

# The Mediation in Certain Divorce Matters Act, 1987

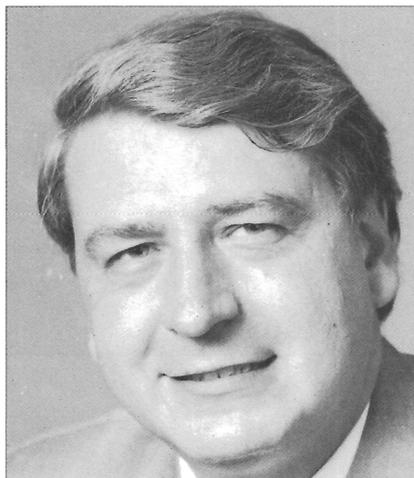
Nic Grobler  
Director: Department of Justice

The announcement on 21 May 1990 by the Minister of Justice of the appointment of a Family Advocate at the Transvaal Provincial Division of the Supreme Court and of the appointment of a Committee, chaired by the honourable Mr Justice DH van Zyl, for advice on the implementation of the Mediation in Certain Divorce Matters Act, 1987 by way of pilot projects, heralded the final phases in the realization of one of the far-reaching reforms in the field of family law undertaken by Minister Coetsee in recent years.

The Act's inventive combination of the principles of legal protection of the interests of minor children, with the objective of a mediatory approach to divorces in which such children are involved, puts the South African administration of justice firmly in the company of the pioneering systems of family law and divorce procedures of the world.

The Act provides for the powers and duties of the Family Advocate to institute an enquiry to enable him to furnish the court with recommendations on any matter concerning the welfare of minors involved in divorce and related proceedings or on such matters as are referred to him by the court. The Family Advocate may also of his own accord appear at the trial of a divorce action and adduce evidence and cross-examine witnesses if he deems it to be in the interest of the children involved. The Family Advocate shall be assisted by a Family Counsellor. The Divorce Act is also amended to add the consideration of a report and recommendations by the Family Advocate, where such are available, to the prerequisites for the granting of a decree of divorce or a variation, rescission or suspension of maintenance and custody orders by a court.

A very important aspect of the Act



is somewhat hidden, if not nearly lost, in the long title which spells out its objective of mediation in certain divorce proceedings, and the provision made for the Minister of Justice to make regulations to realize (also) this object of the Act. While it is true that, per definition, the intervention in an essentially bilateral matter on behalf of minors by neutral third parties in the person of Family Advocates and Counsellors, does constitute a form of mediation, it must be expected that the trial period during the pilot projects will prove that a much more challenging concept of mediation is called for.

In its final report, when dealing with the desirability of Family Courts, the Hoexter Commission pointed out that a characteristic feature of divorce litigation is the deeply felt need on the part of the litigants to strike back at each other, very often at the expense of the children. The Act now holds out the opportunity, at least in those divorces where the courts and the litigants will allow it to apply, for pre-trial conciliation through the mediation of both Family Advocates and Family Counsellors, to facilitate the resolution of issues regarding the children concerned in

an atmosphere without the characteristic acrimony and bitterness. Much of the realization of the mediation-objective of the Act depends therefore on the pre-trial procedures to be developed in the pilot projects and later possibly to be regulated by the Minister of Justice. It will be recalled that conciliation was a key consideration for the Hoexter Commission's recommendation of a Family Court.

One of the other findings of the Hoexter Commission, which gave rise to its recommendation of a Family Court with a counselling service attached to it, was the fact that the existing working relationship, pooling of expertise and liaison between the courts of law and social services leaves much to be desired. By allowing for mediation, as a supportive function in respect of the court-related enquiry by the Family Advocate, the Act gives more than incidental effect to the concept of a counselling service such as envisaged by the Hoexter Commission to be attached to a Family Court. In doing so, the Act may be the first step towards forging a new and unique working relationship between the legal fraternity and social service disciplines in a joint effort to protect the interests of children affected by divorce.

The availability of counsel for children affected by divorce proceedings, albeit in the particular fashion provided for by the Act, raises the question of the desirability of such assistance also in other matters, such as child neglect and juvenile delinquency.

In view of the above considerations the question could be asked whether or not a successfully implemented Mediation in Certain Divorce Matters Act might be the embryo of a fully fledged Family Court. ■