



Situating Children in Divorce Mediation in South Africa and Australia: A Comparative Study

Author

Vivian Moraa Nyaata 

Author's Email: vmtesi@gmail.com

University of KwaZulu-Natal, South Africa.

Cite this article in APA

Nyaata, V. M. (2022). Situating children in divorce mediation in South Africa and Australia: A comparative study. *Journal of policy and development studies*, 1(1), 30-41. <https://doi.org/10.51317/jpds.v4i1.226>



A publication of Editon Consortium Publishing (online)

Article history

Received: 16.06.2022

Accepted: 18.07.2022

Published: 26.08.2022

Scan this QR to read the paper online



Copyright: ©2022 by the author(s). This article is an Open Access article distributed under the terms and conditions of the Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License (CC BY-NC-SA 4.0).



Abstract

This study focuses on situating children in divorce mediation in South Africa and Australia. This study investigates how South Africa and Australia have domesticated and are implementing relevant international laws and policies that allows hearing the voices of children in divorce mediation. This study found that South Africa and Australia do not have specific legislation that provides hearing in the child's voice in divorce mediation. However, the Australian government funds on-going research to improve the hearing of a child's voice in divorce mediation. Aided by government funding, Australia has developed unique techniques to listen to the child's voice during divorce mediation. The special priority afforded to children's rights in South Africa and Australia is justified under the Capabilities approach cost-effectiveness principle because it prevents a spiralling need for state intervention later in the lives of its citizens. Some of the techniques used by the Australian government go beyond the requirements of the UNCRC and ACRWC. For example, some FRCs employ technology to screen for child abuse before hearing a child's voice in divorce mediation. Like the Office of the Family Advocate in South Africa, FRCs use a teamwork approach where child consultants and mediators work together to listen to the child's voice during divorce mediation.

Key terms: Voices of children, structures, divorce mediation.

INTRODUCTION

For several years, lawmakers and policymakers worldwide have been confronted by public concerns about the prevalence of divorce, particularly, its effects on children (Elena, 2014). While it is acknowledged that the law cannot address the underlying causes of divorce, it is possible for it to provide mechanisms to prioritise the welfare of children when their parents decide to divorce (Cummings & Bergman, 2018). One such mechanism is laws and policies that safeguard children's right to participate during a parental divorce. This study examines the specific aspect of hearing a child's voice during divorce mediation.

According to Cassandra (2011), parental divorce is a traumatic time for children and in itself a traumatic event or series of events. Like other distressing events, it brings about major challenges in a child's world, which are beyond their control. Unfortunately, many children are not told about their parent's divorce until it has happened. Family members' participation can minimise the trauma that usually accompanies family disintegration. In particular, children's participation in divorce mediation can prove invaluable in helping parents to focus on their children's needs during this process. Indeed, children are part of a family unit and, therefore, should be given the option to be part of a process that will affect their lives.

A number of factors and theoretical propositions have contributed to the claim that children have a right to a voice during divorce mediation, and adults need to listen to their voices. In addition to the international treaties discussed below, sociocultural theories and studies on childhood have shaped the notion of children as citizens with the inherent right to participate in matters that affect them. Historically, children were not considered active participants in cultural life; rather, they were defined through theories of socialisation in families and schools and by biological and psychological theories (Ramsden, 2013). A study by Noppari et al. (2017) indicates that during the 1970s, ethnographic research challenged traditional socialisation approaches and led to the study of children both as people and as interactive and independent agents. More details about children's subjective childhood experiences emerged and

highlighted that they are not simply passive recipients but social actors with their own views and thoughts, despite a paternalistic society's reluctance to afford them control of their destiny. The research includes children and their voices as insightful, legitimate and articulate. Children began to share widely diverse accounts of their family experiences, coping abilities, acceptance, and satisfaction of their various needs. It was established that children are actively involved in negotiation and re-negotiation of their family relationships. This expanded views of childhood and also enabled broader consideration of individual children's different feelings and thoughts about issues such as transition, custody arrangements, and relationships with their divorced parents. It was acknowledged that it was no longer possible to provide one-size-fits-all guidelines to divorce and that it was important to recognise children's childhood experiences without adult interpretations stifling their views (Noppari et al., 2017).

Children around the world have expressed the need to be heard during a parental divorce. In interviews with children on this issue, the overwhelming majority stated that they believed it was important to 'have a say' in their parents' divorce (Schaan, 2016). For example, the four main messages conveyed by the children between the ages of 7 and 15 interviewed in a study in Britain were: (1) the children wanted to know what was happening at the time of their parent's divorce; (2) they wanted someone to listen to their views on their living arrangements; (3) most of the children wanted to continue to have relationships with both parents, and (4) most of the children wanted to spend equal time with each parent (Parkinson, 2013).

Other studies produced similar outcomes. For example, Ewing et al. (2015) qualitative research on children's lives from their own perspectives uncovered many areas of importance that children would like to talk about during their parent's divorce, including narratives about physical space and living spaces, adjustment and organising possessions as well as emotional space (the emotional zones between the two parents' homes, and transitions between two emotional landscapes), psychological spaces (the distance between themselves and their parents, seeing their parents as individuals and distinguishing

their parents more), and issues relating to time dimensions.

From the preceding discussion, although a number of Kenyan commentators have appreciated the value of divorce mediation, they have tended to overlook the importance of having a method to ensure that child's views and opinions are available to be considered during such mediation. The paucity of references to children in the Kenyan literature also suggests that their views are not taken into account as frequently as they should be. Some mediators are even against hearing the voices of children when their parents mediate. They argue that child involvement will only amplify their vulnerability and shift the responsibility from the parents to the innocent children. While such an argument may sound convincing, such commentators fail to explore ways in which children's voices could be heard without making them vulnerable or responsible. More than that, there is little evidence to guide policy formulation on the right of children to be heard in divorce mediation because there is a scarcity of relevant research data in Kenya.

McIntosh (2000) notes that this was unfortunate because children are the most vulnerable stakeholders in divorce matters simply because of their age. This research examines how the voices of children whose parents are divorcing are listened to in Australia and South Africa. The purpose is to draw lessons and learn from best practices in this area that may inform policy-making in the Kenyan context.

LITERATURE REVIEW

Historically, children were not to be heard but rather to be seen. This perception has continued to negatively impact hearing a child's voice on many fronts in Kenya. For example, only a husband and wife are privy to divorce proceedings, and children have no right to be heard as interested parties (National Council for Children's Services, 2016). Fortunately, recent developments, motivated by the judiciary of Kenya, have laid the foundation for the country to improve its framework for hearing a child's voice during divorce mediation. The day of 18 April 2016 marked the beginning of the implementation of the new Mediation Pilot Project Rules in Nairobi's law courts. The pilot phase for the new mediation rules is being

implemented in the commercial and family divisions of the High Court in Nairobi before being rolled out across the country. This study, therefore, comes at a crucial time when Kenya needs to critically examine whether or not the mediation pilot rules are in accordance with international best practices. An examination of the new rules and existing policies reveals that no provision has been made for hearing the child's voice during divorce mediation. Unfortunately, this situation is not unique to Kenya. This section shall consider what international scholars have said around this very specific topic of hearing the voices of children whose parents are divorcing. After that, we will review the most closely related literature on this topic in Kenya.

Schoffer (2005) states that children are often those whose lives are most severely affected by their parent's divorce. Recent research on families has linked divorce to severe childhood disadvantages. Children with divorced parents tend to be malnourished, miss out on vaccinations, attend less school, and die before age five than their peers whose parents remain married (Shelley & Hamplova, 2017). There are many advantages to involving children in the divorce mediation process, provided that their parents are psychologically capable of utilising the information in a way that does not harm the children. For example, research shows that parents do not always have sufficient insight into children's lives to be able to make effective and informed decisions on their behalf. Lansdown (2011) argues that children have a unique body of knowledge about their family lives, needs and concerns, together with ideas and views that they derive from their own experiences. This experience and knowledge related to both matters affecting them as individuals and matters of wider concern to children as siblings. He argues that parental custody and access decisions that are fully informed by children's own perspectives will be more relevant, effective and sustainable.

Cashmore and Parkinson (2008) argue that children are capable of making significant contributions to the parenting plan. They describe a case in which two children, aged 9 and 11, suggested a solution that they had discussed between themselves, which was put to the parents after they were not able to agree on the arrangements for residence. The children stated that

they knew each parent was sad when they were not with the children and that they, too, missed that parent. The children said that they did not need to be together at the same time. They, therefore, suggested a plan in which each child would be alone with either parent, and at other times, the children would be together. This proposal was greeted with great relief and high emotion from both parents as it formed the best solution.

Similarly, De Jong (2008) maintains that hearing the voice of children in parental separation correlates positively with their ability to adapt to a newly reconfigured family as well as to regain mastery and control during what is often a confusing time. Sanches and Kibler (2004) argue for children's inclusion in divorce mediation on the grounds that it enables the most direct enunciation of their needs. Emery (2003) believes that a child's participation can also be used in confirming whether the adult parties are telling the truth. She adds that including the child's views may enhance the mediator's and the parent's understanding of the child's needs and that it can also be helpful to take note of a child's wishes when an impasse is reached during the mediation process. A child can add valuable information and remind parents why it is important to find solutions in the child's best interests (Ato, 2015).

McIntosh (2008) depicts that if children are to be regarded as rights-bearing individuals and as family group members who will be affected by decision-making, then they should be involved at the start of the process so that all members enter on relatively equal footing. Some scholars argue that including the child's voice early in divorce mediation can reduce both the intensity and duration of the disputes between parents. Others hold that if children cannot be consulted during parental separation for any reason, they should be informed about what is happening in a manner appropriate to their understanding. Otherwise, they may feel uncertain and apprehensive, and what they imagine may be worse than reality. If another professional is already involved with the child, the mediator should ensure that the invitation to attend is not another process replication. Another benefit of hearing the voices of children in divorce mediation is that it may enhance the chances of reconciliation between parents. Even

if parents do not reconcile, child involvement in mediation will help them communicate more effectively (Smithson et al., 2015). While the UNCRC and ACRWC recognise hearing a child's voice as a fundamental human right, and despite the above arguments for its benefits in divorce mediation, there is still considerable resistance to its realisation.

Muigua (2013) argues that divorce mediation in Kenya is mostly limited to resolving the division of property between the parties and settling child custody disputes. The need for the latter is that, first, divorce does not change parental status or responsibility, and secondly, the interests of children are best served by resolving issues outside court. He urges that mediation in family matters should be employed in Kenya on a larger scale than is the case currently, especially because the divorce rate in Kenya is on the rise (Kenya Health Demographic Survey, 2014).

Thongori (2018) states that the rates of depression in children from divorced homes in Kenya are significantly higher than in children from intact families. She adds that, as opposed to a determination made by a court, the parties to a mediation tend to successfully agree on issues such as co-parenting of children, matrimonial property and maintenance fee[s] without much resistance. She notes that the degree of conflict is higher among couples who have not sought mediation before or during litigation than among couples who have. In his recent article promoting the use of mediation over litigation in family disputes, Kariuki (2020) argues that mediation of family disputes in Kenya promotes family self-determination. He points out that "if parents can participate in mediation, they will be better able to fully explore options, truly hear one another, and ultimately be empowered to make decisions that determine their own future". Because parents know the most about their children and their own living situation, their decisions will integrate the needs of all family members better than determinations imposed by judges (perhaps based on the recommendation of another third party) or distributive negotiations orchestrated by lawyers".

Furthermore, Kariuki (2020) argues that having participated in the process fully, the parents will experience a greater sense of satisfaction and ownership with the outcomes because the agreements they make will reflect the parents' "actual needs and interests, and will thus be more enduring". Unfortunately, like other Kenyan scholars, Kariuki (2020) does not mention the importance of hearing the child's voice during the mediation process. Instead, he appears to assume that parents have the necessary knowledge and the child's best interests at heart. Unfortunately, this may not always be true (Alexa, 2016).

Kariuki (2020) argues further that in order to increase the effectiveness of divorce mediation, it is critical for mediators who wish to practice in this area to continually acquire skills that are specific to divorce mediation, considering that it is an important area with possibly more fundamental interests at stake than other areas of general mediation practice. He states that particular caution should be exercised when dealing with gender issues and the poor and disadvantaged due to inherent power imbalances. Traditionally, the man (husband) wields more financial power, and this may prejudice the woman's rights, especially where the man and the mediator exert undue influence on the woman to come to a compromise. Significantly, he cites the woman as the vulnerable party in a divorce, not the child or children involved. More than that, when he discusses the need to train specialised divorce mediators, he does not mention the training of practitioners who are properly able to listen to the children, who are the most vulnerable when their parents divorce.

Closely linked to the above, Kibet (2013) argues that divorce mediation training should be included in the law curricula of universities in Kenya, from entry-level to expert level. Every law graduate should understand divorce mediation. This would increase the number of divorce mediation professionals for the benefit of clients. In addition, Kibet (2013) argues that there is a need for greater public awareness about divorce mediation as a divorce litigation alternative in Kenya. This can be achieved by organising public seminars. Promotion of this kind within Kenya might serve to attract parties on the verge of divorce, no matter how irretrievably broken their marriages might be. Finally,

he argues that Kenya should increase the number of organisations that offer divorce mediation and follow the example South Africa set, where divorce mediation groups such as the South African Association of Mediators in Divorce and Family Matters (SAAM) and the Family Mediators Association of the Cape (FAMAC) have been set up.

Mediation processes in Kenya are more likely to achieve durable peace between the parties if all domestic actors are involved in informing the decision. Such inclusion would positively affect the legitimacy of a mediation process. Her empirical data shows the importance of civil society in promoting the use of divorce mediation in Kenya. However, her research does not mention the role, which ought to be played by children in the mediation process (Zanker, 2013).

Muigua (2018) critiques the composition of the Mediation Accreditation Committee in Kenya on the ground that it does not include specialised mediators. The Committee consists of representatives from the Office of the Attorney General, the Law Society of Kenya, the Chartered Institute of Arbitrators (Kenya Branch), the Kenya Private Sector Alliance, the Institute of Certified Public Accountants of Kenya (ICPAK), the Institute of Certified Public Secretaries of Kenya, the Kenya Bankers Association, the Federation of Kenya Employers, the International Commission of Jurists (Kenyan Chapter) and the Central Organizations of Trade Unions. In addition, the Chief Justice also appointed a Judge as the acting registrar of the Committee. He points out that informal mediation practitioners who conduct mediation every day outside court are excluded from the mediators' list approved by the Committee. Arguably, the list is also elitist, as it excludes those who act as mediators at the grassroots level.

Mangerere (2020) argues that when partners in conflict subject themselves voluntarily to mediation in Kenya, their conflicts are frequently easily resolved. However, most couples are not competent to handle conflicts without mediation; hence, they respond destructively to disagreements, and a simple conflict gets worse. Therefore, he advises that conflicts between couples should not find their way to court.

This is because courts deal with rights, whereas mediation deals with the interests of both the parents and the children. He also praises divorce mediation as a speedy, efficient, economical, flexible and informal process, taking into account the long-term underlying interests of the parties. This is unlike litigation, which does not give parties an opportunity to personally express themselves in a safe space. In addition, divorce mediation allows for creativity when attempting to resolve difficult issues between couples (Law Society of Kenya, 2020).

Mbanya (2020) states that in Kenya, divorce mediation should be conducted in good faith, with a view to facilitating less acrimonious divorce processes. She agrees with Mangerere (2020) that certain mediation processes may result in couples reconciling, that a spouse may feel that they have finally been heard, or that they can now see the other party's point of view. Although certain parties may not reconcile, they may agree to put in place measures that reduce the general acrimony between them. This may involve agreements on money and property matter and the sharing of parental responsibilities.

Ritchbell (2014) discusses the core skills a mediator in Kenya should have. Initially, mediators should try to build rapport with the parties in order for them to comfortably express themselves. He argues that the mediator should be empathetic and listen actively throughout the session. After both parties have spoken, the mediator should summarise the main points of each and reframe the needs of the spouses while pausing to confirm each party's position. No mention is made of hearing the voices of the children of the parties. Muigua (2018) argues that mediation is the solution to Kenya's legal sector crisis. Kenya's judiciary has been slowed down for many years by too few judges and magistrates handling too many cases. Furthermore, many judges and magistrates are not experts in the judicial divisions they serve. This includes the family division. He thus recommends the widespread practice of alternative dispute resolution, particularly mediation in Kenya to ease the burden on judicial officers and help resolve conflicts as quickly as possible, with as little damage to parties as possible. The article does not mention damage to children as a

result of legal disputes, particularly children involved in divorce proceedings.

Kariuki (2020) argues that formal mechanisms for conflict management have not always been effective in Kenya. Courts have been inaccessible to the poor owing to technicalities, complex procedures, high costs and delays. There has therefore been a shift towards informal mechanisms for conflict management, including alternative dispute resolution, in resolving a myriad of conflicts, for instance, those relating to land, family matters, and commercial and political questions. This article argues that recognising ADR and TDRMs (Traditional Dispute Resolution Mechanisms) within the legal framework in Kenya will contribute to economic, social, cultural and political development. Such recognition would expand the array of options available to parties to ventilate their disputes. ADR is becoming a lucrative economic venture, where many professionals now work as part-time or full-time ADR practitioners. In addition, several organisations have established ADR centres, some of which are expected to attract foreign investments by being competent in handling international arbitrations.

FINDINGS AND DISCUSSION

South Africa's Domestication of International Treaties Relating to Hearing the Voices of Children in Divorce Mediation

South Africa is a party to the various international treaties discussed in section 1.6. These include the UNCRC and ACRWC, both of which contain provisions for hearing children's voices in divorce mediation. The Constitution of the Republic of South Africa, (1996), the children's Act 38 of 2005, the Divorce Act 70 of 1979, and the Mediation in Certain Divorce Matters Act 24 of 1987, will be considered in this chapter. The first part focuses on if and how relevant provisions in the aforementioned international treaties have been incorporated into the South African Constitution, the children's Act, the Divorce Act and the Mediation Act. The Mediation Act is discussed last because the Office of the Family Advocate was established in terms of its provisions.

The South African Constitution

This sub-section outlines South Africa's domestication of some of the provisions of the above-mentioned

treaties in its Constitution. It outlines the relevant provisions on a child's definition, the child's best interests, the child's right to freedom of protection and expression from discrimination, and the right to parental care. Articles 1 and 2 of the UNCRC and the ACRWC define a child as a person below the age of 18. Section 28(3) of the Constitution also adopts this definition as well as the international best interests of the child standard.

Article 4(1) of the ACRWC and Article 3(1) of the UNCRC directs that the child's best interests be guaranteed in all actions concerning the child. Similarly, section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. Article 13 of the UNCRC, article 7 of the ACRWC and paragraph 52 of General Comment No. 12 direct that a child's freedom of expression is respected in any judicial and administrative proceedings affecting the child. These provisions have been domesticated into South African law. Section 16 of the Constitution provides for the right of freedom of expression. Article 2 of the UNCRC and article 3 of the ACRWC require state parties to take all appropriate measures in ensuring that the child is protected from discrimination. Similarly, section 9(3) of the Constitution asserts the equality of all persons, providing that the state may not unfairly discriminate indirectly or directly against anyone on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, culture and language.

Articles 1 of the ACRWC, 2 of the UNCRC and General Comment No. 12 are important in that they urge governments to take steps to the maximum of their available resources to progressively achieve the realisation of the full right set out in the respective conventions. Whether or not South Africa has done this will be discussed further in this chapter. In addition, the Divorce Act and the children's Act contain provisions relating to the child's best interests. These Acts are discussed below.

Hearing the Voices of Children in Divorce Mediation at the Office of the Family Advocate

According to Robinson (2007), offices of the Family Advocate exist in all of South Africa's nine provinces,

and this has assisted in addressing some of the difficulties and limitations associated with the adversarial divorce system. For example, they help mediate contentious issues by making the process more participatory for all members of the family while encouraging a more child-centred approach in care and contact disputes. One of the most meaningful roles fulfilled by the Office of the Family Advocate is to hear the views of children during their parents' divorce process (South African Law Reform Commission, 2020).

De Jong (2010) argues that the Office of the Family Advocate provides mandatory and voluntary divorce mediation elements, as the enquiry may be initiated by the court, the family advocate or the parties involved. However, hearing the children is voluntary, in accordance with paragraph 22 of General Comment No. 12 (2009). As both family counsellors and advocates are involved in the enquiry, the Office can be said to adopt an interdisciplinary approach to hearing children's voices. De Jong (2010) argues that because it is part of the family advocate's function to evaluate the best interests of children at an enquiry in order to make a recommendation to the court, the office uses the evaluative model of mediation (Williams). However, expecting children and parents to participate in mediation knowing that the facts and information will be used as part of the evaluation process militates against the notion of mediation. In addition, De Jong (2010) argues that because counsellors and advocates mediate a matter to determine and report on the child's best interests, this disqualifies them from being mediators. Rather, they should be regarded as advocates for the children.

Introduction to the Practice of Hearing the Voices of Children in Divorce Mediation in South Africa

Section 4 of the Mediation Act makes provision for the family advocate to institute an enquiry into divorce matters in which the welfare of children is at stake, indicating that an enquiry may be instituted in any of the following ways:

a) Request by either party involved in the proceedings to institute proceedings in terms of section 4 of the Mediation Act.

b) Request by the judge or magistrate responsible for the case. This is done by a court order requesting the family advocate to intervene in the matter.

c) Request by the family advocate that an enquiry be instituted if the arrangements made for the children of divorce do not seem to be in their best interests. Furthermore, if there are any allegations of abuse or neglect of the children, the family advocate may request the court to institute an enquiry into the matter.

Once an enquiry is instituted, a written notice is placed on the court file. The parties cannot proceed with the divorce until the matter has been investigated and the office submits a written report. Entire parties are notified in writing of the date and details of the enquiry unless an urgent investigation is required. When an interested party, a judge or a family advocate has requested an enquiry at the office of the Family Advocate, the parents are requested to attend the enquiry together with their children. On the day of the enquiry, the family advocate and the counsellor interview both parents to ascertain their circumstances. The family advocate acts as the lead mediator, and the role and function of the family advocate and the counsellor are explained to the parties. The suitability of both parents' circumstances, including financial circumstances and accommodation and support systems, are investigated. Williams, a senior counsellor currently practising at the Office of the Family Advocate in Durban, states that an initial understanding of the children's needs forms a good basis for commencing the mediation.

Interviews are then conducted with the children. This centres on their care arrangements, daily routine and reliance on their parents for specific tasks. Family counsellors, who are often skilled at interview techniques, usually conduct interviews with children. However, Williams notes that the interview takes a forensic approach as the main aim of the interview is information gathering and assessment rather than therapeutic intervention. Unfortunately, this is the main, and often, the only interview-the forensic emphasis adversely impacts hearing the child's views. Details of the forensic approach will be discussed immediately below.

The Historical Development of Hearing the Voices of Children during Divorce Mediation in Australia

This section situates hearing the voice of children during divorce mediation in Australia within the broader legislative and political background of family law in this country, providing an overview of the policy developments and relevant legislation that govern hearing the voice of a child in a parental divorce. The Australian family law system and its relevance to hearing the voice of children in divorce mediation have undergone radical change over a number of years, as will be discussed below.

In 1975, Australia passed the first law to provide for family dispute resolution, the 1975 Family Law Act (hereafter FLA), which provides for the resolution of disputes concerning children the following divorce in all the country's states. Section 60 CA of the act states that the child's best interests should be of paramount consideration in all matters that affect them. However, the FLA does not specifically refer to a child's right to have their views heard and taken into account during divorce mediation. Section 10F of the FLA defines family dispute resolution as a process in which an independent family dispute resolution consultant helps those affected or likely to be influenced by separation or divorce to resolve some or all of their conflicts. Section 60 CC refers to the need for a child to maintain a meaningful relationship with both parents and the need for the child's protection from physical or psychological harm due to being subjected to, or exposed to, neglect, abuse or family violence.

Provision for the child's views to be heard is stipulated in section 60 CC 3(a) as one of a number of 'additional' considerations when determining the best interests of a child. Therefore, as mentioned earlier, hearing children's voices in divorce mediation is not directly provided for in the FLA. However, Australia is a party to several international treaties that require hearing children in divorce mediation. These include the 1989 United Nations Convention on the Rights of the Child (UNCRC), the 1996 European Convention on the Exercise of children's Rights (EU Convention) and the 2003 European Convention on Contact Concerning Children (European Convention). Parkinson (2013) credits these three international treaties as being the main catalysts for hearing the children in divorce mediation in Australia. Fitzgerald adds that the

dedication of certain individuals and institutions, rather than supportive federal or state legislation, has resulted in the growth of hearing a child's voice in divorce mediation in Australia. The validity of these sentiments is investigated in the following section.

Setting the Policy Context for Hearing the Voices of Children in Divorce Mediation in Australia

As earlier mentioned, the Australian family law system has undergone numerous changes. This subsection examines the increased visibility of hearing a child's voice following a divorce. It begins by focusing on two key policy documents which underpin how hearing the voices of children in divorce has been understood, debated, and positioned throughout the policy formulation process of federal legislation. The first is the House of Representatives Standing Committee on Family and Community Affairs' Enquiry into Child Custody Arrangements in the occurrence of Family Separation (the Enquiry), initiated on 26 June 2003, to examine whether there should be a presumption that children spend equal time with both parents after divorce and, if so, under what circumstances such a presumption could be rebutted.

The second document is the report of the Standing Committee (the Committee), *Every Picture Tells a Story: Report on the Enquiry into Child Custody Arrangements in the Event of Family Separation* (Every Picture Report) (2003). These reports constituted the major impetus for family law reforms concerning children affected by divorce, which subsequently provided the legal platform for hearing children in divorce mediation in Australia (Fehlberg, 2011). The two policies are discussed below.

Introduction to the Practice of Hearing the Voices of Children in Divorce Mediation in Family Relationship Centres

As noted earlier, FRCs in Australia practices the child-focused and child-inclusive approaches: consult with children in a supportive, developmentally appropriate manner about their experiences during their parents' divorce;

- Ensure that the style of consultation avoids and removes any burden of decision-making from the child.

- Understand and formulate a child's core experience within a developmental framework for feedback to parents.
- Validate children's experiences and provide basic information that may assist parents in understanding their current and future coping.
- Support a parent to hear and reflect upon their child's needs.
- Ensure that mediation agreements reflect the psycho-developmental needs of each child (Yasenik & Graham, 2016).

Child-focused and child-inclusive approaches are forms of indirect rather than direct participation. This is due to one of the main aims of hearing a child's voice in FRCs is to promote the parental reflective capacity to enable an easier and more sustainable transition from a united family to a separated family, which is in line with the CAs cost-effective principle.

Moreover, the FRCs concept of promoting parental reflective capacity goes hand in hand with the CA vulnerability principle, which considers children's vulnerability when participating in matters that affect them. In order to achieve this, the help of a child consultant who analyses and explains the child's needs to the parents in a therapeutic way is necessary. This therapeutic method differs from the forensic method adopted in South Africa, as discussed in chapter 3. The Australian method is thus worth examining in order to compare international best practices with the aim of making recommendations for Kenya.

In current Australian practice, the child-focused approach allows children below the age of five to indirectly participate during their parents' divorce mediation, while the child-inclusive approach enables those over five years of age to do so. Both approaches allow very young children to be heard in their parent's divorce mediation in synchrony with the CA, which promotes child participation regardless of age. In addition, both approaches make use of a child consultant (hereafter also referred to as 'consultant'), who is often a social worker trained to listen to the verbal and non-verbal voice of the child during parental divorce (Yasenik & Graham, 2016).

Both approaches support therapeutic benefits from the consultant who works closely with a divorce mediator. The role of consultants in FRCs is to meet with the mediator handling the divorce to obtain a picture of the family history and family dynamics and to call the parents telephonically to introduce himself/herself and arrange a time to meet and consult with the child/children in the case of child-assisted participation or engage in child observation in the case of a child-focused approach (McIntosh et al., 2010). These different models are discussed in more detail later in this chapter. Following the consultation or observation, he/she meets with the mediator and the parents to share the child's needs.

As noted previously, the Australian government contracts with NGOs to run FRCs across the country. They include Relationships Australia, Interrelate and Burnside Australia, which offer their services in Western and Southern Australia, Victoria and Queensland, using the child-inclusive approach (Willis et al., 2014). However, Relationships Australia also applies the child-focused approach. Hearing the voices of children in divorce mediation facilitated by FRCs involves five steps.

These steps apply to both the child-focused and child-inclusive approaches. The first step is parent education and determination of parent reflective capacity; the second is screening for domestic violence; the third step is hearing the voice of a child itself using either

the child-focused or the child-inclusive approach; the fourth is feedback on hearing the voice of a child to parents and children, and the fifth step is including the voice of the child in the parental agreement. These steps are each discussed separately in the following sections.

CONCLUSION AND RECOMMENDATIONS

Conclusion: There are numerous challenges that children on the move have had to endure across the EAC borders. It is evident that these challenges have only been exuberated by the covid-19 pandemic. However, despite its many shocks, the pandemic has presented an opportunity for EAC partner states to reassess their strategies and protection mechanism where children on the move are involved.

Recommendations: The study recommends that the best interest of the child in all policies established to respond to the Covid-19 pandemic should be prioritised. The principle of non-discrimination and inclusion at all stages of the checkpoint should be adopted. In addition, the study recommends the adoption of effective communication mechanisms and relaying child-friendly information. Also, it encourages the child participation in the decision-making process to establish the views and needs of the children on the move. Finally, multi-sectoral response and collaboration and investing in statistical data to determine the nature and extent of response required.

REFERENCES

- Alexa, N. (2016). High-conflict divorce: A form of child neglect. *Family Court Review*, 54(4), 642–646.
- Ato, E., Gali, N. M., & Fernández-Vilar, M. (2015). The moderating role of children's effortful control in the relation between marital adjustment and parenting. *Journal of Child and Family Studies*, 24(11), 341–349.
- Australian Law Reform Commission. (1997). *Seen but not heard report*.
- Bergman, K., & Cummings, E. (2018). Innovations in research on conflict, families, and children. *Family Court Review*, 56(2), 207–208.
- Cashmore, J., & Parkinson, P. (2008). Children's and parents' perceptions on children's participation in decision making after parental separation and divorce. *Family Court Review*, 7, 12–19.
- De Jong, M. (2008). Giving children a voice in family separation issues: A case for mediation. *Tydskrif vir die Suid-Afrikaanse Reg*, 17–22.
- De Jong, M. (2008). International trends in family mediation—Are we still on track? *Tydskrif vir die Suid-Afrikaanse Reg*, 71, 454–457.
- De Jong, M. (2010). A pragmatic look at mediation as an alternative to divorce litigation. *Tydskrif vir die Suid-Afrikaanse Reg*, 515–519.
- Elena, L. (2014). Effects of divorce on children. *International Journal of Legal Information*, 47–51.

- Emery, R. E. (2003). Easing the pain of divorce for children: Children's voices, causes of conflict, and mediation. *Virginia Journal of Social Policy and Law*, 164–172.
- Ewing, J., Hunter, R., Barlow, A., & Smithson, J. (2015). Children's voices: Centre-stage or sidelined in out-of-court dispute resolution in England and Wales? *Child and Family Law Quarterly*, 27, 43–46.
- Fehlberg, B., Smyth, B., & Maclean, M. (2011). Legislating for shared time parenting after separation: A research review. *International Journal of Law, Policy and the Family*, 25(3), 318–337.
- Fitzgerald, R. (2009). *Children having a say: A study on children's participation in family decision making* (Unpublished doctoral dissertation). Southern Cross University.
- Kariuki, M. (2018). *Entrenching family mediation in the law in Kenya*. <http://kmco.co.ke>
- Kenya Demographic and Health Survey. (2014). <https://dhsprogram.com>
- Kibet, T. (2013). *The potential role of divorce mediation in advancing access to justice in divorce cases in Kenya* (Unpublished master's thesis). Moi University.
- Lansdown, G. (2011). *Every child's right to be heard: A resource guide on the United Nations Committee on the Rights of the Child General Comment No. 12*. UNICEF. <http://www.unicef.org>
- Law Society of Kenya. (2020). *Role of advocates in the mediation process*. <http://www.lsk.or.ke>
- Mbanya, R. (2020). Marriage advice from divorce lawyers. *The Standard*. <https://www.standardmedia.co.ke/sunday-magazine/article/2001297349/marriage-advice-from-divorce-lawyers>
- McIntosh, J. (2000). Child-inclusive divorce mediation: Report on a qualitative research study. *Mediation Quarterly*, 18, 55–70.
- McIntosh, J. (2010). *Children beyond dispute: Young children in divorce and separation online training programme*. <http://childrenbeyonddispute.com>
- McIntosh, J., Wells, Y., Smyth, B., & Long, C. (2008). Child-inclusive divorce mediation: Comparative outcomes from a prospective study of post-separation adjustment. *Family Court Review*, 105–111.
- Muigua, K. (2013). Heralding a new dawn: Achieving justice through effective application of alternative dispute resolution mechanisms in Kenya. *Alternative Dispute Resolution*, 1(1), 43–78.
- National Council for Children's Services. (2020). *National plan of action for children in Kenya 2015–2022*.
- Noppiari, E., Uusitalo, N., & Kupiainen, R. (2017). Talk to me: Possibilities of constructing children's voices in the domestic research context. *Childhood*, 68–83.
- Parkinson, P. (2013). The idea of family relationship centers in Australia. *Family Court Review*, 51, 195–211.
- Ramsden, K. (2013). Children's perspectives on their own wellbeing: I don't think they can hear us. *The Child, Youth & Family Work Journal*, 18–30.
- Richbell, D. (2014). *How to master mediation*. Bloomsbury Publishing.
- Robinson, J. A. (2007). The right of children to be heard at their parents' divorce: Reflections on the legal position in South Africa. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, 263–267.
- Sanches, A., & Kibler, S. (2004). Empowering children in mediation: An intervention model. *Family Court Review*, 42, 554–564.
- Schaan, V., & Claus, V. (2016). Resilience and rejection sensitivity mediate long-term outcomes of parental divorce. *European Child & Adolescent Psychiatry*, 25, 1267–1269.
- Schoffer, M. (2005). Bringing children to the mediation table: Defining a child's best interest in divorce mediation. *Family Court Review*, 323–330.
- Shelley, C., & Hamplova, D. (2017). Single motherhood and mortality in sub-Saharan Africa: A life course perspective. *Demography*, 50(5), 1521–1549.
- Smithson, J., Barlow, A., Hunter, R., & Ewing, J. (2015). The child's best interests as an argumentative resource in family mediation sessions. *Discourse Studies*, 17(5), 609–623.
- South African Law Reform Commission. (2020). *Alternative dispute resolution in family matters*.
- Thongori, J. (2018). Experts raise issues fanning divorces and separations. *Daily Nation*. <https://www.nation.co.ke>
- Willis, A., & Walters, L. (2014). Assessing play-based activities, child talk, and single-session outcome in family therapy with young children. *Journal of Marital and Family Therapy*, 287–301.
- Yasenik, L., & Graham, J. (2016). The continuum of including children in ADR processes: A child-centered continuum model. *Family Court Review*, 54, 186–202.

Zanker, F. (2013). Legitimate representation in mediation processes: Civil society involvement in Liberia and Kenya. *Mediation Arguments*, 1–22.