reporting obligations, neutrality and impartiality. A practical component is also proposed consisting of role-play and mock mediation sessions before a trained mediator. There are two levels of mediators proposed in terms of qualifications.

However, there is a need for continuous training to facilitate the professional growth of mediators, as 40 hours of training is not adequate in ameliorating high levels of hostility and conflict between warring parents. We are currently in South Africa at the cusp of mediation, and the level of training and qualifications of mediators should be explicated. There have been no studies to investigate the effectiveness of mediation training in South Africa; however, many qualified mediators are offering training for mediators within a mere 40-hour training course.

As early as 2005 Lieberman, Foux-Levy and Segal (2005, p. 239) remarked that the field is flooded with *abysmal* mediators that underwent a minimum number of training hours, such as the current situation in South Africa. Mediation training, according to Hedeen, Raines and Barton (2010), the standards for trainees as well as performance criteria continues to be a contentious issue. Mediation training is a relatively new field in South Africa, and the training and qualifications of mediators remain to be a grey area without explicit ethical rules and standards for training and supervision.

7.3.7 Guideline 7: Implement an evaluation system to enhance the quality of divorce mediation

The mediation field in South Africa is very much in transformation, as there are new regulations for the training and qualifications of mediators as well as the newly appointed task force for parent coordination. The current mediation system should be more self-reflexive and methods to evaluate the current system should be encouraged and implemented. An evaluation system is required to address questions about the efficacy of the process and its strengths and weaknesses.

An evaluation system is proposed, where mediators are evaluated on an ongoing basis. It is recommended that there are panels of professionals where they review all reports and parenting plans. Where a parenting plan and/or report is not within specific standards, the parenting plan shall not be submitted to the parents' lawyers to be made an order of court. The report's focus should be in terms of the child, not in terms of the parents' ability to parent the child. The researcher recommends further that all parenting plans and assessments should be discussed with the parents and feedback offered to all parents.

An evaluation system should ideally include the following, namely a place where families view the mediation as fair and they had an opportunity to have their

concerns heard. Mediation should ideally produce high levels of settlement, as Giovannucci and Largent (2013) aver that a percentage of 80% is an indication of the level of settlements that should be reached, however, the success rate of settlements focuses on results and does not produce a complete picture of the quality of the settlement (Lieberman, Foux-Levy & Segal, 2005). Mediation would engage the parents and effectively address problems and greater parental compliance should be encouraged and reached within the mediation process. Mediation would save parents money on litigation and cooperative relationships and collaborative decision-making should be encouraged.

There should be a template for evaluating mediation and ongoing training to improve skills. Mediators should be encouraged to complete advanced training and should be updated and aware of latest research, changes in laws and policies. Supervision should be mandatory and the model of two mediators should be implemented to ensure effective mediation with compulsory and ongoing training. There should be accepted standards of ethical and professional conduct of mediators. Supervision groups and reading groups should ideally be formed to keep updated of the latest research and where difficult case studies can be discussed in a supervision group. Cooperative relationships and collaborative decision-making should be encouraged.

The child's voice is essential in the process, and children should always be interviewed to address their needs in a collaborative manner within the family system. The impact for evaluating the effectiveness of mediation in South Africa would be that high-quality mediation is ensured and children are protected in this process and their voices are heard. The evaluation should include a process in whether it is required to remove the section in the *Children's Act*, 38 of 2005, where any *suitable person* is allowed to mediate and draft a parenting plan and to amend it

to a skilled and qualified professional with specific qualifications and experience. Where there are underlying psychological dynamics that is significant to the process, the professional should be skilled to recognise and contain psychological dynamics, such as alienation, estrangement and enmeshment.

A variety of affordable problem-solving mechanisms should be made available to the families. Extended family members and other support persons should also be encouraged to participate. Families are unique and the process should include services in offering assistance on child protection, health concerns, domestic violence, financial concerns, parenting issues, mental health concerns, substance abuse, limited resources and third party concerns (Firestone & Weinstein, 2004).

The focus of the evaluation process should not be on winning, but rather on problem solving. From the onset the family should know that the focus is on problem solving and that they are expected to resolve the disputes. Screening is important to assess whether there are child protection issues and domestic abuse present. Screening is also important to establish whether there are imbalances of power present to establish whether some services of the mediation process will be ruled out in the process. The parents should be empowered in this process and supported and the families' privacy should be respected. The focus should be on future-orientated strategies and encouragement of professional collaboration.

Furthermore, the process should be simple and comprehensive and long-term thinking and ongoing evaluation should be implemented. The advantages of the application of this guideline will lead to responsible mediation within a context of evaluative procedures. Table 7.2 indicates the themes identified from the results and the subsequent guidelines, informed by the theoretical perspectives and the results. A summary of the relevant articles of the United Nations Convention on the Rights of the Child (UNCRC) is included.

Table 7.2: Summary of themes, results, guidelines and theoretical perspectives

Guideline	Related results	Relevant theoretical perspective
Guideline 1 Conduct extensive and responsible assessments of family functioning with specific reference to the child's needs and interests	<p>A child should be heard in proceedings (UNCRC: A (12.2) Children must express their views if applicable (UNCRC: A (12.1) All parties should participate in intervention (UNCRC: A (9.2)) Parents must give direction and guidance to their children (UNCRC: A (5))</p> <p>Theme 4: Assessment as part of the mediation process</p> <p>Theme 6: Requirements for divorce mediation in cases where children are involved</p> <p>Individual mediators</p> <p>Responsible assessments are required in terms of the divorce process and with the structuring of a parenting plan. The documents as well as the interviews with the participants indicated high levels of hostility between the parents, and this needs to be addressed adequately. A holistic and comprehensive assessment of the parents and children are required. The assessment of the child, the assessment of the child and parents' relationship, namely the attachment between the parents and child is required. Assessment of the parents and extended family is required. Studies (Kochanska & Kim, 2013; Warshak, 2014) found that children with the most behaviour problems are those children with insecure attachments to both parents, indicating the importance of assessing attachment.</p>	<ol style="list-style-type: none"> 1. Attachment theory: assess the child-parent relationship to make recommendations for the parenting plan. Using validated attachment assessment measures, professionals are able to make predictions about the course of the child-parent relationship. 2. Developmental phase of the child in terms of Erik Erikson: parenting plan needs to be structured in accordance to the child's developmental stage. 3. Wellbeing of child is of importance in all aspects of the parenting plan. 4. Family systems theory: The parenting plan is drafted with the family in mind, and the family is underpinned with family systems theory.

Guideline	Related results	Relevant theoretical perspective
Guideline 2 Pro-actively deal with barriers to the facilitation of a process to serve the best interests	<p>A child must be protected against abuse, neglect, negligent treatment, maltreatment, and exploitation (UNCRC: A (19.1)) Caregiving and protection must conform to certain standards (UNCRC: A (3.3))</p> <p>Theme 2: Hostility and high conflict between parents</p> <p>Theme 3: Parental alienation</p> <p>Individual mediators</p> <p>The barriers here are the high levels of hostility between the parents and alienation of one of the parents. Ongoing conflict can compromise the child's behaviour, sense of self and sense of reality. Divorce poses multiple challenges for the child that extends over time (Kelly and Emery, 2003). Kelly (2003) established in her research that as many as one third on entrenched parental disputes, one parent was responsible for initiating, maintaining and sustaining conflict. Children that reject a parent suffer a burden of guilt when they grow up for rejecting the parent. Parents require guidance on single parenting and co-parenting, the specific developmental stage of the child and guidance on the effects of hostility and alienation</p>	<ol style="list-style-type: none"> 1. Wellbeing of the child: The wellbeing of the child is negatively affected during high conflict situations between the parents. 2. Family systems theory: The family is viewed as a system and in terms of alienation it is seldom the actions of one parent alone that are the cause. Hostility between the parents not only affects the child's wellbeing negatively, but also high levels of hostility affect the family system. 3. Specific developmental stage of the child: Children experience specific developmental stages and these stages should be taken into account during the mediation. 4. Effects of divorce on the child

Guideline	Related results	Relevant theoretical perspective
Guideline 3 Ensure safe and supportive spaces for children throughout the mediation process	<p>Protection of the child is of paramount importance (UNCRC: A (2))</p> <p>Theme 5: Recognition of children's voices and the protection of their rights.</p> <p>Individual mediators</p> <p>Safety measures should be built in for the child, according to Amato (2000). Protective factors act like shock absorbers for the child. The divorce process often leads to less sensitivity to the child's needs and distressed parents that impact negatively on the child. Children do not feel secure or empowered during their parents' divorce.</p>	<ol style="list-style-type: none"> Wellbeing of the child: The wellbeing of the child correlates with the best interests of the child. To ensure safe and supportive spaces for the child during the process is in terms of the wellbeing of the child. Children are dependent on others to meet their needs, for instance education, health care and protection. Developmental phase of the child in terms of Erik Erikson: the child's needs would be in accordance with the specific developmental phase.
Guideline 4 Prepare and support parents for the post-divorce phase and implementation of parenting plan	<p>The child should maintain personal relations and direct contact with both parents on a regular basis (UNCRC: A (9.3)) Parents' responsibilities, rights, and duties must be respected (UNCRC: A (5))</p> <p>Theme 1: Facilitation of the best interests of the child principle in practice</p> <p>Individual mediators</p> <p>If the parent is supported and guided through the divorce, the parent in turn will be sensitive to the child's needs. A collaborative team should be involved to assist the parents in the drafting of a parenting plan. A parent coordinator should be appointed for the parents to effectively co-parent after the divorce. Parent coordination is a child-centered and non-confidential process for parents where there are high levels of conflict. Parent coordination is more than basic conflict resolution.</p>	<ol style="list-style-type: none"> Family systems theory: The family is viewed as a system, an integral whole (Becvar & Becvar, 2009). The life history of a family is a succession of experiments in living. Wellbeing of the child: In view of the challenges that children have to contend with during the divorce process, the best interest from a psychological perspective necessarily imply that the psycho-social wellbeing of the children involved have to be attended to during the divorce mediation process. Developmental phases of the child: the parents should be informed with regards to the specific developmental phase the child is in, and what the needs of the child are. To gain a comprehensive understanding of the child's needs and developmental stages, Erikson's theory is fundamental. Attachment theory: Attachment formation is dependent on quality of caregiving, with regular times of warm interactions

Guideline	Related results	Relevant theoretical perspective
Guideline 5 Apply a collaborative approach to divorce mediation practices and - procedures	<p>The best interests of the child should be prioritised and should be the basic concern of the parents (UNCRC: A (3): A (18.1)) Both parents have a common primary responsibility for the upbringing and development of their children (UNCRC: A (18.1))</p> <p>Theme 1: Facilitation of the best interests of the child principle in practice</p> <p>Theme 5: Recognition of the child's voice and the protection of her rights</p> <p>Mediation practice in general</p> <p>The collaborative team can assist parents in managing the conflict and reduce the negative effects of the acrimony and conflict on the child. The collaborative team needs to shed light on the dynamics of the conflict to properly address and manage the hostility and conflict. Firestone and Weinstein (2004) propose the development of a comprehensive dispute resolution program for families undergoing divorce.</p>	<ol style="list-style-type: none"> 1. Wellbeing of the child: Families are not static entities and they are continuously changing, which presents both challenge and opportunities (Nelson & Prilleltensky, 2011). 2. Family systems theory: Professionals working from the family systems approach focus on the what and the how of the phenomena and on the here-and-now experience of events. 3. Developmental theory: Erik Erikson proposes that psychological development occurs over eight stages of development, and that development is life-long.
Guideline 6	<p>Theme 6: Requirements for divorce mediators where a child is involved</p>	<ol style="list-style-type: none"> 1. Wellbeing of the child: Prilleltensky (2010) advocate a holistic and strengths-based ecological perspective to support families in crisis.

Guideline	Related results	Relevant theoretical perspective
Develop professional training for pro-active and responsible engagement in the process	<p>Mediation practice in general</p> <p>Comprehensive and sufficient training is required for professionals to deal with the complexities of divorce. It is recommended that two mediators conduct the mediation to ensure high quality mediation.</p>	<ol style="list-style-type: none"> 2. Family systems theory: People exist in a relationship in which one influences the other, and professionals should be aware of the underlying dynamics in the family. 3. Attachment theory: To put forward proposals for the child's placement at the parents' respective homes, attachment theory has to be investigated as a fundamental part of the child's future wellbeing. 4. Developmental phases of the child: The social context of the child is taken into account. Each stage is a challenge or developmental tension that exists in the child. 5. All professionals conducting mediation should be trained in the abovementioned theory.
Guideline 7 Advocate for and contribute to the development of an alternative system for the divorce mediation practice in the South African context	<p>Theme 6: Requirements for divorce mediators where child is involved</p> <p>Legal system</p> <p>There should be a template for evaluating mediation and ongoing training to improve skills. Mediators should be encouraged to complete advanced training and should be aware of latest research, changes in laws and policies. There should be accepted standards of ethical and professional conduct of mediators.</p>	<ol style="list-style-type: none"> 1. Family systems theory: People exist in a relationship in which one influences the other and both are the cause and effect of each other's behaviour, therefore parent coordinators should be well aware of the family dynamics. 2. Wellbeing of the child: Family assessments should be reframed to consider the strengths of the family and potential opportunities that are available for the family. 3. Developmental phases of the child: Mediators should be knowledgeable in terms of the developmental stages of a child to make age appropriate recommendations in the parenting plan. 4. Attachment theory: All mediators should be adequately trained in attachment theory and how to assess the attachment between parents and children.

7.4 CONCLUSION

These guidelines were developed from a psychological perspective with the aim of contributing to the facilitation of the best interests of the child during divorce mediation in the South African context. The guidelines propose that the divorce mediation process and the development of parenting plans need to be a more structured process in which experienced professionals should conduct specific proper assessment of the family's functioning, as a basis for recommendations.

While these assessment processes are in progress professionals should consider the emotional safety of the child by providing safe and secure spaces where the child will feel protected against the trauma associated with the divorce of her parents. The professionals also need to attend more purposively to guiding parents on how to cope with the children in the context of the divorce and in general by providing or suggesting parent guidance. A pro-active approach to dealing with serious challenges such as hostility and high conflict and parental alienation is needed to prevent the current practice of ongoing legal processes. The introduction of a parent coordination process as suggested in the guidelines of SAAM is supported in cases of high conflict and alienation.

Furthermore, the guidelines emphasise the importance of appropriate training of professionals in order to ensure that they will have adequate skills to facilitate the best interests of the children. The implication is a shift from a more individualistic approach to a collaborative team approach that would provide a holistic affordable service to the parents and enhance the wellbeing of the family as a whole. Finally, the introduction of a proper evaluation system is advocated, as a way to ensure that divorce mediation and the development of parenting plans serves the best interests of the children who are involved in these processes.

In Chapter 8 a summary and a brief discussion of the main concepts as well as recommendations for future studies and limitations and strengths of the study. The study will conclude with final remarks.

CHAPTER 8

CONCLUSION AND RECOMMENDATIONS

8.1 INTRODUCTION

The purpose of this study was to contribute to the improvement of the mediation process and in the process facilitate a better dispensation for children in divorce as well as developing a more child-oriented practice. The aim of the investigation was to develop guidelines for professionals to facilitate the best interests of the child in the divorce mediation process and the development of parenting plans. Departing from a psychological perspective, the researcher investigated the current situation pertaining to divorce mediation practice where children are involved through document analysis and interviews with professionals who are experienced in the field of divorce mediation.

The researcher was motivated to conduct this research based on her experience of two extreme scenarios in the divorce mediation process where parenting plans are required. On the one hand, parenting plans are often approved, or turned into court orders, without any consideration for the child's position. In some instances, children are not even mentioned by name or identified. Consequently, families struggle in the post-divorce phase with inadequate and superficial, and often generic parenting plans that are slightly adapted for each case. On the other hand, families may be exposed to several forensic investigations – in one instance 11 intensive forensic investigations over a period of four years – to establish the 'elusive' best interests of the child principle. These children are overburdened, anxious and traumatised and their worldview is one of extreme caution and distrust.

Research literature and legal documents studied also clearly indicated that the best interests of the child principle is often not efficiently applied to protect the interests of children.

8.2 SUMMATIVE OVERVIEW OF THE STUDY

In the first instance the legal context of divorce mediation in the South African context was described to ensure that the research considered the position of these families and in particular the children in terms of the *Constitution of South Africa 1996*, and the *Children's Act, 38 of 2005*. Secondly, a conceptual framework was presented for understanding the principle of the best interests of the child from a psychological perspective.

The researcher presented a conceptual framework underpinned by attachment theory, psychosocial theory of Erikson, and Family Systems Theory. The researcher specifically focused on the developmental phases and the associated effects of divorce in each of these phases. Furthermore, attachment theory was explicated, as the attachment between parents and children is an indication of the significance and strength of the relationships in the child's life.

The study was conducted within an interpretivist paradigm and a qualitative, descriptive and interpretive design was applied in the study. The empirical work in this study comprised two phases. In the first phase the researcher conducted document analysis through content analysis of 20 documents and established 2 indicators. In the second phase the researcher identified 6 themes and various sub-themes through thematic analysis from interviews with 12 participants in this study. From the themes and sub-themes, 7 guidelines were developed.

8.3 CONCLUSIONS BASED ON THE RESULTS OF THE STUDY

Current legislation regulating the child's best interests in the South African context entails the *Constitution of South Africa, 1996* and the *Children's Act, 38 of 2005*. However, in terms of the nuanced application of these Acts in the South African context, discrepancies are evident in their interpretation.

From a psychological perspective, divorce and the associated facilitation to understand the position of the child have an enormous influence on the child's development and holds serious implications for future relationships of children. The results of this study confirmed that the divorce mediation process is a complex process and cannot be regulated through the application of linear, causal strategies, but need to consider the complexity of human interaction.

Based on the research conducted in the first phase of the study, the researcher conclude that professionals involved in the mediation process play a significant role and could either advance or restrain the facilitation of the best interests of the child. Professionals who conducted a thorough assessment to ensure that they understand the child's situation, the parents' situation and gave detailed arrangements and recommendations based on these thorough assessments apparently contributed to the facilitation of the best interests of the children involved in the processes that they mediated. On the contrary, professionals who focused mainly on the parents' situation tend to be drawn into the hostility and conflict between the parents. They also mainly adhered to the parents' demands at the cost of the child's best interest. These professionals failed to present in-depth and sensible recommendations that could steer the process to serve the best interests of the child on both the medium and the long term.

Based on the research in the second phase of the study the researcher concluded that experienced professionals still experience a limited understanding of how the best interests of the child as described in the research literature and the legal documents, should be applied in practice.

The participants who were involved in this study raised two major concerns. The first concern, hostility and high conflict were evident throughout the interviews, as participants described various manifestations of hostility and high conflict that were often fuelled by the legal processes that allowed parents to continue their pursuit to protect their own interests at the cost of their children's best interest. The participants consider dysfunctional behaviour of parents, father's awareness of their rights associated with their claim to primary residency and parents' concern about the safety of their children as main contributing factors to the hostility and high conflict. They did suggest that parents should be encouraged to communicate more openly by providing safe spaces for them to say how they perceive the contexts before engaging in a discussion with the other parents. Insisting that mediation only takes place when both parents are present might not work in these situations. Parent coordination, was suggested by some participants as discussed in guideline 3.

The second concern was parental alienation, which according to participants presented a major threat to the facilitation of the best interests of the child. Participants acknowledged that this is a complex issue to deal with, as it is based on allegations against one of the parents in a time of distress. Circumstances that could aggravate the parental alienation claims were highlighted and participants emphasised that professionals need to have sufficient knowledge to address this complex issue during the divorce mediation process.

The need for proper assessment as part of the mediation process was emphasised in this study. The participants who have extensive experience in the practice of assessment (mainly the social workers and the psychologists) elaborated on their assessment procedure. It was concluded that appropriate assessments should be conducted as part of the divorce mediation process and that these assessments have to be conducted by suitably qualified professionals. However these assessments is currently not accessible to the whole population, a matter that needs urgent attention in the legal processes.

In terms of the recognition of the child's voice in the divorce mediation process, the researcher came to the conclusion that professionals do not necessarily agree that children should be involved in this process. There are those who feel strongly about the inclusion of the child and those who consider the involvement of the child as a traumatising event. The divide seems to be based on the perspective, either legal or psychological, from which the matter of children's involvement is viewed.

The participants strongly emphasised the need for specialised training or mentoring of professionals involved in the divorce mediation process and it was therefore concluded that they do not perceive the current training models as appropriate.

8.4 CONCLUSIONS WITH REFERENCE TO THE GUIDELINES

Seven guidelines were developed based on the research conducted in this study. These guidelines, as indicated in Table 7.1 applies to the actions taken by individual mediators, mediation practice in general and the systemic process and procedures associated with the divorce mediation process. In conclusion, it seems evident that some of these guidelines are already incorporated in the divorce mediation processes. However, it is critically important that we think in a more integrated and

holistic manner about the divorce mediation process if we intend to serve the best interests of the children in the process. The current fragmented approach therefore need to be replaced by a holistic, integrated approach that is collaborative in nature and involve mental health professionals and legal professionals in a coherent manner.

8.5 RECOMMENDATIONS

The researcher recommends that the *Children's Act*, 38 of 2005, the *Constitution of South Africa 1996*, as well as two international instruments, the UNCRC and the ACRWC, should guide professionals during divorce mediation. Professionals should be educated about the instruments pertaining to children's rights to ensure the principle of the best interests of the child during divorce mediation.

The professionals should be able to draft high quality parenting plans to ensure the principle of the best interests of the child, and should implement measures to avoid a parenting plan in terms of the best interests of the parents but a child-centered parenting plan. These requirements imply that professionals should be highly skilled and qualified to mediate and to draft a parenting plan. They should also be well versed in dealing with conflict and ways of remediating the situation to the benefit of the child. They should further be trained in the development of the child, how to assess the child and obtain the child's views. Furthermore, professionals should be well versed in decision-making abilities and setting clear boundaries.

It is recommended that a collaborative team approach be followed, with attorneys signing a contract that they will remove themselves if the parents wish to litigate, the appointment of two mediators and recommendations in the parenting plan of two parent coordinators and a specialist child therapist.

8.6 RECOMMENDATIONS FOR FURTHER RESEARCH

The researcher recommends ongoing research on the principle of the best interests of the child during divorce mediation. As the *Children's Act*, 38 of 2005 is still in its infancy, a longitudinal study is proposed in interviewing children on the effects of parenting plans and their parent's hostility and ongoing litigation about such plans. One participant (5) used the analogy that the *Children's Act* is like a *Ferrari*, but it is unfortunately too costly to implement efficiently in South Africa. The applicability of the Act should therefore, also be investigated in research.

The researcher further recommends in-depth and extensive research on current training practices for mediators, with specific focus on the content and quality of training for professionals. Finally, research has to be conducted to inform the development of an evaluation system for the divorce mediation practice in the South African context.

8.7 LIMITATIONS OF THE STUDY

The research acknowledges the following limitations to the study. The documents selected for analysis in Phase 1, mainly reported cases of families from the middle to higher socio-economic status, due to the fact these families can afford divorce mediation as part of the development of the parenting plans. The study can therefore, not be regarded as representative of divorce cases across the socio-economic spectrum. However, the interview with two family advocates provided some indication of current practices relating to parents from lower income groups and suggested that more research is required to include these cases.

The researcher is of the opinion that the process of divorce mediation and the development of parenting plans have to be regulated to benefit the entire population

– in accordance with the *Constitution of South Africa 1996*, whereby equal access to all families in South Africa is guaranteed to high quality mediation and assessments.

Furthermore, the exclusion of parents and children from a research process that directly deals with them might be questioned. The researcher acknowledges that their inclusion in the research could have provided rich deep data and recognised their voice within this context. However, the researcher consulted with professionals in the field of psychology and law, and they advised her to steer away from the inclusion of these groups, because of the vulnerable position in which such exposure would have placed these families. The researcher therefore reverted to reports and the voices of the professionals with extensive experience in this field.

8.8 CONTRIBUTION OF THE STUDY

This study contributed to a knowledge base for professionals involved in divorce mediation across various disciplines, since it is critically important that all professionals acknowledge the psychological implications of the divorce process for children involved. The fact that the knowledge was obtained based on reported cases and co-constructed by professionals with extensive experience contributes to the applicability of the knowledge to the practice of divorce mediation and the development of parenting plans. The guidelines are not prescriptive, but rather intend to facilitate on-going deliberations across various levels and disciplines from a psychological perspective about ways to ensure that the best interests of the child is facilitated during the divorce mediation process.

8.9 FINAL THOUGHTS

Divorce has an enormous impact on many children's lives. In the South African context, the *Constitution of South Africa 1996*, and the *Children's Act, 38 of 2005*, and the associated legal documents are set out to protect the rights of children

impacted by divorce. The implementation of these protective notions poses complex challenges to all professionals involved in divorce mediation. Yet it critically influences the future of a whole generation and should therefore, be structured in a manner that reflects our concern about the lives of these children who cannot be held responsible for the predisposition.

In conclusion, participant 10 stated as follows: *Parents often know their children quite well, and we should be hearing what they are saying, even though they might manipulate them. And what might be in the best interests of the child this year, might not be in the best interests of the child next year. We are flying by the seat of our pants that this is going to be the best interests of the child.*

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APPENDIX A: INFORMATION SHEET AND WRITTEN CONSENT

Information Sheet

Research Title: Guidelines for Professionals to ensure the best interests of the child in the mediation process in divorce.

Name of Researcher: Karin Meyer

Karin Meyer is registered for a PhD in the Department of Psychology at the University of the North West under supervision of Dr. A.E. Kitching

Consent Form:

I confirm that I have read and understand the information sheet for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily.

I understand that my participation is voluntary and that I am free to withdraw at any time, without giving any reason.

I understand that any information given by me may be used in future reports, articles or presentations by the researcher.

I agree that there is no remuneration for my involvement in this study.

I understand that my name will not appear in any reports, articles or presentations.

I agree to take part in the above study.

Name of participant.....

Date.....

Signature.....

The research information will be password coded and only the researcher and the supervisor of this study will have access to the research information. The data will be deleted after seven years of data collection.

If you have any questions, please contact the Department of Psychology, University of the North West.

Key informant interviews with judges, advocates, attorneys, family advocates, social workers and psychologists specialising in the field of divorce and family law.

Address:.....

Interviewer:.....

Respondent: Social Worker:.....

Psychologist:.....

Judge:.....

Advocate:.....

Attorney:.....

Family Advocate:.....

Gender: Male:..... Female:.....

Years of experience:.....

Location of practice:.....

Appointment Date and Time:.....

INTRODUCTION:

Thank you for agreeing to have this interview.

Please feel free to talk openly. If you feel uncomfortable talking about something, or would rather not answer a question, please tell me. You do not have to answer questions if you do not want to.

Time: The interview will take up approximately an hour. If you are tired, or need to stop and do something else, please tell me and we can take a break;

Confidentiality: Everything you said in this interview will be treated as confidential by the researcher.

Recording: Do you mind if I record this interview?

Yes..... No.....

The recording is only for research purposes. Nobody except the researcher listens to the recordings.

INTERVIEW GUIDE/ QUESTIONS:

1. How many cases do you see per week/month? (Parenting plans, forensic evaluations, recommendations for parenting plans, judgements)
2. What are the problems you experience? Can you give me some examples?
3. Is there a correlation between hostility between parents and the levels of anxiety in children?
4. How do you understand the concept of the best interests of the child?
5. How do you ensure that the best interests of the child are addressed in your assessment?
6. What processes do you follow in the development of the parenting plan?
7. How do you canvass the views of the child?
8. How do you establish the best interests of the child?
9. What criteria can be used to determine the best interests of the child?
10. Is the construct of the best interests of the child relevant during the divorce mediation process?

11. Based on your experience, how do you perceive the current position of the child during this process?

12. What knowledge and skills do professionals need to have to promote and establish the best interests of the child during divorce mediation?

Further questions arising from interviews with professionals:

1. What do you base your decision on the recommendation of handovers?
2. Is there a need for more in depth reports with regards to forensic assessments and residency evaluations?
3. Is there a need for guidelines on the specific child's interests?
4. Information gained from parents' backgrounds – did you gain any valuable information from the background information, was it helpful? Why do you require background information?
5. What guidelines do you recommend for the child's best interests?
6. What information do you hope to obtain by collateral information?
7. Do you ever discuss the child/children during the initial parent interview?
8. Why do you require all the information from the parents? Is it in the child's best interests?
9. When you recommend shared residency, what is your criteria for this recommendation?

Dear Professional

I have selected you from my referral data basis. I am currently busy with a doctoral study and need your professional assistance.

I have considered the ethical issue of confidentiality. As professionals, you may want to keep your identity confidential. Your names and surnames will not be revealed in the research study and I will only refer to your profession and qualifications. A number will be allocated to each professional, for example "Participant 1". This reference method ensures that the professional's identity will be kept private. The parents and children mentioned in the reports will also remain anonymous and will be referred to as male or female/ mother and father and children. Please give permission that the information provided by you can be used in this research.

Thank you very much in taking time and making the effort to assist me with this doctoral research study. The title of the research study is: *Guidelines for Professionals to ensure the best interests of the child in the mediation process in divorce*. My supervisor is Dr. A.E. Kitching at the University of the North West, Potchefstroom Campus.

Thank you for your co-operation

Yours faithfully

Karin Meyer

Themes of hostility between parents

The following are extracts from the reports and judgements of the intensity of the hostility between the parents:

Report 1: *There was always a tremendous amount of tension,he was extremely controlling... her input was ignored...he never even offered.... Not fully agree to the situation and said that he could help out more...making her feel inadequate as a mother...this is one of many examples where her actions or decisions were usurped...come rushing to her and whisk the child out of her arms...when he turned to her and said verbatim "I'm a better mother than you are". She will never forget that...without being rebuked or criticized...and his "devious" behaviour in conducting an affair with ... is a concern... repulsive and totally unacceptable...concerned about the lack of Mrs. X's parental supervision...his concern is for the children's safety...his concerns with Mrs. X's reluctance to take on the role as a mother. His concern with the way Mr. X has been introduced to the children. Mrs. X poses a flight risk to him and he feels she is determined to remove the children to the at any time, with or without him. Harassed her...He ranted using foul language within earshot of the children, spat at her on several occasions, locked her out of the house once, stalked her, slapped a glass out of her hand, and squirted sunscreen all over her face and head while yelling at her within earshot of the children. Ms. X was granted a temporary Protection order by the Court.... He refuses to let her in. He feels that Mr. X bullies Ms. X in her own house.*

Report 3: *...became emotionally abusive...was having an affair... showed the police her Protection Order...cause her considerable anxiety and stress...acted*

unreasonable and irrationally ... barged in and demanded that she hand the envelope back to him...were traumatized by it... severely traumatized by what had taken place...witnessed a number of incidents of domestic violence....children have been traumatized by witnessing such incidents...no insight into the effect his aggressive behavior towards her and the children has upon the children. ...does not adhere to agreements.. rude and argumentative towards him...screamed and shouted at him...angry outbursts...rude and disrespectful towards him throughout the marriage...due to her aggressive and unbecoming conduct...lost her temper very quickly and without much provocation...she threw things at him...unpleasant and critical all the time...unsupportive..

Report 4: does not participate emotionally, socially, physically or financially in the parenting of... sometimes goes missing for extended periods of time...suffering from psychological and or a psychiatric problem...hostile towards him...poor role model for child...

Report 6: makes unreasonable demands on him...the children are not receiving adequate educational stimulation...over protective of the children...belittles and berates him in front of the children.. she says that he is selfish, irresponsible and that he is a Gigolo...swears and uses foul language in front of the children.. calls him vulgar names in front of the children...manipulates the children...traumatic for the children and for him...shouting and screaming... experiences him as being spiteful...shouting and screaming at her....rude and disrespectful...was very angry...he seems indecisive and ambivalent...he is a selfish person...was never in the children's lives as he did not want them...is not a stable individual...dresses the children in cheap clothing...partner is a control freak...he is thoughtless and inconsiderate...exposed to high levels of overt conflict..

Report 7: ...was abusing substances including alcohol and heroin...the children were living in an unstable and dysfunctional environment...been on a detoxification program...relationship broke down due to chronic drug abuse...was very abusive towards her...he does not speak to the children or show any interest in them...reluctant to allow him to drive with the children... blamed him whom he said was trying to control him...he becomes threatening and aggressive when he is intoxicated or when he is 'high' on drugs...steals valuables from his home which he sells in order to feed his drug addiction...has threatened to remove the children... has been arrested on a few occasions...a poor role model for the children...laid charges of assault which she later withdrew.

Report 8: Mom withholds baby...protection order...unhappily married...relationship deteriorated and they constantly fought with one another... relationship was soon terminated...denied that he was the father of the child... became obsessed with him... he was not allowed to be alone with the baby... parties often fought...was going to leave...made her feel extremely distressed... she broke down emotionally... determined not to lose her child... did not attend the appointment... unhappy with current contact and finds current arrangements draining... unable to resolve their differences... yells at her and insults her and her family...threatens to take her child from her...no respect for her father... makes her feel inadequate...criticizes her for not buying the child designer clothing...she accused him of having another girlfriend... she threatened to kill herself, went so far as sending a suicide note by sms wherein she provided details... did not want to see him again...would not co-operate...wanted to fight with him...informed by her to 'get lost'...she disliked his mother and his sister...negative feelings caused friction between them...she often locked herself in the bedroom...alleging that members of his family were bewitching her...however, his attempts were unsuccessful... parties broke up at the time...she reacted in an extreme manner...simply refuse to let him have the child for no reason

at all...was furious with him for taking the child away...after receiving the Protection Order, the parties could no longer continue with their counseling...discussions were fruitless... very worried about... refusing him contact...he is worried that the child's current fragmented and disjointed lifestyle may have future negative psychological sequela... acrimonious relationship between the parents that was characterized by a high level of hostility and conflict between them...acrimonious relationship between the parents that was characterized by a high level of hostility and conflict between them. It seemed as if trust had eroded between the parties and they were unable to communicate with one another. Felt aggrieved and threatened... protection order... refused to allow him to have contact with the child... hidden feelings of resentment and dependency...particular resentment is felt...antagonistic feelings...suspicious and untrusting and may be vigilant...control in a rigid manner and eventually that appears to take control away from her...compulsive and rigid...very distressed by the current situation...

Report 9: she makes vicious claims about him not being involved in the child's upbringing. ... and reasons for the divorce were a mystery. ... but this was met with hateful, resentful and bitter reactions. ...but was met with bitter resistance. He has backed off and loved from a distance. Believes she is a rolling stone and a rolling stone gathers no moss. He is concerned that Mrs. X has learned to play the perfect victim. ... she can be viciously dishonest in trying to achieve her goals. ... the way she omits telling the whole story and further more blatantly lie to achieve her goals. He is very concerned that any promises made by Mrs. X are worth as little as the words on paper. ... expresses grave concern... Mr. X believes that the supposed deal that Mrs. X has put on the table describing how he can see the child is also a well thought out plan of deceit. He feels he cannot trust Mrs. X. Mrs. X is concerned that Mr. X is not committed to protecting the child from hurt and the disagreements between them. Mr. X will embark on a road of hurting the child by not wanting to see

her and so on. Child explained that the problem is that her father loves her very much and she feels that her mother is dishonest. She indicated that some of the things her father says are “very weird”.

Report 10: These paragraphs allude to a fundamental difference between Mr. and Mrs.... I disagree most empathically with Mrs. X.’s decision to move the child to Johannesburg, and I have appealed to Mrs. X to reconsider. I will surrender no rights at all in respect of the child ... Applicant alleges that respondent deserted the children and took little or no interest in them..... failed to visit the children when they were seriously ill;... There are serious personality conflicts between the first and second defendants. There is however, criticism of his ability to take care of the child. It is alleged too that he had suffered from depression, slept late into the mornings and that he allowed the child to play violent computer games... he had grave concerns about Mr. X’s ability to care mentally and emotionally, especially given his emotional issues. On more than one occasion accused Mr. X of causing Mrs. X’s death – something he strongly denies.

Report 11: On 13 November 2014 an argument erupted between Mr. X and child via WhatsApp messages. WhatsApp message from Father to son: But for now I am finished with you my son. However, his father shuns his efforts. The children never felt they were his priority. They have witnessed their father acting abusively towards their mother. They have seen their father behaving inappropriately with another woman whilst he was still married to their mother. Their father never keeps his word. He makes promises, which he never fulfills. Their father has let them down time and time again. Their father does not have time for their kids. They experience him as cold and distant. It is notable that the children did not feel that their father had expressed an apology to them. Moreover, Mr. X has never asked for their

forgiveness. It was evident from the discussion that emanated from the children, that they have been deeply psychologically wounded by their father.

Report 13: She said he was initially very kind, caring and attentive towards her. However, after she fell pregnant his behavior towards her became abusive. ...of being exposed to the conflict between his parents. She reports that she asked Mr. X to leave after an incident occurred in which he kicked the nursery door and he swore at her. When asked how she and her child's other parent make decisions about schools, doctors, holidays, etc., she responded as follows: "His father has shown no interest." His father was opposed to me listing my child in the schools in the area because it involved money and he simply was not interested. Has not met my son's driver. Has not even enquired into which school child will attend next year... Has never taken child on holiday or enquired into his holidays or volunteered to help to contribute financially. He has frequently been unreliable in exercising contact. Whenever he experiences friction or problems with her he fails to contact the child. Mr. X has forgotten to put on child's nighttime nappy. Mr. X has verbally abused her in front of child. Mr. X has watched violent movies in child's presence. He has also behaved aggressively and violently at times. He has uncontrollable emotional outbursts. He has demonstrated that he places his own needs before the needs of the child. He explained that his relationship with Mrs. X has always been problematic, however, it seemed to reach an all time low after the birth of the child. He said she worked long hours and she travelled all over the world, which left her with little time to invest in their relationship. Mr. X reports that pursuant to the breakup of their relationship, Mrs. X "blocked off" all his contact with the child. He reports that he believes that her behavior in this regard was simply a way of controlling the situation and punishing him at the same time. He reports that he experienced Mrs. X's behavior towards him as being very ruthless at times. Mrs. X can be too rigid and authoritarian at times. She has a tendency to bully others and

not to care about their wants and needs. He said that the parties have been verbally abusive towards one another, which resulted in Mrs. X obtaining a Protection Order against him. She has done her best to undermine him as a father and a parent. She is disrespectful and dismissive of him as the child's father. She is disrespectful towards him and his family. He has no faith that she will respect his role and his rights as a father in the future. She behaves in an authoritarian manner. He has experienced her bully and walk all over people. She shows scant regard for other people's rights of free will. She has told the child negative things about him. She has demonstrated no goodwill in establishing a co-operative co-parenting relationship with him. She is a ruthless self-serving woman who has a Machiavellian approach to life. She will stop at nothing in order to win and to get her own way. He does not believe that Mrs. X is a good role model for the child. My investigation findings indicate that the child has unfortunately been exposed to the high levels of conflict between his parents. Research has shown that ongoing parental conflict has a profound negative effect upon children and it is consistently linked to children's psychological and behavioural problems.

Report 14: Mrs. X reported that she was previously married to a Mr. X, which marriage was dissolved after only 6 months when Mr. X inexplicably and unexpectedly left her. ...he later became abusive and began drinking heavily. Indulging in binge drinking, he would disappear for days on end. The First respondent stated that she had began to 'unravel' from the stress of a failed marriage, the responsibility of supporting the family both financially and emotionally as well as the physical exhaustion of caring for a baby at night. The Second Respondent's alcohol abuse escalated and he became physically violent. ... he attacked his father who was living with the couple and assaulted him very badly, wrecking the house in the process. It became apparent to the First respondent that her partner was a danger to her and their child. She reported that she felt alone with

the child and unable to cope. She reverted to the abuse of narcotics after having been clean for some two years. The First Respondent's fear of the Second Respondent was compounded by the side effects of the narcotics and alcohol she was abusing. Although no longer living with the Second Respondent, the First Respondent was afraid of him. She moved house so that he would not know where she lived. ... she was not managing her life or the care of the minor child. The Second Respondent has maintained a sporadic interest in the minor child. Not even phoning to apologize for his absence. The Second Respondent does not meet any of his financial obligations to the child.

Report 15: He curtly advised me that he would not speak to me and he further instructed me to contact his attorney. Mrs. X reports that both she and Mr. X, the child's biological father, were divorced from their respective spouses prior to their establishing a relationship with one another. She explained that this arrangement came to a halt as Mr. X allegedly harassed the child's school teacher. ...the child told her that her father screamed at her and he was ugly to her during contact. She also reported that her father forced her to eat. She maintains that her conversation with Mr. X fell on deaf ears and her concerns regarding his reported behavior towards the child were not allayed. Mrs. X maintains that Mr. X adopted a defensive stance towards her. She said that Mr. X accused the child of lying about his behavior during contact. She reports that she was very worried about the overt changes that she had observed in the child's behavior. Thereafter, she stopped the child's contact with her father as her father appeared reluctant to change his behavior towards her. Mrs. X maintains that Mr. X is not genuinely interested in having a meaningful relationship with the child. She said for the past three years he has made no effort to see the child or to engage with her. He failed to attend the appointment at the Family Advocate's Office.... He does not publicly acknowledge the child as his daughter. He is extremely emotionally manipulative. In order to evoke the child's sympathy, he

told her that he sleeps in the veld and he uses a rock for a pillow. On one occasion when Mr. X exercised contact with the child, he cut a cross in her finger. He cannot be rusted. He served a ten year prison sentence for committing fraud. Pursuant to his release from prison he defrauded several individuals that she knows of. Mr. X informed me that Mrs. X has not permitted him to see the child for the past four years. He reports that his role has been reduced to that of a simple onlooker. Based on Mr. X's responses it appears that he externalizes blame and accepts no responsibility for his part in the child's refusal to have contact with him. The parties blame one another for this situation. The answers he chose to give were scant and evasive. Moreover, I found Mr. X was not open and honest in his responses to questions posed to him. It seems that Mrs. X has engaged in mild alienating strategies, which may have been employed to protect the child from what she perceived as Mr. X's inept parenting.

Report 16: P v P 2007 (5) SA 94 (SCA). The family advocate appointed a social worker, family counselor and clinical psychologist to assess the children and conduct an investigation into the best interest of the children. All expert evidence adduced at the trial diagnosed Mrs. P with several psychological disorders and added that this generalized anxiety disorder was a life-long condition and that, although it could be treated, it was not curable. Chetty J was unimpressed with the various expert witnesses. He described them as being evasive, unable to answer questions directly and reluctant to make obvious concessions. Lack of objectivity was highlighted. Chetty J pointed out that it is clear that the expert opinion is not mere conjecture, surmise or speculation of the expert; it is his judgment in a matter of fact. It is equally clear, that whilst in many cases a court needs and benefit from an expert's opinion, the expert witness should not usurp the function of the court. The most telling example of this failure on the part of the expert witness was the...portrayed Mrs. P as uncaring, neglectful and bullying mother prone to outbursts of rage and psychical

abuse directed at both the appellant and the children. BJ Van Heerden JA found that neither court misdirected itself in this regard. She stated that Chetty J did not question the special knowledge, training or experience of the various expert witnesses, but identified his main problem with such experts as their inability to draw a line between matters of fact and matters of value thereby distorting the judicial process by acting like judges.... despite the trauma and stress caused by the protracted divorce proceedings...The way in which the family advocate assisted the court is of real concern. Acceptance of the recommendations of expert witnesses without conducting an individual investigation or assessment into the matter stipulates gross negligence on the part of the family advocate. Courts are not bound by the recommendations of either the family advocate or expert witnesses.

Report 17: McCall v McCall 1994 3 SA 201 (C) Onus on non-custodian parent to show that existing situation detrimental to child's best interests and that variation of custody arrangement would be to the child's advantage. The parties were divorced on 28 February 1992, but sadly the war is not over. The particular battle which has been fought out in this Court, concerns the custody of one of the two children of the marriage, the son of the parties. In view of the unremitting enmity between the parties, it is as well to remind them that the Court is determining what is in the best interests of their child. The Court is not adjudicating a dispute between antagonists with conflicting interests in order to resolve their discordance. The Court's concern is for the child. The sadness is that this matter could not be settled on an amicable basis, resulting in this arduous and costly litigation to the detriment of the parties and their already miserable relationship with each other and also the cause of great anguish and sorrow to ...Applicant removed the children from respondent's custody on 22 April 1990, which provoked at the instance of respondent an urgent application before this Court.... This recommendation was not acceptable to respondent and in the event the present application was launched on 15 October 1992. called by the

respondent, was concerned, as was... with applicant's temper. The character and temperament of the applicant was attacked on two grounds, that he has a quick temper and that he is not honest. Applicant has a temper, of that there is not doubt. Instances of his loss of temper were detailed in evidence and applicant candidly admitted as much. The same may be said of the applicant's alleged dishonesty. Applicant also misled the Legal Aid Office when, during the course of the trial, he applied for legal aid. There is no winner and no loser. There are two concerned parents.

Report 18: Van der Linde v Van der Linde 1996 3 SA 509 (O). The mother subsequently applied for custody of both children or, alternatively, custody of When the case was heard, the mother however conceded that it would be in the boy's best interests if he remained in his father's custody. The only issue was therefore who should have custody of child. The court has the power to award split or divided custody to children's parents. This means that one parent gets custody of some of the children and the other parent gets custody of the remaining children. This was what the mother sought in the present case.

Report 20: Hummel v Hummel Case No 2012/06274 South Gauteng High Court, Johannesburg. The honorable Judge Roland Sutherland. However, ultimately, despite some effort to achieve this end, no plan was ever agreed.... the court appointed Adv.....as the case manager to the parties after an initial attempt by the applicant, abandoned at court, to have a parenting plan, in respect of which there was no agreement, made an order of court.... The court order stipulated, after setting out the extensive schedule of times to regulate contact by the applicant that...Despite her interventions the parties still could not agree on the appropriate nursery school which ...should attend....He disapproves of it...The voluminous tirade of tasteless acrimony spewed forth in these papers, are, in the view I take of the

matter, unnecessary to traverse.... Thus, so it was contended, the ceaseless bickering of these two parents was injurious to their child and a deadlock breaker would handsomely reduce the risk of a plethora of litigation. The submission, in my view, misses the point: The issue is not whether or not it is a good idea to put a brake on a debilitating course of conduct by truncating the patens (parents) power to make a final decision and vesting decision making authority in a reasonable third party.

Extracts from reports, assessments and judgements where the child's voice and development stage has been taken into account.

The following are extracts from reports, assessments and judgements where the child's voice and development stage has been taken into account:

Report 1: explained how he looks forward to the morning routines including the preparation of hot milk and reading stories, which gives him a real sense of closeness and fulfillment towards the children.... provided the following description of care prior to the parents' separation... Mrs. X is concerned about daughter and her decline at school. Proposes that no child be away from the other parent for more than 10 days...I consulted with the minor child. The Child's Voice Toolkit – school playground, photo cards, my world board, feeling cards, mom's voice and dad's voice, partner cards, Interactional analysis. Structured Child Assessment of Relationships in Families – SCARF. Interview with the child. Summary of ratings for child by both parents. Child was unable to participate in the assessment due to his level of maturity. Rates child as insecure. Interactional analysis – the parents and the children: Task One: Requires the parent and child each to draw the child's world with their non-dominant hand and them explain their drawing to one another; Task Two: requires the parent to put lotion on the child; Task Three: Requires the parent and child to play a familiar game; Task Four: Requires the parent to leave the room for a minute; Task Five: Requires the parent and child to complete a worksheet; Task Six: Requires the parent to teach the child something the child does not know. Dramatic change in child's functioning this year. Regression in her academic work. Not ready to enter Grade 1. The parents have informed the school that child X is more mature than child Y. The school placed significant focus on child's development. He does not know how to listen. He improved his understanding of

the structure of the school day. He has sought out an attachment figure. He does not know how to play and fleetingly engages in parallel play with other children. A follow-up occupational therapy assessment may be useful. Child has shown some worrisome behaviour at present which is cause of concern. She has to set boundaries. Child's attachment with his mother presents as insecure. There is an affectionate bond between child and his mother. He tests the boundaries on an ongoing basis.

Report 2: Parenting Plan: Deserves the positive input of both her parents. Has healthy and constructive time with both parents. Encourage child to pursue her educational interests and enthusiasms. Recognizes her rights to emotional and physical safety, feel loved by both of them, know and be cared for by both parents, develop an independent and meaningful relationship with both parents. To protect the child they agree to foster the love, affection and respect of child for each parent, co-operate with each other to make decisions in child's best interest.

Report 3: I conducted interactional analysis between child and Mr. X. Completed parenting questionnaires. Child had been sleeping over with him every weekend. Whether the child had been adequately taken care of. He states that he and child enjoy participating a number of activities together such as fishing, riding bikes and swimming. For example, if child has nightmares she comes to his side of the bed so that she can sleep next to him. First interview with child. Second interview with child. Third interview with child. Interactional analysis with child. Section 10 of the Children's Act, 38 of 2005. The child's wishes. Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration. I found that Mr. X is a warm responsive parent who is able to meet child's emotional, physical and social

needs. I found that Mr. X is the parent who is most involved in child's daily activities. I found that child does not feel safe when she is in her mother's care. She has also demonstrated a lack of respect for the child's feelings. My findings indicate that child is experiencing contact refusal which is defined as the behavior of a child or adolescent who adamantly avoids spending time with one of their parents during or after the divorce that cannot be considered as a mental condition, syndrome or a disorder. Child is presently placed in the middle of their conflict...

Report 4: I completed a parenting questionnaire. I conducted a clinical interview with the child. Child reports that she enjoys school and that she is happy at her school. She reports that her father helps her with her homework and with her projects.

Report 5: Neither parent may change child's school, without the other parent's prior written consent. At the end of the three months, midweek contact will remain the same but weekend contact will change to alternate weekends from Friday at 17h30 till Sunday at 18h00. Until child reaches Grade 1, parents agree to meet with their case manager annually in order to readjust contact times in line with child's developmental stages. The parties record that child is too young to play any meaningful role in formulating this parenting plan.

Report 6: make recommendations that would be in the minor child's best interests with regard to their primary residence, care and contact. I conducted a clinical interview with each child independently....I observed the children in their school environment...I interviewed the children's teacher ...They have difficulty in keeping up with two energetic and lively 5 year old boys. She is overprotective of the children and she does not encourage them to be independent. She tends to do things for the children like wiping their bottoms, feeding them with a spoon, rather than allowing

them to master skills themselves. ... does not read to the children... uses infantile language when she speaks to the children... It is traumatic for both the children and for him, to have to separate from one another after they have spent time together. They separated easily from their father and they entered the playroom without any hesitation. When shown feeling cards... The children appear to have developed sufficient cognition to understand some of the... has been unsettling, disruptive and destabilizing for the children. The children indicated to me... As the children grow older their educational, social and emotional needs and demands are going to increase significantly. The children have clearly expressed their wish to live with their father to me. There is considerable research evidence to suggest that the absence of a father in the life of a child is detrimental and handicaps maturation and development. In order to safeguard the children's attachment to their grandmother...

Report 7: I conducted clinical interviews with both children. I conducted an interactional analysis between the minor children and the father. Children were living in an unstable and dysfunctional environment. He reports that he takes the child to school every day and he fetches him home from school in the afternoon. He reported that he did a lot of computer development games with child from the age that he was two years old. He reports that one child has been diagnosed with Attention Deficit Disorder and the other child has been diagnosed with Attention Deficit and Hyperactivity Disorder. Home visit. When asked to draw his family doing something... I administered aspects of the Marchak Intervention Method (MIM) to observe the interaction between the father and the two older children in a structured environment in my office.

Report 8: Handovers at police station – in child's best interest? Baby with parents two days then handover? In child's best interest? Home visits and Interactional analysis – child only two years old. Schools for child discussed. Separation anxiety

of child – socializes with other children at the crèche. Although child attends two different schools – one when with mother and another when with dad? Discussed Erikson's phases in terms of what is in best interests of child. Discussed attachment in terms of child's age and stage of development.

Report 9: According to Mrs. X, Mr. X reveals everything to her, which she feels is too much for a child of her age to handle. ... she does not believe the child will be able to function normally with her so far away. Interviews with the child. Child understood the reason for the assessment as follows. They (her and her mother) wish to go to a university in a different country. Dr. ... gave an explanation given to the child about the reason for the assessment, about the interview and the purpose of the interview. I consulted with the child on 20... and I used the My World board to elicit a description of the child's world from her. Childs' experience of the parental relationship and communication. Risk factors. Child's views and wishes. Child stated clearly that she wishes to relocate with her mother and that she will be disappointed if the relocation does not go ahead. Child can express a preference. She does not have the capacity to consider all possible implications of the move. Child's views and wishes are coloured by the nature of the information she is receiving. Mr. X attempts to counter the information. He primarily tells her that her mother is lying to her and that her mother cannot be trusted in facilitating contact between him and child in the future. This causes her emotional strain. She feels that she is a no win situation insofar as pleasing her parents, is concerned. Psychometric Test results. Interactional analysis – the parents and child. The age, maturity, interests, activities and special needs of the child. Child's developmental and individual needs at this point and how they expect to change in future. The child's relationship with peers. Child's capacity to deal with change. Will the child enjoy a healthy, decent life style in the new community (adequate schooling, housing, financial support).

Report 10: *Mrs. X undertakes that she will not at any time discourage child from pursuing a tertiary education. To thrust G back into that environment from the safe environment in which she has been nurtured for the past four years would clearly do her substantial damage, let alone no good. Having observed the interaction between the Respondent and minor child, it is my professional opinion that they enjoy a loving, comfortable relationship. He would be able to prepare child for school in the mornings and have breakfast with him and take him to school.*

Report 11: *Mr. X does not allow the children to have friends over when they have contact with him. They are also not allowed to participate in extra mural activities when they are with their father. The children have been devastated when their father has seemingly “written them off.” They are often scared to go to their father. It is not nice to be with him. There are no facilities at his father’s house for them to do their homework.*

Report 12: *Children were psychometrically assessed. No signs of separation anxiety were noted. She did not appear to be anxious during the assessment. No problems were noted with motor coordination. Her activity levels were normal. Her speech at times haltingly but is overall organized and coherent. She came across as a shy but friendly child. She was on occasion distant even though she cooperated. No self-soothing and/or destructive behavior was noted. No ritualistic and/or repetitive behavior was noted. There were no signs of increased frustration. She came across as an aloof child. She answered questions in short sentences in an abrupt way.* 1. *Infancy birth to 18 months: Ego development outcome: Trust v Mistrust. Basic Strength: Drive and Hope. With reference to the children, it needs to be noted that child was born premature. This does affect bonding and attachment*

negatively. The child's first eighteen months of five where trust is formed was thus not a secure time for her.

2. Early Childhood: 18 months to 3 years: Ego development outcome: Autonomy v Shame: Basic Strengths: Self-Control, Courage and Will. Both of the children's environments during their early childhood when autonomy develops were also conflict ridden.

Report 13: I observed that parties have comfortable homes that cater for child's needs. I observed that he has toys, books and dvds in both of his homes. I observed that Mrs. X has set firm limits and boundaries for the child. I observed that Mr. X was very gentle and nurturing towards the child throughout the duration of the contact. I conducted an interactional analysis with Mrs. X and the child in my office. I observed inter alia that: Mrs. X engaged warmly with the child. I observed that she was unable to get down to the child's level and interact with him in an informal child like manner. Mrs. X directed him rather than allowing him to choose the activities, which he wanted to do. I conducted an interactional analysis with Mr. X and the child. I observed inter alia that: Mr. X interacted with child in a warm, relaxed and playful manner. Mr. X maintained good eye contact with the child. He spoke to him using age appropriate language.

Report 15: It must be borne in mind that the child's relationship with her father has broken down to the extent that her attachment to him has been ruptured. When asked what developmental stage the child is in at the moment and what her needs are, Mr. X stated that he did not know the answers to these questions. It is evident that she is well cared for by her mother. It is noteworthy that shortly before I terminated the second interview with the child, she made a point of vehemently reiterating that she does not want to have contact with her biological father at this stage, as she is afraid that he will be "ugly" towards her in the future. I conducted an

interactional analysis between Mrs. X and the child in my office. From the interaction between them, it is evident that Mrs. X is attuned to the child's needs and she is able to create a secure base for her. Mrs. X was able to regulate the child's behavior and provide her with direction and support with the structured tasks they were asked to perform.

Report 16: P v P At the instance of the appellant, the trial court directed the family advocate to conduct an enquiry in terms of section 41 (1) of the Mediation in Certain Divorce Matters Act 24 of 1987. The family advocate appointed a social worker, family counselor and clinical psychologist to assess the children and conduct an investigation into the best interests of the children.

Report 17: McCall v McCall Onus on non-custodial parent to show that existing situation detrimental to child's interests and that variation of custody arrangement would be to child's advantage. When Court to have regard to child's preference.

- (a) *the love, affection and other emotional ties which exist between parent and child and the parents' compatibility with the child;*
- (b) *the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;*
- (c) *the ability of the parent to communicate with the child and the parents' insight into, understanding of and sensitivity to the child's feelings;*
- (d) *the capacity and disposition of the parent to give the child the guidance which he requires;*
- (e) *the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;*
- (f) *the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;*
- (g) *the desirability or otherwise of keeping siblings together;*

(h) the child's preference...

(i) the desirability or otherwise of applying the doctrine of same sex matching; ...such bond being stronger than that between the child and his mother...Court was particularly impressed with the easy communication between father and son....R's expressed statements and views came across to the Court as his own, genuine and accurate reflection of his feelings towards his relationship with each of his parents...and that the Court was satisfied that it could and should give weight to his preference for his father so clearly and firmly expressed.... R had now reached the stage of his development, at the doorstep of puberty, where his need for the discipline and guidance of a father was greater than his need for the protectiveness of a mother. ... needed the masculine environment...best interests would be served by placing him in the custody of his father. The Court's concern is for the child. ... parties agree that R is to remain at his present school... As to R's general development, there again is in my view nothing to choose between the parties, both of whom are able to see to this. ... namely his mother's home, is not providing him with the emotional stability he requires. If there had been any compelling reason for not giving effect to R's wishes, a reason such as to indicate that it should nevertheless not be in his interests, that reason would have...

Report 18: Van der Linde v Van der Linde the mother however conceded that it would be in the best interests if he remained in his father's custody. The only issue was therefore who should have custody of M. (daughter). The court held that the children should remain in their father's custody. In the past, mothers were preferred as custodians as it was simply assumed that they make better caretakers. In the case under discussion, the court declared that mothers are not necessarily better able to be good parents on a day-to-day basis. HATTINGH J held that 'mothering'

refers to caring for a child's physical and emotional wellbeing, and that it is not only a component of a mother but also forms part of a father's wellbeing. ...the child's interests must be paramount. The case is important because it contains guidelines on when a family advocate ought to investigate the arrangements regarding the children.

Report 20: Hummel v Hummel ...despite extensive prior debate over the selection of a nursery school for, he learnt that the respondent had unilaterally chosen Mina Lopato for ... to attend. He disapproves of it, apparently because 30% of the children are gentiles and this together with the school's alleged faint hearted commitment to proper Jewish norms will inhibit the moulding of his son to strictly adhere to the customs and practices of which the applicant approves. In my view, no court has the jurisdictional competence to appoint a third party to make decisions about parenting for a pair of parents who are holders of parental power as contemplated in section 30 and 31 of the Act. Section 7 of the Act sets the 'best interests of the child standard' at great length. The interpretation of the balance of the Act must, in terms of section 7 (1) occur through the prism of this standard. I understand that injunction to require a court, when faced with rival interpretations of a provision, to prefer the interpretation that produces an outcome most consonant with the best interests of the child. ...the ceaseless bickering of these two parents was injurious to their child...

Evidence of personality disorders in reports, judgements and assessments.

The following are extracts of the samples reports and judgements to illustrate the complexity and difficulty of dealing and managing partners with personality disorders. It is firstly important that professionals have the knowledge in identifying the personality type and secondly know how to manage the process, in order for parents with this pathology not to unnecessarily delay the process:

Report 4: *She appears to be suffering from psychological and or psychiatric problems. She is unable to provide any stability, safety or security for child. She lives an itinerant lifestyle and she does not have a fixed abode. For a time she lived in a shelter for abused and homeless people in Cape Town. He avers that mother has been a vagrant since 2010.*

Report 7: *After their relationship ended, his next girlfriend shot herself through the head whilst he was present. He describes himself as a broken man and stated that he plans to open a brothel or to be a stock course salesman. He stated he feels to old to work as a male prostitute at this stage. He steals valuables from his home, which he sells to feed his drug addiction. He becomes threatening and aggressive when he is intoxicated or when he is "high" on drugs.*

Report 10: *It is alleged too that he suffered from depression, slept late in the mornings and that he allowed the child to play violent computer games,... There are serious personality conflicts between the first and second defendants. The child, A, who is apparently a retarded child, is, at any level, giving the defendants a great deal of difficulty in his discipline and management.*

Report 11: Based on my interactions with, and in addition to my observations of Mr. X during consultations with him and during telephonic discussions with him, it appears that he is consumed and overwhelmed by his own feelings thus he seems to have difficulty focusing on the children and accepting how they are experiencing his crisis. Mr. X seems to lack insightfulness, which involves the ability to see things from the child's point of view and to empathically think about and consider the motives underlying the children's behaviour.

Report 12: Narcissistic personality: Mr. X may be haughty and may act in an arrogant supercilious and disdainful manner when under stress. Mr. X is expressively disciplined. He maintains a regulated, highly structured, strictly organized life. Perfectionism may interfere with decision-making and task completion. He exhibits unusual adherence to social conventions and properties.

Report 15: These deficits range from mild insensitivities to blatant emotional abuse. These authors posit that some rejected parents are rigid, controlling and have a distant parenting style. Others are immature or narcissistic and have great difficulty being attuned to the child's feelings and needs. They argue that some parents have problems managing their anger and disappointment and their rages terrify their children.

Report 16: P v P 2007 All expert evidence at the trial diagnosed Mrs. P with several physiological disorders and added that this 'generalized anxiety disorder' was a life-long condition and that, although it could be treated, it was not curable. Accordingly her long-term prognosis was not good. This opinion was derived largely from a conclusion, that, given Mrs. P's ego-strength, psychiatric history and previous style of coping while she was full-term mother and housewife with considerable domestic support. Her evidence-in-chief portrayed Mrs. P as an uncaring, neglectful and

bullying mother prone to outbursts of rage and physical abuse directed against both the appellant and the children. ... although she suffered from psychological disorders to some extent,...

