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## AFRICAN-STYLE MEDIATION AND WESTERN-STYLE DIVORCE AND FAMILY MEDIATION: REFLECTIONS FOR THE SOUTH AFRICAN CONTEXT

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### 1 Introduction

Both Western-style mediation and African-style mediation are practised in South Africa. Each of these models is applied in specific social contexts. How can Western-style divorce and family mediation learn from the African style of group mediation? In this article the question will be explored of whether the Western-style mediation model is adequate to use as it is in South Africa, a country that has high levels of poverty, distinct cultural affinities and religious affiliations, as well as an adherence to traditional and communal values, or whether African-style group mediation can improve the Western model.

An explanation of the meaning of the term "divorce and family mediation" and of the general principles of Western-style mediation is provided. In addition, mediators' roles in Western-style mediation and the stages in and styles of Western mediation will be discussed. The concept of African group mediation will then be examined and attention will be paid to the *Ubuntu*-influenced values found in African group mediation, as well as the general principles of African dispute resolution and the mediator's role in African-style group mediation.

In order to broaden our understanding of the concept of mediation in South Africa and of the role that African group-style mediation can play, specific attention is also given to the provisions of the *Children's Act 38 of 2005*, as well as to family group conferencing as provided for in the *Child Justice Act 75 of 2008*. The concept of mediation circles as currently found in Western-styled mediation is described. Lastly,

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ways of improving Western divorce and family mediation in South Africa by learning from African-style group mediation are suggested.

## 2 Western-style divorce and family mediation

Western mediation is an ancient process that has been re-engineered to suit the needs of highly industrialised urban societies, and so has discarded the social context that originally underscored it.<sup>1</sup> According to Faris,<sup>2</sup> Western mediation serves the needs of "self-existent, individual and autonomous societies" that are "equipped with the service of a complex commercial sector and court system".

Western mediation as it is currently practised in South Africa is a service profession. Mediators need to be accredited by a professional body and mediation generally occurs in a formal setting. Usually the person who is the mediator has no prior relationship with the disputants. There is generally a mediation agreement that states the "ground rules" for the mediation process and sets out the roles and responsibilities of the parties to the mediation. There are recognisable stages that occur during the mediation process. The objective of Western mediation is that consensus is reached and that this gives rise to a settlement agreement.<sup>3</sup>

Before examining Western mediation, the meaning inherent in "divorce and family mediation" should be examined. Mediation is one of the primary processes of alternative dispute resolution. In mediation a neutral third party (the mediator) mediates (acts as a go-between, facilitates) the conflict between parties in order to assist them in reaching a mutually acceptable agreement. This agreement may take the form of a settlement and the settlement may be made an order of court if the parties want to do so.<sup>4</sup>

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1 Faris "From Alternative Dispute Resolution. 1.

2 Faris "From Alternative Dispute Resolution" 1.

3 Faris "From Alternative Dispute Resolution" 1.

4 Singer *Settling Disputes* 20; Van Zyl *Divorce Mediation* 142; and De Jong "Child-focused Mediation" 112.

Family mediation takes place where there is a dispute between family members, including divorce and post-divorce matters.<sup>5</sup> For example, mediation can be used for a couple who are not married to each other but living together and want to reach an agreement regarding the division of property; where siblings who need to maintain their aged parents want to reach an agreement in this respect; or between a child who has reached the age of majority and is claiming maintenance and the child's parents.

Western-style divorce and family mediation is based on general principles.<sup>6</sup> There are numerous advantages to the practise.<sup>7</sup> Various concerns regarding Western-styled mediation are also found.<sup>8</sup> Stages (or steps) are followed during the mediation,<sup>9</sup> which can accommodate various styles.<sup>10</sup>

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5 In family mediation the mediator tries to help the parties reach a mutually satisfying agreement that recognises the needs and rights of all family members: De Jong "Child-focused Mediation" 112. "Divorce mediation" is a form of family mediation where the couple are divorcing, or involves matters related to the divorce of the couple.

6 For example, mediation occurs at the boundaries or under the "shadow" of the law: Levy and Mowatt 1991 *De Jure* 65; Clark 1993 *THRHR* 454; and Mnookin and Kornhauser 1979 *Yale L J* 950; mediation is a multi-stage process: Van Zyl *Divorce Mediation* 156; mediation is generally private and confidential: Roberts *Mediation in Family Disputes* 95; mediation is a multi-disciplinary field; the mediator is impartial: Parkinson *Family Mediation* 13-14 and the parties control the outcome of the mediation, the mediator does not make decisions for the parties: Scott-MacNab and Mowatt 1987 *De Jure* 50.

7 These benefits include avoiding litigation; giving parties more control over the decisions made in their case, and time and cost-savings: Van Zyl *Divorce Mediation* 191; and Stintzing *Mediation* 48.

8 Amongst these are that mediation may be unsuitable in certain instances, for example where there is a risk of child abuse or alcohol, drug or mental health problems: Van Zyl *Divorce Mediation* 98; or where there is domestic violence: De Jong 2008 *THRHR* 655; mediators may see themselves as advocates for children's rights and ignore women's rights and women may "bargain away" property in order to obtain sole care: De Jong 2008 *THRHR* 654-655; Heaton 2005 *SAJHR* 567; and Van Zyl *Divorce Mediation* 20-22. Another concern is that parties who attend mediation may not be able to afford to go to court afterwards as the combined costs would be too high. See Stintzing *Mediation* 49.

9 Generally these include the mediator's opening statement, which includes an explanation of the purpose of the mediation and the mediator's role; the parties' statements and mediator's summaries; issue identification and agenda setting; clarification and the exploration of issues; facilitating negotiations and then the mediation outcome, which may consist of an agreement or adjournment or termination. See Singer *Settling Disputes* 22; Charlton and Dewdney *Mediator's Handbook* 3-6 and Van Zyl *Divorce Mediation* 156.

10 Amongst these are activist mediation, used where there is an unbalanced power relationship or to ensure that parties are protected where domestic violence is present: Faris 2006 *CILSA* 442; and evaluative (or directive) mediation, where the mediator plays an active role in the decision-making process and points out weaknesses in the parties' cases and predicts what a judge would be likely to do. See Faris 2006 *CILSA* 442. Evaluative mediation is often found in court-mandated or court-referred mediation. As per Zumeta 2000 [www.mediate.com](http://www.mediate.com). Facilitative (non-directive) mediation is where the mediator acts only as a facilitator for the negotiations that take place

Three mediator roles<sup>11</sup> are generally found in Western-style divorce and family mediation. Firstly, there are individual mediators who do not have a prior relationship with the parties and help the parties to settle their disputes on grounds that are mutually acceptable to the disputing parties. The model of individual mediators is found most often in Western-style divorce and family mediation in South Africa. Secondly, authoritative mediators are persons who are in authority over the disputing parties, for example managers. Thirdly, there are social network mediators. These are mediators that have existing relationships with the parties and are usually respected members of the community. They are not "neutral" but are seen as being fair. These mediators are concerned with maintaining long-term social relations and may even participate in the implementation of the agreement. Peer or social pressure may be used to enforce the agreement.<sup>12</sup>

### 3 African group mediation

In Africa there is the tradition of family or neighbourhood mediation. This mediation is facilitated by elders and takes place in "an attitude of togetherness" and "in the spirit of *Ubuntu*".<sup>13</sup> African group mediation shows a commitment to the community and a

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between the parties - multi-generational family mediation may occur in this type of mediation. See Cooper and Brandon 2007 *Aust J Fam Law* 292-293. In facilitative mediation the parties are encouraged to reach a settlement within a range of likely outcomes and the mediator is usually an expert in child and/or family law. The facilitative mediator assumes that the parties understand their situation and can probably create better solutions than the mediator can. Faris 2006 *CILSA* 442. Transformative mediation is where the focus is on trying to change the dispute from a negative one into a positive event. The focus is on "empowering" the parties and "recognition" by each of the parties of the other party's needs, interests and values. Zumeta 2000 [www.mediate.com](http://www.mediate.com); and Faris 2006 *CILSA* 446. Gestalt theory informs transformative mediation. Fundamentally it is concerned with two things. The first is the present, raising awareness about the self and one's environment in the moment, the here and now, dealing with the past as embedded in the present moment. The second is the "whole". Human beings seek to understand in an organised manner and everything that captures our attention is in the context of its background. The Gestalt theory is non-interpretive and non-judgemental. Its emphasis is on personal responsibility and it is holistic. Gaynier 2005 *CRQ* 405 indicates that according to this theory the intent of the mediator would be to "support the development of good 'contact' between the parties". "Contact" here means a meaningful exchange between the two parties, seeing one another's point of view and sympathising, viewing one's opponent as a human being with feelings, values and needs as valid as one's own. Contact means a shift in orientation towards the dispute and each other. Gaynier 2005 *CRQ* 406.

11 Moore *Mediation Process* 43.

12 Moore *Mediation Process* 43.

13 An English rendering of the word *Ubuntu* is "A human being is a human being through other human beings". Malan *Conflict Resolution* 88. Malan further states that "[a]n expanded paraphrasing may be: Every single human being only becomes a truly human being by means of

comprehensive view of life.<sup>14</sup> Mediation is compulsory in African culture, including when a family problem occurs.<sup>15</sup>

In African mediation, conflicts are seen in their social contexts. They are not seen as isolated events and all relevant background information is covered during mediation. During mediation not only are the consequences for the parties looked at but also the consequences for others in their families.<sup>16</sup> The traditional objectives of African mediation are to soothe hurt feelings and to reach a compromise that can improve future relationships.<sup>17</sup> The values that are upheld in African mediation are African humanistic values.<sup>18</sup>

The *Lekgotla/Inkundla* is a group or public mediation forum.<sup>19</sup> The entire community is involved, the disputants and their family members, witnesses as well as members of the public. The mediation is conducted by the elders and the headman or chief.

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relationships with other human beings... *ubuntu* signifies being as human and humane as can be, being as human oriented as can be, living in genuine human-ness, and humane-ness, together with fellow human beings". *Ubuntu* is "not knowledge which can be learnt in a classroom. Neither is it a skill that can be acquired in a training session... the air of the atmosphere provides a good comparison. Like an invisible but essential prerequisite for living, it constantly enters and energises us. Most of the time, as with breathing, we may not even be consciously aware of this influence entering us. But if we are privileged to live our daily life in a human environment where *ubuntu* is taking place around us, we may experience how the *Ubuntu* spirit is becoming a part of us... the *ubuntu* attitude may reach all our words and deeds. It is by such a silent but potent process that real human-ness can be nurtured into us... the internalisation of the implications and applications of *Ubuntu* is usually an extended process": Malan *Conflict Resolution* 89. *Ubuntu* may be understood as a "quality word, but especially as an event word, with relational implications" as indicated by Malan *Conflict Resolution* 88. The origins of the African dictum "I am, therefore I exist" is consistent with the *Ubuntu* dictum "I am because you are" or "I exist because you exist", "each part grows in the context of the whole, so that it does not exist independently, nor can it be said that it merely interacts with others, without itself being essentially affected in this relationship". See Nabudere *Afrikology, Philosophy and Wholeness* 30-33.

14 Malan *Conflict Resolution* 17.

15 De Jong 2008 *THRHR* 630.

16 Family ties and community networks are "respected, maintained and strengthened" and "Africa's emphasis on relationships may be regarded as unique". See Malan *Conflict Resolution* 87.

17 Relationships of the past, present and future are looked at. There is an "interest-based orientation towards the future". Malan *Conflict Resolution* 27.

18 Malan *Conflict Resolution*.

19 Murithi 2006 *JPAS* 25. Informal courts have also arisen in the urban/informal sectors as a means of community policing and to settle disputes within communities. These are known as community courts or Makgotla. The process is informal. Senior members of the community mediate, in the presence of all interested parties, with the aim being the restoration of community relations. See Murithi 2006 *JPAS* 25 and Faris "From Alternative Dispute Resolution".

They provide the forum and listen.<sup>20</sup> All present have the right to ask questions and to make suggestions for the resolution of the dispute. The elders guide the process and also have investigative functions. They intermediate between the chief or headmen and the community and advise the headman or chief.<sup>21</sup> The objective of the mediation is to restore social equilibrium. The elders do not have formal mediation qualifications. Mediatory authority is conferred on elders because they have a reputation in the community as persons with wisdom and integrity and because they understand the cultures and traditions of their people.<sup>22</sup> The elders are appointed on the basis of their lineage and occasionally due to their "notable status" in the community.<sup>23</sup>

Dispute resolution in Africa involves families as well as neighbours and the elders participating in public negotiation.<sup>24</sup> Individual conflicts are seen as affecting the order of the group and the families of the parties are expected to be the "guarantors of agreements".<sup>25</sup> The basis of settling disputes is reconciliation instead of retribution or punishment.<sup>26</sup>

*Ubuntu*-style values are found in African-style mediation.<sup>27</sup> The essence of the African judicial system is reconciliation<sup>28</sup> and the restoration of harmony is more important than stating the rule of law.<sup>29</sup> The nature of the proceedings is informal and flexible, enabling litigants and witnesses to feel that "justice is done", and this leads to social harmony.<sup>30</sup> Harmony is important and rituals are performed to maintain it.<sup>31</sup>

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20 Faris "From Alternative Dispute Resolution".

21 Faris "From Alternative Dispute Resolution".

22 Obarrio "Traditional Justice" 32-34.

23 Obarrio "Traditional Justice" 32.

24 Obarrio "Traditional Justice" 32.

25 Obarrio "Traditional Justice" 32.

26 Obarrio "Traditional Justice" 32.

27 Murove *Theory of Self-interest* 208-217. These values include an emphasis on communal belonging as per (Murithi 2006 *JPAS* 25) the importance of promoting good in our existence; the need to be sympathetic to the suffering of others; the need to consider the consequences of our actions on the present and the future; the fact that communication is important and that relationships involve the past, present and future (Choudree 1999 *AJCR* 11).

28 Choudree 1999 *AJCR* 10.

29 Dlamini 1991 *Acta Juridica* 83-84.

30 Dlamini 1991 *Acta Juridica* 84.

31 There is a belief that one can only be in harmony in society if the relationship between you and the ancestors is good (Zulu 1998 *OTE* 185).

Peace is a communal matter and reconciliation involves all of the parties concerned.<sup>32</sup> Trust and openness are important. Facts need to be brought into the open so that the truth can be known and the parties can heal.<sup>33</sup>

According to Malan, in African society mediators function in different roles<sup>34</sup> and may even limit themselves to a passive role, as when they are simply there to represent important shared values. Mediators are entitled to change their roles from time to time according to the needs they sense at various times.<sup>35</sup>

African-style group mediation holds many advantages for the parties.<sup>36</sup> Members of families and neighbours can check if parties are doing everything to which they have committed themselves. Including *Ubuntu*-styled<sup>37</sup> values in mediation also has many advantages.<sup>38</sup> Because marriage is between families,<sup>39</sup> families deal with marriage

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32 Zulu 1998 OTE 187.

33 Murithi 2006 JPAS 31.

34 Mediators may be pressurising or manipulative; be allowed to make recommendations (eg reciprocal offers, package deals); give assessments (of information or proposals); convey suggestions on behalf of a party, who for face-saving reasons refrains from suggesting it himself; give assessments (of information or proposals) or convey a suggestion on behalf of a party; may fulfil a facilitating role, by clarifying information, promoting clear communication, interpreting standpoints, summarising discussions, emphasising relevant norms or rules, envisaging the situation if an agreement is not reached, or repeating points of an agreement already attained. See Malan *Conflict Resolution* 28.

35 Malan *Conflict Resolution* 28.

36 These include: when all the ethical, relational and attitudinal elements of a social setting are taken into consideration, it can provide a meaningful, comprehensive perspective of a conflict; the insights derived from the social context may greatly increase the understanding of the origin of a conflict; all those in the discussion experience a growing awareness of the remote and immediate causes of the conflict; the social context can also improve the end of the conflict resolution process, if the purpose of the process is formulated in social, relational language; both short-term objectives and long-term aims may benefit from Africa's concern with relationships; parties need to adopt a mode of co-operation after the conflict; relationships that are broken need to be repaired; the stages of implementation and follow-up are more far-reaching. See Malan *Conflict Resolution* 23-30.

37 In South Africa, we are not bound by a single, traditional concept of *Ubuntu*, as found in African humanism, but new meanings are shaped by our courts and writers who concentrate on values critical to South Africa's changing social order. (Bennett 2011 PELJ 47). In *S v Makwanyane* 1995 3 SA 391 (CC) the word *Ubuntu* was for example said to: "express... itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation". See Bennett 2011 PELJ 47.

38 It re-emphasises the essential unity of humanity and it promotes attitudes and values based on the sharing of resources (Murithi for example 2006 JPAS 29) it emphasises cooperation and collaboration in solving problems: Murithi 2006 JPAS 29; it gives a sense of shared destiny to people, providing a value system for giving and receiving forgiveness and giving a rationale for

disputes, violations and abuse in a way that is reconciliatory and not adversarial.<sup>40</sup> The procedure of resolving conflict is an event in the continuum of social life.<sup>41</sup> African-style mediation is characterised by norms and values that are beneficial in mediation.<sup>42</sup>

#### 4 Mediation in the South African context

African group mediation methods can be found in present-day methods which are used either independently of Western structures or used alternatively to such structures. The principles of African group mediation have influenced South African legislation, for example.

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letting go of the desire for revenge (Murithi 2006 *JPAS* 29) the members in the community form a "uniting force" that could care for the wellbeing of others and recognise the needs of others in the community: Nyaumwe and Mkabela 2007 *IJIKS* 155-157; when forgiveness is granted it generates goodwill and a renewal of social trust (Murithi 2006 *JPAS* 31) and it helps maintain social harmony and brings prosperity (Zulu 1998 *OTE* 187). Other advantages are that the emphasis is on the mending of relationships and the reconciliation of groups. (Choudree 1999 *AJCR* 16) the parties get to tell their stories and this allows them to be heard and to vent anger or frustration; the need to harmonise relationships at the macro-level impacts upon the greater whole (Choudree 1999 *AJCR* 25) the process is less intimidating to participants than Western-styled courts; the majority of disputes are resolved through mediation within or between families, so only serious cases are referred to the traditional courts (Choudree 1999 *AJCR* 17) family processes are the preferred method of dispute resolution (Choudree 1999 *AJCR* 17) and disagreements can be heard quickly. (Palmary *Traditional Leaders*)

39 *Mabuza v Mbatha* 2003 4 SA 218 (C).

40 Ozoemena and Hasungule *Re-envisioning Gender Justice*.

41 Malan *Conflict Resolution* 25.

42 These include respect for persons and property, tolerance, reliability, compassion, sensitivity towards the aged, the physically challenged and less privileged and emotional benefits due to healing. See Masenya 1997 *OTE* 448. There are also arguments that the use of Ubuntu-styled values in mediation has limitations. Amongst these are that people may not want to bring events out into the open and could withhold forgiveness, thus resulting in the process being stalled. (Murithi 2006 *JPAS* 31); that "the traditional values on which *Ubuntu* was based may no longer be relevant to the contemporary African experience". (Masango 2006 *VeE* 930940) that the community also has a dark side, the bonds of unity may not extend beyond the boundaries of the community and the individual may "disappear into the community" or the community be "absolved into the individual", as seen in patriarchal societies and religious sects: Onazi 2009 [www.go.warwick.ac.uk](http://www.go.warwick.ac.uk) 10; that the group may demand oppressive conformity and loyalty and exclude through rhetorical or other violence. (Onazi 2009 [www.gowarwick.ac.uk](http://www.gowarwick.ac.uk) 10). Other concerns are that as marriage in African societies traditionally unites two families, this makes it difficult – especially for women – to dissolve a customary marriage, and the *lobolo* may have to be paid back; (Anderson 2007 *JEP* 151) polygamy may result in women not being regarded as equal partners with men. (Ozoemena *African Customary Law* 40-42), thus resulting in unequal power during mediation; that women could be in a position of less power in the mediation environment, and women may not know what their rights are or what the provisions of the law are, for example in relation to property and domestic violence. (Curan and Bonthuys 2004 [www.csvr.org.za](http://www.csvr.org.za) 10; and Ozoemena *African Customary Law* 38-39); and the neutrality or impartiality of the mediator, especially when from the same cultural background or living in the same area as the parties, may be questioned. See Mayer 1987 *CRQ* 75-76.

The *Children's Act*<sup>43</sup> provides for mediation as a method of dispute resolution, particularly with regards to disputes involving parental rights and responsibilities.<sup>44</sup> The *Children's Act* specifies that in any matter that concerns a child, an approach that is conducive to problem-solving and conciliation should be followed, and a confrontational approach should be avoided.<sup>45</sup> Various sections of the *Children's Act* provide for compulsory mediation.<sup>46</sup> If the mediation succeeds, the parties may have the parenting plan registered with the Family Advocate or made an order of court.<sup>47</sup>

Before a Children's Court decides on a matter, it may order<sup>48</sup> a lay forum hearing in an attempt to settle the matter. This may include mediation by a family advocate, social worker, social service professional or other suitably qualified person, or a family group conference,<sup>49</sup> or mediation at a lay-forum, including a traditional authority.<sup>50</sup> If a matter brought to the Children's Court is contested, the court may order that a pre-hearing conference be held<sup>51</sup> with the parties in order to mediate between the parties, to settle the disputes between the parties and define the issues

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43 *Children's Act* 38 of 2005.

44 Regarding parental responsibilities and rights, see further Boniface "Revolutionary Changes" 151.

45 Section 6(4) *Children's Act* 38 of 2005.

46 For example, s 21(1) provides that if there is a dispute as to whether an unmarried father has fulfilled the conditions to acquire full parental responsibilities and rights, then the matter must be referred for mediation to a family advocate; social worker; social service professional or other suitably qualified person. The other "suitably qualified person" would be a professional mediator who is a member of one of the recognised body of mediators in South Africa and who has undergone a training course (s 21(3)(a)). S 33(2) stipulates that where co-holders of parental responsibilities and rights are experiencing difficulties in exercising their responsibilities and rights, those parties must first "seek to agree" on a parenting plan that will determine the exercise of their responsibilities and rights before seeking court intervention. A parenting plan sets out the parental responsibilities and rights of each party and may specify things such as with whom the child will reside; the maintenance payable for the child; contact with the child; and who may make decisions, regarding matters such as schooling and religion, as well as the way in which they should be made. S 33(5) stipulates that the parties must first seek the assistance of a family advocate, social worker or psychologist in preparing the parenting plan or mediation through a social worker or other suitably qualified person.

47 Section 34(1)(b) *Children's Act* 38 of 2005. Either of the parties may have the outcome of the mediation reviewed by a court. (s 21(3)(b)).

48 Mediation is in the discretion of the court. Parties must attend if the court decides they should. See De Jong 2008 *THRHR* 636.

49 A family group conference will include the parties involved in the matter and include any other family members of the child. The aim of the family group conference is to find solutions for any problem involving the child. The court may appoint a suitably qualified person or organisation to facilitate the family group conference. (s 71).

50 Section 49 *Children's Act* 38 of 2005.

51 Matters may not be referred to either a lay forum or a pre-hearing conference in any matter involving the alleged abuse or sexual abuse of a child.

to be heard by the court.<sup>52</sup> De Jong<sup>53</sup> submits that a "multi-generational model of mediation" that involves the extended family, including children affected by the proceedings, would probably be used. The *Children's Act* further provides that a court may make use of intervention services, which include mediation.<sup>54</sup> The *Children's Act* also contains provisions that imply that mediation should take place.<sup>55</sup>

The *Child Justice Act* also provides for mediation. Although the context within which this occurs is that of criminal justice, and child justice and restorative justice in particular, it can be situated and utilised within a far broader context. Family group conferencing<sup>56</sup> in particular can be used within the sphere of divorce and family mediation in South Africa. The restorative justice approach proposes that the persons who are most affected by the crime should be "actively involved in resolving the conflict".<sup>57</sup> The approach sees imposed solutions as less effective, less educative and less likely to be honoured. Restorative justice does not see violations as only

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52 Section 69 *Children's Act* 38 of 2005. The court may prescribe by whom and how the pre-hearing conference may be set up and whom should attend it (s 69(4)(a)). The court would take note of the other stipulations in the Act, regarding who may act as mediator, that is, a family advocate; social worker; social service professional; other suitably qualified person; lay forum or traditional authority.

53 De Jong 2008 *THRHR* 635.

54 Section 155(8) *Children's Act* 38 of 2005; De Jong 2008 *THRHR* 636.

55 Section 22(1) *Children's Act* 38 of 2005; where the mother or person having parental responsibilities and rights may enter into an agreement with the unmarried father, or other person, who does not have parental responsibilities and rights, in order to confer parental responsibilities and rights on that person. S 30(3) provides that where a co-holder of parental responsibilities and rights may enter into an agreement with the other co-holder of parental responsibilities and rights to allow the other co-holder, or another person, to exercise certain parental responsibilities and rights on behalf of the co-holder. S 234(1) states that a post-adoption agreement with prospective parent allowing for communication between the biological parent, or other stipulated person, and the child post-adoption and s 292 deals with surrogate motherhood agreements.

56 Restorative justice models include family group conferencing; victim-offender mediation; victim-intervention programs; sentencing circles and peacemaking circles. See Hargovan 2009 *Acta Criminologica* 63.

57 Umbreit *et al* 2007 *CJCR* 511. For a discussion of the history of alternatives to the formal justice system see Hargovan 2009 *Acta Criminologica* 64-66. Within the sphere of restorative justice, "circle sentencing" is practised in the USA and Northern Canada. Circle sentencing consists of a meeting to address the family and the community regarding circumstances that underlie an offence. There is no independent legislative basis for circle sentencing, but it occurs within the context of court proceedings. See Naudé, Prinsloo and Ladikos 2003 *Acta Criminologica* 12. In circle sentencing the mediator first meets with each party separately to listen to their story of what happened and to explain the program and prepare them for the meeting before the circle comes together. Umbreit 1997 *MQ* 2011. For information about the process followed in circle sentencing see Naudé, Prinsloo and Ladikos 2003 *Acta Criminologica* 12 and Umbreit 1997 *MQ* 218.

creating guilt but as also creating obligations.<sup>58</sup> The central focus here is not on "offenders getting what they deserve" but on "victim needs and offender responsibility for repairing harm".<sup>59</sup> One of the aims of the *Child Justice Act* is to "expand and entrench the principles of restorative justice in the criminal justice system for children who are in conflict with the law, while ensuring their responsibility and accountability for crimes committed".<sup>60</sup>

The *Child Justice Act* contains an explanation of what the legislature means by the word *Ubuntu* in relation to child justice.<sup>61</sup> According to the *Child Justice Act*, *Ubuntu* means understanding the "rootedness of child offenders" in their families and communities, and must take the child's family and community into account; the fostering of a child's sense of dignity and worth and the reinforcement of the child's respect for the human rights and fundamental freedoms of others; steering away from revenge, banishment, exclusion or the retaliation tradition of criminal procedure under African law, to reconciliation,<sup>62</sup> and leaving out some important dimensions of *Ubuntu* or glossing over these. For example instead of collective shaming, subjective shaming is used with the absence of the public facet to this concept.<sup>63</sup>

Family group conferencing is provided for in the *Child Justice Act*.<sup>64</sup> The term "family group conferencing"<sup>65</sup> was coined in New Zealand and is similar to victim-offender mediation. However, it can also involve support groups such as family or community

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58 Umbreit *et al* 2007 *CJCR* 517.

59 Umbreit *et al* 2007 *CJCR* 517. Restorative justice also contains elements of *Ubuntu*, as the restoration of "social harmony lies at the heart of *ubuntu*" and restorative justice aims to "promote cohesion by inducing reconciliation". See Bennett 2011 *PELJ* 35. Restorative justice is also found in the *Traditional Courts Bill* B15-2008. Clause 2(a) states that there is a need to "affirm the values of the traditional justice system, and to align the goals of restorative justice and reconciliation with the Constitution". See further Bennett 2011 *PELJ* 35.

60 Umbreit *et al* 2007 *CJCR* 517.

61 Section 2(b) *Child Justice Act* 75 of 2008; Sloth-Nielsen and Gallinetti 2011 *PELJ* 62, 70.

62 These are referred to directly as some of the objects of *Ubuntu* in s 2(b)(iii) *Child Justice Act* 75 of 2008. See further Skelton and Frank "Conferencing in South Africa".

63 The concept has been incorporated in this way due to the child's right to privacy. See Sloth-Nielsen and Gallinetti 2011 *PELJ* 70.

64 Section 61 *Child Justice Act* 75 of 2008.

65 The distinction between "mediation" and "group conferencing" has begun to blur, and some programmes refer to a process as "family group conferencing" when there are few, if any support persons and no community representatives. See Umbreit *et al* 2007 *CJCR* 530.

members, who assist the victim and offender in the restorative process.<sup>66</sup> This process is used mostly to deal with young offenders, and family members may take collective responsibility for restitution. Many group conferences rely on a script, though some are more open-ended. The number of support persons could range from ten to six or be only a few. Some group conferences can be quite large.<sup>67</sup> A family group conference is described in the *Child Justice Act* as "an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together, supported by their families and other appropriate persons".<sup>68</sup>

The family group conference may be attended by the child and his or her parent,<sup>69</sup> any person requested by the child; the victim of the alleged offence and his or her parent<sup>70</sup> and any support person of the victim's choice; the probation officer;<sup>71</sup> the prosecutor; any police official; a member of the community in which the child normally resides<sup>72</sup> and any person authorised by the family group conference facilitator to attend the conference.<sup>73</sup> At the family group conference a plan is developed on how the child will redress the effects of the offence.<sup>74</sup> A family group conference may take place only if both the victim and the offender consent.<sup>75</sup> Participants in a family group conference must follow the procedure agreed on by them and may agree on a plan in respect of a child.<sup>76</sup> If the participants cannot agree

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66 Umbreit *et al* 2007 *CJCR* 530.

67 Umbreit *et al* 2007 *CJCR* 530.

68 Section 61(1)(a) *Child Justice Act* 75 of 2008.

69 Or guardian or appropriate adult. If a child has been ordered to appear at a family group conference, a probation officer (appointed by magistrate, an inquiry magistrate or Child Justice Court) must within 21 days after the order convene the family group conference.

70 Or guardian or appropriate adult.

71 If they are not the family group conference facilitator.

72 As determined by the family group conference facilitator.

73 Section 61(3)(b) *Child Justice Act* 75 of 2008.

74 Section 61(1)(a) *Child Justice Act* 75 of 2008.

75 Section 61(1)(b) *Child Justice Act* 75 of 2008.

76 Section 61(5) *Child Justice Act* 75 of 2008. Such a plan may include any option contained in s 53(3). These options include, for example, an oral or written apology; a formal caution, with or without conditions; a compulsory school attendance order; and a family time order. The plan must specify the objectives for the child and the period within which they are to be achieved; contain details of the services and assistances to be provided to the child and a parent (or appropriate adult or a guardian); specify the persons or organisations to provide the required services and assistance; state the responsibilities of the child and of the child's parent (or an appropriate adult or a guardian); state personal objectives for the child and for the child's parent (or an appropriate adult or a guardian); include any other matters relating to the education,

on a plan then the conference will be closed and the probation officer must refer the matter back to the magistrate<sup>77</sup> for consideration of another option.<sup>78</sup> No information furnished by the child at a family group conference may be used in any subsequent criminal proceedings arising from the same facts.

According to Skelton and Zenobia,<sup>79</sup> some advantages of family group conferences are that there is the opportunity and possibility for change to occur; they invest in a complex set of dynamics and feelings; instead of being Eurocentric they "resonate with the themes and mechanisms for the resolution of conflicts in traditional African society";<sup>80</sup> the real accountability of offenders is sought during the conference; the conference brings victims into the centre of the justice process; and such conferences have healing possibilities. The process of conferencing itself may be a catalyst to rebuild families and communities.<sup>81</sup>

Some concerns exist regarding family group conferences. Amongst these concerns is that it takes a long time to set up family group conferences; they are lengthy in duration; it is an expensive process, due to the time and skills required for each case;<sup>82</sup> there is a need to harmonise the formal and informal systems; African models of conflict resolution worked well in homogenous societies where there was substantive equality between the parties, restitution and compensation was often linked to payments of goats or cattle and people could make these payments, but colonisation and apartheid have left a legacy of gross inequalities and urbanisation has led to the breakdown of the family and community. Another concern is that language difficulties may also emerge during family group conferencing.<sup>83</sup>

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employment, recreation and welfare of the child as are relevant; and include a mechanism to monitor the plan. See s 61(6)(b) *Child Justice Act 75* of 2008.

77 Or inquiry magistrate or child justice court.

78 Section 61(8) *Child Justice Act 75* of 2008.

79 Skelton "Family Group Conferencing" 180.

80 Skelton "Family Group Conferencing" 180.

81 Skelton "Family Group Conferencing" 180.

82 Skelton "Family Group Conferencing" 180.

83 Skelton and Frank "Conferencing in South Africa" 117; and Skelton "Family Group Conferencing" 180.

## 5 Reflections on South African mediation

How can African group mediation improve the way that Western-style divorce and family mediation is practised, for the benefit of the parties concerned?

A unique model which unlocks the innate conflict resolution skills which exist in communities and merges them with the realities of life in South Africa is needed.<sup>84</sup> Where Western knowledge systems are dominant, they need to be deconstructed in order to introduce other indigenous knowledge.<sup>85</sup> Neither Western knowledge nor African knowledge should be rejected. Instead, the Western knowledge needs to be brought into a complementary relationship with the relevant indigenous knowledge.<sup>86</sup> The system of mediation would have to comply with current legislation governing human rights. Concerns regarding women's rights would need to be addressed.<sup>87</sup>

These benefits are found in a combination of transformative and family inclusive mediation, but African conflict resolution goes beyond these models of mediation, as it includes *Ubuntu*-style values. All members of the community are entitled to participate in African dispute resolution, whereas in Western-style mediation circles this is not always so and many circles are "closed". Amongst the differences between Western mediation and African-style group mediation is that the customary process is non-adversarial and the emphasis is on a restorative outcome which benefits the whole community.

The African style of mediation shows that mediation can be value-based, community-oriented and directed towards a restorative outcome.<sup>88</sup> The *Lekgotla/Inkundla* can be remodelled in a modern setting as a circle for use in family and divorce mediation. Depending on the circumstances, the mediator may conduct the circle according to

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84 Skelton "Family Group Conferencing" 175.

85 Faris "From Alternative Dispute Resolution".

86 Faris "From Alternative Dispute Resolution".

87 Curan and Bonthuys 2004 [www.csvr.org.za](http://www.csvr.org.za) 23.

88 Faris " From Alternative Dispute Resolution". Often Western-styled mediation, as practised in South Africa, is focused on the individuals and is not concerned with the community or the extended family.

Western standards or use an intra-cultural style of mediation.<sup>89</sup> Narrative mediation and transformative mediation, encountered in both African and Western-style mediation, allow an opportunity for healing, and not just a settlement, and the strengths of both of these models can be combined in mediation.<sup>90</sup> South African mediators need to demonstrate a caring and nonjudgmental acceptance of the person's humanity; to help people to listen to their preference for peace and to create a safe place for dialogue to occur; to acknowledge brokenness and to share the journey towards healing. The extended family should be included in the mediation process. For example, two "elders" from either side of the family could fulfil the role of investigators and go-betweens, if this accords with the beliefs of the parties in mediation.<sup>91</sup> Elements of African group-style mediation should be included in divorce and family mediation in South Africa.<sup>92</sup>

The divorce or family mediation must be viewed holistically. Social contexts must be part of a broader mediation process that may include visits to individuals' or families' homes, and mediators may become more personally involved with the parties than is usual in Western-style mediation.<sup>93</sup> Agreements reached during mediation should "include... more than merely solving the problem or rectifying the injustice" and need to aim for genuine conciliation and, where necessary, restitution and rehabilitation,<sup>94</sup> whilst adopting a mode of co-operation, honouring reciprocal obligations,<sup>95</sup> and supporting and encouraging parties as they go through the process of peacemaking.<sup>96</sup>

It has been seen that elements of African group-style mediation are currently being applied in restorative justice in South Africa, particularly in the form of family group

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89 Faris " From Alternative Dispute Resolution".

90 Paquin and Harvey 2001-2002 *Fla Coastal L J* 167, 186-188.

91 Mediation must also allow for the participation of children, in order to comply with international and South African legislation.

92 For example, mediation must be multi-generational where possible; storytelling must take place; mediation must allow for the venting of anger and the release of emotions; emotional and spiritual spheres may be integral to the mediation; and parties must be seen as consisting of body, mind and soul (spirit): Brigg 2003 *CRQ* 302.

93 Brigg 2003 *CRQ*.

94 Malan *Conflict Resolution* 18-24.

95 Malan *Conflict Resolution* 24.

96 Murithi 2006 *JPAS* 32.

conferencing for juvenile offenders. Additionally, there is room for African group-style mediation to be used within the spheres of mediation provided for by the *Children's Act*. This can be done by incorporating elements of African group mediation in mediation sessions mandated by the *Children's Act*. These elements should also be successfully included in private divorce and family mediations that take place in South Africa, as well as in court-mandated mediation. Learning from African group-styled mediation and including this in mediation will benefit divorce and family mediation in South Africa. The principles of African group-style mediation can be used to positively change the way that divorce and family mediation is practised in South Africa.

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**List of abbreviations**

AJCR African Journal on Conflict Resolution

Aust J Fam L Australian Journal of Family Law

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CILSA	Comparative and International Law Journal of South Africa
CJCR	Cardozo Journal of Conflict Resolution
CRQ	Conflict Resolution Quarterly
Fla Coastal L J	Florida Coastal Law Journal
HSRC	Human Sciences Research Council
IAJIKS	Indilinga - African Journal of Indigenous Knowledge Systems
JEP	Journal of Economic Perspectives
JPAS	Journal of Pan African Studies
OTE	Old Testament Essays
MQ	Mediation Quarterly
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SAPL	South African Journal of Public Law
THRHR	Journal for Contemporary Roman-Dutch Law / Tydskrif vir Hedendaagse Romeins-Hollandse Reg
UP	University of Pretoria
VeE	Verbum et Ecclesia
Yale L J	Yale Law Journal