After the Act

Access to Family Justice after LASPO

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• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

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First published in Great Britain 2019

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Maclean, Mavis, author. | Eekelaar, John, author.

Title: After the act : access to family justice after LASPO / Mavis Maclean, John Eekelaar.

Description: Oxford, UK ; Portland, Oregon : Hart Publishing, 2019. | Includes bibliographical references and index.

Identifiers: LCCN 2018053024 (print) | LCCN 2018056243 (ebook) | ISBN 9781509920204 (EPub) | ISBN 9781509920198 (hardback)

Subjects: LCSH: Legal aid—England. | Domestic relations—England. | Great Britain. Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Classification: LCC KD512 (ebook) | LCC KD512 .M33 2019 (print) | DDC 346.4201/5—dc23

LC record available at https://lccn.loc.gov/2018053024

ISBN: HB: 978-1-50992-019-8
ePDF: 978-1-50992-021-1
ePub: 978-1-50992-020-4

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

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11

A Post-Legal World for Family Disputes?

This book arose from our concern about the withdrawal of public funding for legal help with most private law family issues in LASPO effective in 2013. The prevailing message from government clearly set out in the policy paper preceding the Act[1] was that legal help with problems arising from personal decisions should not be the responsibility of the state. We therefore began by looking carefully at the evidence regarding the need for such help[2] and began to explore published reports, interview key people and directly observe the services provided as we tried to map the initiatives developing after the changes effected by the Act. We aimed to describe who is doing what, and comment on what seems to work. The range of activities surprised us, from residual support from government for various bodies and initiatives to pro bono work by the legal professions, the activities of students and the work of the advice sector. But we were left with a number of unanswered questions which we set out here, followed by our thoughts on where they might take us.

I. The Initiatives Summarised

In chapter one we described what we term 'the collapse of the supportive state' as it affects access to family justice, and the continuing need for family legal help. We began by presenting the evidence of the prevalence of such need. In the questions asked in the early surveys, Hazel Genn[3] used the term 'justiciable event' rather than 'legal need'. She was interested in the prevalence of problems for which there could be a justiciable outcome, with a view to raising awareness of what the law can offer, before going on to ask questions about what kind of help had been sought, ranging from talking to friends and family, through general advice, to the active partisan help of a lawyer. The problems included under the label 'family' in these early surveys are not always independent of each other; they may overlap, and there are

[1] Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales*, CP 12.10, Cm 7967 (2010).

[2] H Genn, *Paths to Justice*, (Oxford, Hart Publishing, 1999).

[3] ibid.

differences of overall definition in the various surveys, such as whether to include domestic violence and children's schooling issues. However defined, family issues have been found to be linked to other difficulties with health, debt, housing and employment.[4] But there is no evidence that a lawyer is the only person who can help, or that various combinations of intervention cannot be effective.

Chapter one also traced the development of legal aid for family matters from the acceptance of government responsibility to help service men and women after World War II, acknowledging the need for help in re-establishing post-war stable family life in a heavily legalised divorce system, to a comprehensive and generous level of support. But after the cost began to rise in the 1980s, legal aid was given a fixed budget, and tightly controlled contracting began in the attempt to secure value for money. As economies of scale were sought, many small firms were no longer able to offer family legal aid services. The government had failed to realise that the rising costs were due not so much to lawyer-driven increases in litigation, but rather to the rising number of divorces, more complex legislation on finance, more wealth to divide derived from more home ownership, and more willingness to contest children issues. A more holistic community-based approach to providing legal help, together with advice services, was attempted during the 1990s, bringing together local sources of advice in CLACs and CLANs, but the different cultures and funding mechanisms of the various agencies made cooperation in seeking a legal aid contract too difficult to sustain at the time. But these relatively recent attempts indicate that the present post-LASPO approach is by no means the only way to work. The Scots have managed to avoid cuts to provision while experiencing similar cuts in funding, and innovative work is developing in other jurisdictions.

Given the failure of government attempts so far to discourage use of courts in family matters by removing access to lawyers, and given the major cuts in expenditure as part of 'austerity' policies across government departments, we were pleasantly surprised by the extent of support to the litigants in person who now populate the family courts, which we describe in chapter two. This is no longer in the form of direct subsidy for using a lawyer, but instead resources are directed to advice and support organisations through the LiPs support strategy (LiPSS) and the aims of the modernisation of courts programme to achieve effective use of IT to simplify process and provide information for users. Following the failure of ADR (Alternative Dispute Resolution, in effect, mediation), the policy focus has turned to ODR (On Line Dispute Resolution). This line of development slowed down as the Dutch leading brand, the *Rechtwijzer*, proved to be both unpopular and unprofitable despite government support. Government here is now more focused on providing information, and is making progress. But research confirms that, while information can be obtained from a website, the step of making decisions

[4] See eg P Pleasence, A Buck, NJ Balmer, A O'Grady and H Genn, 'Multiple Justiciable Problems: Common Clusters and their Social and Demographic Indicators' (2004) 1(1) *Journal of Empirical Legal Studies* 301.

about what to do next requires the support of what the Canadians call a 'trusted intermediary'. There are encouraging developments: government departments are now contractually required to set up digital support when taking a service out of direct provision and offering it online, and work on the Alternative Digital Pathway (alternative to court) continues in a more nuanced form with close reference to client needs, and is now complemented by pilot schemes where trusted expert intermediaries (Cafcass) help parties settle children cases even after issuing an application to the court.[5]

Having looked at the role of government, we then considered the activity of the professions (chapters three to six). Pro bono activity is clearly increasing through the Law Society and LawWorks with their organisation of member clinics, and the Bar Pro Bono Unit. Motivations are complex. They include not only philanthropy but the wish to support the reputation of the profession as being socially responsible, or to give young lawyers in city firms experience with clients who are not otherwise available in corporate work, or young barristers the chance to handle complex cases before high profile judges. There is no direct government support as in Australia, where Public Interest Insurance for in house lawyers doing pro bono work is covered by government. (There appear to have been no claims so far in the 10 years of the scheme.) The profession also has anxieties about letting government off the hook by doing too much pro bono work.

The impact of pro bono work on potential clients is limited by the number of hours available, problems of matching expertise to client need, and the general culture/pattern of working pro bono, which is more often a set number of hours rather than full end-to-end casework. It is particularly difficult for members of the Bar to offer firm diary slots. There is no tradition of pro bono work being undertaken by recently retired lawyers, as in the US. The profession is also working to offer more affordable services, such as through free initial advice, use of unbundling and IT and cutting down on administrative costs. Even so, it is increasingly difficult for former legal aid practitioners outside the large firms to stay in business under the combined impact of fewer eligible clients and lower rates of legal aid remuneration. And the quantity of pro bono work done, though representing a considerable commitment and cleverly organised by groups of firms or individuals, remains far from filling the LASPO gap. And if it ever did fill the gap, there is every chance that government would feel able to move the goalposts.

We have illustrated that pro bono legal work by solicitors is currently provided in an extraordinarily confusing range of settings with different criteria for access and levels of help offered. The situation for members of the Bar is even more difficult. The Bar Pro Bono Unit had helped only 470 family cases in 2016–17, less than half of those referred to the Unit by solicitors or MPs. A number of schemes

[5] See *Piloting child impact analysis and Positive Parenting Programme*: https://www.cafcass.gov.uk/2018/02/01/piloting-child-impact-analysis-positive-parenting-programme/ (last accessed 5 September 2018).

run by barristers had foundered, as being simply too difficult to organise timing and appropriate specialism, with the added stress of direct access. But the judiciary, having taken due notice of the impending LASPO changes, had in some cases made preparations. Although the cuts were intended to reduce the number of cases coming to the family courts, they were followed, after an initial dip, by increases in applications and a large increase in the number of self-representing litigants. Some of the judges needed to deal with cross examination by alleged perpetrators in domestic violence cases, others had cases with a need for translation in care proceedings, or simply with litigants who did not understand what a court could or could not do. A number of Designated Family Judges had set up duty solicitor schemes in their courts, which varied in scope, strategy and level of success. It seems that vision alone is not enough, and that practical and reliable support services matter.

In chapters seven to ten of this exploratory study, we moved from the work of the professions to look at lay support. Chapter seven reports on two examples of unregulated non-professional activity related to legal needs of unrepresented persons appearing in family courts, the Personal Support Unit (PSU) and McKenzie Friends. The PSU, now active in 20 courts, offers a court-based support service for LiPs, drop in or by appointment, with no limit on visits. After LASPO, over half their work consists of family cases. The volunteers are carefully trained *not* to give legal advice. They come from a range of backgrounds, including retired judges, and run a reliable and efficient service. They do not speak in court, though some judges would like them to, but can sit with a LiP in support. There are pressures for PSU to do more, with volunteers reporting that the judiciary would like them to help parties reach agreement, perhaps through some form of negotiation or mediation. The distinction between providing information and giving advice, however, remains difficult. Their line is that if someone knows what they want to do, they can help them to do it. If they do not know, they cannot advise them what to do, but we observed how difficult this approach can be in practice. In the view of some key lawyers, PSU goes too far towards giving advice, such as in help with filling in forms which have a legal implication. People are using terms like 'legal help' or 'divorce coaching' to avoid the issue. But at present PSU is holding firmly to the distinction, however frustrating this may be for volunteers and clients. This secures the confidence of the judiciary and avoids further criticism from the profession and possibly avoids concerns over insurance.

The second non-professional activity discussed in chapter seven was the work of McKenzie Friends, who are not qualified lawyers, but who may sit with the client and speak if asked to do so by the court. They can certainly be seen as offering advice to clients in the conduct of the case in court, but not as 'conducting litigation' on the client's behalf outside the court (such as signing documents, which is a regulated activity) or addressing the court (which is also regulated), but they may do this with the permission of the judge. There is a Society of (fee charging) Professional McKenzie Friends, but there is fear that recognising these as a professional group risks creating a new branch of the legal profession which falls outside

the regulatory system. Discussion about attempts to regulate this group remain ongoing, as there are concerns about the commitment of some to a particular view (such as fathers' rights in children cases) and the provision of legal information and advice which is not always accurate or appropriate. In some settings students are represented as following the McKenzie model, though this has been criticised as being inappropriate. So, as with the pro bono practitioners' services, it is hard for a potential client to understand the range of lay support that is on offer in court.

Chapter eight widens the survey of the variety of forms of assistance that may be available (though by no means everywhere). Sitting between professional and lay support are the students engaging in pro bono legal activity. The numbers taking part are impressive. Over half of the LawWorks clinics are university led and funded. But the numbers of clients helped is not so exciting. Bearing in mind that most clinics are only open in term time, and not during exam periods, and that students are not able to give advice without supervision from a practising solicitor, it would be surprising if large number of clients were receiving significant support. Full legal service is rare. We observed a light footfall in a number of clinics offering legal advice, as opposed to high rates of use of court-based Help Desks in family work manned by students. Again, as in pro bono, there were mixed motives. Are the students mainly interested in improving their CV? Is the university mainly interested in improving its degree results, or obtaining data for research? Is anyone primarily interested in helping as many clients as possible?

We describe in detail the CLOCK virtuous circle process, by which students, trained by local lawyers, court staff and their tutors, can help both solicitors and the court, and benefit the client. The model began in Keele but is rapidly spreading to other institutions and requires particular outreach skills from the organiser. We describe another effective scheme where the court help desk is combined with the provision of legal advice by the pracademic in charge.

Having looked at ways in which legal practitioners, either by themselves or along with others, can work with others outside court settings, and the kinds of help available in court settings, the next step is to ask what we can learn from what is being achieved outside the legal system entirely but within the advice sector (the Third Sector). In chapter nine we note that there was no tradition of family work in that sector before LASPO, as family legal aid had been relatively comprehensive in scope. In addition, the advice sector tradition involved supporting the vulnerable individual against more powerful social actors, such as the state, or landlords, employers or creditors. But as we have noted above, power relations also exist within family settings. Yet in the prolonged period of austerity after LASPO it was difficult for advice agencies to consider responding to additional requests for help while existing funds were under threat, and in 2015 less than a quarter offered legal advice for family issues.[6]

[6] A Ames, W Dawes and J Hitchcock, *Survey of Not for Profit Legal Advice Providers in England and Wales* (Ipsos Mori for Ministry of Justice, 2015), Figure 3.3.

So the constraints under which this sector operates are real. Nevertheless, the advice sector has many strengths. It is more accustomed to giving advice than defining it, so does not agonise so much over the distinction between advice and information, or insurance cover (although even here an adviser was found disclaiming the power to advise). Skill in giving advice is the essential element of the work. When dealing with benefit claims or debt enforcement, you often just need the guide book, and the training to look up the rules and help the client apply them. It is easy to quantify success in terms of money recovered. Success in family matters is harder to evaluate, in that family law is mainly about the future, not past facts, and the legal framework contains considerable areas of discretion in money matters and focuses on a third party in children cases.

Citizens Advice (CA) contributes to the post-LASPO gap in a number of ways. One is CourtNav the interactive website for making divorce applications, described in chapter four,[7] and project funding through the local CA has supported a court family adviser in one city for a year. The aim was not to appoint a lawyer but an advice worker. But, as described in chapter nine, there were confused messages about whether advice can or cannot be given. The work is getting harder, particularly to find a specialist adviser or to refer on. But the skills of identifying the issues, discovering the appropriate next step and moving towards it are of great value. The advice worker will always record what advice was given, and will be insured to do this work. Perhaps this is not so different from legal practice. We also described[8] secondary legal consultation by Gingerbread, the national organisation for lone parents, where a non-lawyer helpline advice worker could translate for the caller what the law is about (eg, the child's best interests and not judging unpleasant behaviour by the other parent) and give practical advice or refer to a panel of pro bono family lawyers. But the advice worker could also talk regularly with a specialist family barrister for advice on issues affecting a number of cases. The Canadians call this secondary consultation, and it provides another example of effective use of time, and effective co-working between lawyer and advice worker.

II. Impact Evaluation

What do we know of the impact of these activities? As we noted in chapter two, government is pressing forward with its programme to modernise the courts and for that purpose to digitise the process, including applying for a divorce online,[9] enabling courts to accept applications and other documents online, and even requiring bundles of documents to be submitted online though they may have to be scanned into the system. There was initial anxiety about whether the court staff,

[7] See pp 79–80.
[8] See pp 146–9.
[9] https://www.gov.uk/apply-for-divorce.

reduced in numbers, and not necessarily sufficiently experienced, would be able to cope, but the changes appear to be progressing relatively smoothly. Evaluation of this kind of change tends to consist of measuring targets reached and the completion of a process. But IT is also being used by government, as well as independent providers, to give information and guidance about how to take steps to resolve a family matter.

In this regard, government plans have been affected by the failure of the *Rechtwijzer* in the Netherlands, as described in chapter two, so an element of caution can now be observed in moving to digital services, aiming at user-led design, and it is now a requirement across government that when any service becomes digital rather than face-to-face, there must be a contract to provide support for users. Government has published a Digital Service Manual,[10] and the Ministry of Justice has a contract with the Good Things Foundation, based in Australia, to provide a digital assistance service for family matters. Under the heading 'Our UK work in numbers', the Foundation claims to have supported 2 million people to gain digital skills, of whom 84 per cent were socially excluded.[11] Nevertheless, it remains obscure as to how outcomes can be measured, and it is notable that the successor to *Rechtwijzer* in the Netherlands, 'Justice 42', which declares that 'Instead of the tournament model where two lawyers fight for their clients, the clients themselves are led through a guided mediation process that seek the best solution for the couple and their children', makes no mention of law or legal advice. Such websites, like the Parent Guide Family Wizard,[12] an online diary designed to help members of separated families organise their lives, may be very useful in avoiding conflict, but what does it have to do with law? It may be an aid to the functioning of the justice system, by helping parents to comply with an agreement reached either through the courts or privately. But it may equally help to sustain a totally unfair and even harmful agreement reached privately or without reference to the legal position under the Children Act 1989.

As regards the legal profession, in chapters three and five we noted the constraints under which solicitors and (particularly) the Bar operate, which limit the extent to which they can replace the legal services lost after LASPO. In chapter three we referred to the extent of LawWorks clinics (223) and client surveys in Wales which revealed that, after attendance at a clinic, 81 per cent felt less stressed, 67 per cent felt their physical or mental health had improved and 44 per cent felt that (where applicable in their case) they had avoided going to court. This work is now being carried out on a national basis.[13] Similarly the PSU's 'Spot' surveys, referred to in chapter seven,[14] record high levels of customer satisfaction, thus

[10] https://www.gov.uk/service-manual (last accessed 5 September 2018).

[11] https://www.goodthingsfoundation.org.au/home (last accessed 5 September 2018).

[12] See OurFamilyWizard.com.

[13] See J Sandbach and M Gregor, 'Hearing the Client's Voice in Pro Bono – What helps and What gets in the Way?', Paper given at the Access to Justice and Legal Services Conference (University College, London, June 2018).

[14] See p 107.

supporting the case for funding. CLOCK, Community Legal Outreach Keele, the university based support programme described in chapter eight, also collects and records a great deal of information which it analyses with care both to improve services and also to provide potential research data to the university which supports the project financially. Finally, in the private sector, where fundraising is not an issue (although providing a good service with due client care is an important consideration), DLA Piper (whose work is discussed in chapter three) recently reviewed various aspects of their pro bono work. One of the areas reviewed was the comparative international research undertaken for NGOs to support legislative reform. They found that although the comparative research often took up to three years to have an impact, it was achieving it, and was valued by the users. They also undertook a review of one-off, face-to-face advice clinics. This review found that the local single advice session, usually with a young lawyer with support but working outside his or her area of special expertise did not lead to high levels of client satisfaction, and so the firm made a decision to transition its clinics away from one-off face-to-face advice towards specialist clinics which offer end to end casework for individuals in specific areas of identified legal need. Because the new clinics provide advice and representation in just one discreet area of law, the lawyers can be trained to a higher standard. Various forms of service are therefore attempting data collection, and there is a variety of motivations at work, with varying degrees of success.

However, a 'pure' examination with a statistically robust sample of what kinds of intervention are most effective for different kinds of client or different kinds of problem at different states of resolution, is hard to find. Indeed this is generally difficult in family matters where there are many additional factors involving new partners, new children, new jobs or a new house. It may take time to see the outcome, and assessment of success may vary between parties and professionals. For example, the Manchester Cafcass pilot was designed to reduce applications to court. This can be measured. But it is not possible to see whether the absence of a court hearing and possibly of an order resulted in a resolution of the problems over the long term, or whether the situation deteriorated further.

The difficulty of assessing the quality of legal aid work is not new. It became acute when the need arose to select which law firms might receive a legal aid contract from the Legal Services Commission. Client feedback was not thought to be sufficiently rigorous, and so a process for selecting samples of case files and subjecting them to peer review was developed.[15] This method is well established now in many jurisdictions, but cannot be applied in the advice sector, which does not typically create case files. For example, while it appears to be the case that the PSU can be of great assistance to the court and clients when working with and supporting another pro bono activity where professionals are pressed for time and need administrative backup,[16] the outcomes for the individuals involved are

[15] See A Sherr, R Moorhead and A Paterson, *Lawyers: The Quality Agenda vol. 1 Assessing and developing competence and quality in legal aid; the report of the Birmingham Franchising Pilo*t (HMSO, 1994).
[16] See pp 98–100, 108.

hard to evaluate. And in the case of PLE, with its aim of improving public legal capability and developing websites, in particular, AdviceNow, widely regarded as the most successful of the various independent sites, it is difficult to carry out evaluation as there are so many factors affecting the outcome of any family matter and it is not practicable to attempt a randomised controlled trial. It may not be possible to gather more than a simple customer satisfaction rating.[17] This is often frustrating for those coming from the advice sector, where it has been possible to quantify the monetary gains that benefits or debt advice has achieved for clients.

III. Which Way Forward?

We can see that information-giving about family matters is developing fast. There is more concern to provide support for those who find digital process difficult. While some digital sources, such as AdviceNow, are excellent and may be all that some individuals need, there is still a way to go in recognising that knowledge is a large step beyond information, and a trusted intermediary may be essential for many individuals in enabling them to decide how to use this information and move towards solving a problem or resolving a dispute. This role requires some specific expertise, such as regarding court process, the framework and orientation of the law, and on the limits of what a court might accept.

A. Is a Fully Qualified Lawyer Always Needed?

However, this may not necessarily require a fully qualified lawyer. Our discussion of the advice sector suggested the potential for specific supplementary training for advice workers, not unlike secondary specialism training for young LawWorks pro bono practitioners.[18] But equally, the adviser needs to be able to detect if the issue requires a further level of legal expertise, or if the dispute is too entrenched to be resolved. In that case, the adviser needs to be able to make the appropriate onward reference. If proceedings in court are necessary, it may be sufficient in relatively straightforward cases (such as uncontested applications for certain orders) for a party or parties to represent themselves with the kinds of support offered by the PSU. We might also learn from the work of the pro bono group (Horizon), discussed in chapter three, where trainee paralegals had decided to specialise in an area where they felt there was not too much law to learn, nor barriers to representation, namely, Personal Injury Payment applications and appeals to DWP tribunals. In this way they were helping the maximum number of clients while developing their career prospects. They had an 85 per cent success rate in terms of awards made and appeals succeeding.

[17] A Sherr, R Moorhead and A Paterson, 'Transition Criteria: Back to the Future' (1993) 7 *Legal Action* 7.

[18] See pp 150–1.

So rather than thinking only about *lawyers*, we need also to think about changing professional boundaries and look outside the legal professions, and learn for example how things which used to be done by medical doctors are now being done by nurses or pharmacists with specific extra training. We see clinical assistants in general practice who have had a year less of medical training but make a strong contribution. And in medicine more is expected of the patients. They need to give a good history to take part in the treatment decision making, and to comply with the agreed regime proposed ('stop smoking!) In the world of teaching, the role of teaching assistants and Newly Qualified Teachers (NQTs)[19] is expanding. Access to the highest levels of expertise is being more appropriately allocated. Not everyone with a minor infection expects to see a hospital consultant. The pharmacist is becoming a much more widely used source of medical advice.[20]

We can observe the same process in the creation of 'Limited License Legal Technicians' (LLLTs) in Washington State. LLLTs acquire qualification after three years of training (which is considerably shorter, and cheaper, than for a full legal qualification), may give legal advice (presently confined to family law matters) and own law firms.[21] While we believe that private family law issues should not be kept out of the scope of legal aid as it now is, we believe that many of the matters dealt with by lawyers under the previous legal aid system could be treated in a different way by advisers with enhanced training as described above. Pro bono activity, law schools clinics and volunteer activity all have a role to play, but alone cannot fill the LASPO gap. They also serve other purposes. But, together with those activities, a significant contribution could be made to filling the gap by developing the advice sector, whether through Citizens Advice or other settings. As was stated in the Evans Review of Legal Aid in Scotland: 'Advice services provide a critical service to facilitate early and effective resolution to problems, preventing these escalating, and avoiding court action. The positive impact on lives can be considerable and the economic gain significant'.[22]

We are of course aware of the financial constraints affecting that sector. But in addressing both the personal and social costs of the absence of early legal advice, it is necessary to take into account all reasonable options. That still leaves the issue of availability of legal expertise for those without the necessary financial means in cases which cannot be resolved through the adviser or where a fully legally qualified professional is needed for court proceedings. We believe that in appropriate cases this could be provided on a publicly funded basis, in the same way as

[19] These are qualified teachers who have not yet completed their year's induction period.

[20] See https://nhs.uk/NHSEngland/AboutNHSservices/pharmacists (last accessed June 20 2018). See Harvard Law School, Center on the Legal Profession, 'Addressing the Supply Problem: how medicine made space for physician assistants' *The Practice*, 4 July 2018: https://thepractice.law.harvard.edu/ (last accessed 21 August 2018).

[21] https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians (last accessed 21 August 2018).

[22] M Evans, *Re-thinking Legal Aid: An Independent Strategic Review (of Legal Aid in Scotland)* (February 2018) 56.

mediation is presently publicly funded, by a fully qualified lawyer advising clients together in what we have elsewhere called 'lawyer-assisted family mediation'.[23] In cases where this is not appropriate, such as where the parties are too conflicted, adequate legally aided advice and representation should be available. The overall result would be in essence what has been described as a 'mixed model', recommended in Scotland on the basis that 'any local advice service receiving an enquiry about legal assistance would be required to at least signpost and, better still, refer the client where that service was not able to help. To be effective, an accurate database of local service and referral protocols would have to be developed with responsibility for the oversight of publicly-funded legal assistance and for assessing local action plans resting with a central body, with powers to monitor the delivery of the service'.[24]

B. Information and/or Advice?

It may therefore be time to stop thinking in terms of provision solely by lawyers or by non-lawyers, but of a system in which both legal practitioners and others contribute in an integrated way. It also may be necessary to be less fixated on the boundary between information giving and advising. There is a distinction between them, but also considerable overlap and uncertainty with regard to their provision. One only has to think of a label on a tree describing its species and a notice on a post saying 'Risk of electrocution'. Both convey information, but the latter also advises action. This ambiguity has led to many attempts to refine the distinction: for example, the Lord Chancellor's Department 1999 Consultation Paper on Community Legal Services[25] described 'Information' as being where the customer 'wants to know the rights or obligations he or she has in a particular situation and what his or her options might be' so that what is needed is information 'specific to a category of problem … but not specifically targeted at the customer's individual circumstances'. 'Advice' however referred to when the customer wants to 'take action, or is being threatened with action' and wants to know exactly what his or her options are, and how to set about taking them, so what is needed is 'detailed information that is directly applicable to the customer's individual circumstance, including suggestions for action …'.

However, the individual may wish to 'take action' in either case; and, given that both cases arise from a 'particular situation' it may be very difficult to distinguish between information that is 'specific to a category' and that which is 'directly applicable'. In both cases it is said that the customer wants to know what their options are. In its response to the Consultation, the Advice Services Alliance retained the

[23] M Maclean and J Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing, 2016) 129–30.

[24] Evans (n 22) 62–3.

[25] Lord Chancellor's Department, *Consultation Paper on Community Legal Services* (1999) at 39.

definition of information as being 'not specifically tailored to the circumstances of individual clients' but added a further distinction between 'general' and 'specific' advice. The former was 'basic advice as it applies to the circumstances of individual clients, but not offering detailed help or a full range of services in relation to complex legal problems' often involving explaining legal rights and responsibilities 'in broad terms' but also 'setting out possible options'. The latter covered 'services providing assistance on complex legal problems (entailing) detailed advice, negotiation and advocacy … and representation at courts and tribunals'.[26] Once again, it may not always be easy to differentiate between 'basic' advice that 'applies to the circumstances of individual clients' and the Lord Chancellor's Department's definition[27] of 'information' as being where the customer 'wants to know the rights or obligations he or she has in a particular situation and what his or her options might be' so that what is needed is information 'specific to a category of problem'. The sharper distinction may in fact arise between 'basic' and 'specialist' advice.

Whatever view may be taken of these matters, it is important to understand what turns on such distinctions. Because giving legal advice is not a regulated activity except in the context of 'reserved legal activities', this may be given by someone who is not a qualified member of the legal profession, though of course they should not claim to be acting as such.[28] The true constraint is their training and competence, and in this regard the distinction between general and specialist advice is crucial. At a certain point a matter may need to be handled by a qualified lawyer, even if the matter is not a 'reserved legal activity'. We therefore believe that there should be no constraint upon properly trained non-lawyers from providing 'general' advice, whether legal or otherwise, and that an important part of that training must be to know when the matter should be referred to specialist lawyers. This corresponds to the views and practices of the second group of employment advisers detected by Samuel Kirwan, one of whom said that 'when you say legal advice, people think solicitors, barristers, wigs and gowns, and formal letters. They don't realise that what they are coming to see is actual legal advice'.[29] This seems to accept that what the adviser was giving could be seen as 'general' legal advice (although not recognised as such by clients) which only became 'legal' advice when specialists were required.

C. Only Resolving Disputes?

Understandably, in the context of discussions about legal provision, government tends to frame the issues as concerning the resolution of *disputes*. We speak of

[26] Advice Services Alliance, *Response to the LCD's Consultation Paper*, 1999, paras 3.38–9.
[27] See n 25.
[28] See above pp 12, 60.
[29] See p 150.

'alternative *dispute* resolution', of which mediation is a prime example. The government's goal has been to find a cheap, quick way of resolving disputes. However, as we observed in our study of lawyers and mediators, 'it is possible for people to fail to agree, yet not be in dispute'[30] and we noted that those attending mediation may often be seeking advice as to how their problems might be resolved rather than the resolution of a dispute between them. Therefore, the issue can often be presented as one of problem solving rather than dispute resolution.[31] We have noted above how in many cases this advice, even if legal, may be suitably provided by non-legal professionals. But we should go even further, and observe that the advice needed may not only be regarding legal matters, but concern wider ranging problems one or both of the parties are facing.

We observed earlier[32] the evidence that family problems frequently present themselves in clusters: a relationship breakdown can lead to financial and housing difficulties, and these in turn to health issues: or the causal chain may run the opposite way. Without information and support that addresses these matters, disputes may well arise. This understanding underlays the proposals for CLACS and CLANS, which failed for organisational reasons in this jurisdiction, although the approach taken in Scotland has been more successful.[33]

In this respect, also, advisers with a broader remit than that of professional lawyers may be able to find ways to resolve or mitigate the wider problems, thus reducing the risks of subsequent dispute between the parties. This does not mean that legal issues too may not arise at an early stage which need to be understood as part of an early solution. We have referred to the evidence of the impact of early legal advice.[34] The advice services are well aware of the need to translate a problem into a legal issue where necessary.

IV. The Place of Law in Family Matters

A. The Challenge to Law

We conclude by offering some general observations on the place of law in family matters. In a challenging appraisal of the issue, Jana Singer[35] has argued, with respect to parenting disputes, that, just as the move away from fault-based

[30] M Maclean and J Eekelaar, *Lawyers and Mediators* (2016) 82.

[31] See T Tyler, 'The influence of citizen experiences on trust and confidence in the courts', Paper given at the Conference on the Future of Justice, UCL London (May 2018).

[32] See pp 13, 28–9, 100, 163.

[33] See p 30.

[34] See pp 19–20.

[35] JB Singer, 'Bargaining in the Shadow of the Best-Interests Standard: the Close Connection between Substance and Process in resolving Divorce-related Parenting Disputes' (2014) 77 *Law and Contemporary Problems* 177. See also JC Murphy, JB Singer, *Divorced from Reality: Rethinking Family Dispute Resolution* (New York University Press, 2015).

decisions and backward-looking grounds of adjudication encouraged a shift away from adjudication to ADR (because adjudication is ill-suited to forward-looking decisions), so also that shift has undermined the place of both lawyers and legal norms in the process. 'The shift from adversary to non-adversary processes has also reduced the primacy of lawyers and legal norms in resolving divorce-related parenting disputes'.[36] In particular, in the case of parental planning, the 'shift from judgment to planning also changes the nature of the question courts and disputants are being asked to resolve. No longer is that question, Which, among a predetermined set of custody outcomes, would be right or best for this family according to some external set of criteria? Rather the expectation is that the process itself will generate the options and the disputants will evaluate those options according to their own interests and values'.[37]

While Singer's remarks are focused on 'parenting' issues, they could equally be applied to related financial and property matters. Wintersteiger and Mulqueen[38] go even further, arguing that excessive focus on 'legal need' risks over-juridification of the issues, leading to frustration and too ready an acceptance of the legal status quo, and that seeking solutions through law can obscure the need to challenge the power structures created by the law. Our own observations on the importance of addressing problems wider than those that concern the application of law could also be seen to contribute to a general de-emphasis on the role of the law in these matters, perhaps even leading to its confinement to a very narrow and exceptional role.

This movement was of course very evident in the government's severe curtailment of legal aid in private law family matters in LASPO, as demonstrated in the Consultation Paper of 2010 which stated that 'cases which can very often result from a litigant's own decisions in their personal life' were less likely to be considered as 'issues of the highest importance'.[39] It might also be illustrated by the change over time in the three straplines used for Family Law, later known as Family Justice, over the last 30 years by the Lord Chancellor's Department, later known as the Department for Constitutional Affairs, and now the Ministry of Justice. In 1989 the Strapline for Family Law was 'supporting the vulnerable', which appears alongside legislation to promote the best interests of children, in a context of relatively generous legal aid, and an indication that family law was seen as an instrument to help people made vulnerable by their personal relationships. In 2012, the Strapline changed to 'Promoting fair and informed settlement', adopted immediately before the Norgrove Review of Family Justice, reflecting the concern with process and making a justice system more cost effective and efficient and reducing

[36] ibid, 190.
[37] ibid, 187.
[38] See p 160.
[39] Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales*, CP 12.10, Cm 7967; see J Eekelaar, 'Not of the Highest Importance: Family Justice under Threat' (2011) 33 *Journal of Social Welfare and Family Law* 311.

overall costs. The current strapline in 2018 promises 'Protecting and advancing the principles of justice', which indicates a more abstract purpose, not unlike the ubiquitous puff, 'promoting excellence', with little indication of what these principles might be or where they come from, but presumably including the implementation of legislation, including LASPO. 'Protecting vulnerability' is still retained as a qualification to the legal aid reforms, but is given a very narrow definition, with no appreciation that potentially everyone could be 'vulnerable' to imbalances of power in cases of relationship breakdown.

B. The Role of the Law

However, we believe that the presence of legal norms in this area remains important. Of course it is well understood, not least by family lawyers, that the law alone does not hold the answer to all the problems that can arise in personal relationships. Behaving responsibly, demonstrating empathy and awareness of the practicalities are essential ingredients. As one of the solicitors we interviewed said: 'I have to explain that law can't make people nice, and a lot of things which are unfair are not illegal.' Furthermore, while Wintersteiger and Mulqueen's concern about concentration on law could risk failing to challenge power structures, this may be less of an issue in family law, for while it was certainly true that in the (not so distant) past, family law did uphold social and gender power structures, it can now better be seen as attempting (albeit imperfectly) to provide those vulnerable to the exercise of personal power (often women and children) with a countervailing source of power in their legal rights. As Tony Honoré has observed, while societies 'threaten and coerce' through their laws, people are also 'protected and guaranteed' through law, and that in some ways 'law is more valuable in an oppressive than a benign environment'. Indeed, it could be said that, while law can be a helpful instrument for the exercise of power, it is not a necessary one, whereas it is necessary for protection against it.[40]

Yet it may still be thought that family issues are different; that these are best resolved by the parties themselves. A new divorce procedure effective in France from 1 January 2017[41] might seem to support this view. If the parties agree to divorce and follow the stipulated procedure the marriage will be dissolved without obtaining a court decree and agreements about financial and other consequences will be enforceable as contracts. Yet the law is very much present. They must each appoint a lawyer to take care of their interests; a list of items is specified upon which agreement must be reached, and the result must be checked by and filed

[40] See generally, J Eekelaar, *Family Law and Personal Life* (2017), chs 1 and 2.

[41] Law No. 2016-1547, 18 November 2016, Art 50, supplementing Code Civil, Art 229. This account is taken from Frédérique Ferrand, 'Non-Judicial Divorce in France: Progress or a Mess? in G Douglas, M Murch and V Stephens (eds), *International and National Perspectives on Child and Family Law: Essays in Honour of Nigel Lowe* (Intersentia, 2018) 193–204.

with a notary public. Furthermore, either spouse may apply for free legal advice, and it has been doubted whether this will reduce costs to the parties or the state compared to judicial divorce.[42]

So what then is the role of legal norms in the areas of family law with which this book has been concerned?

i. They Indicate the Scope of Options in Making Arrangements

This includes, for example, the kind of property arrangements possible (both in fact and potentially available through court order), including regarding the home; the types of financial order that may be made, including child support and in some cases issues regarding pensions. Similarly, the norms could indicate how certainty and enforceability might be achieved in regard to such matters and also respecting child arrangements

ii. They Promote a More Inclusive Consideration of Relevant Interests

Singer[43] summarises the expectation of the non-legal process as being that 'the process itself will generate the options and the disputants will evaluate those options according to their own interests and values'. Our evidence indeed supports the view that parties often become fixated on what they think of their own or the other party's interests and 'rights', but these may be very different from those contemplated by the relevant family law. Therefore knowledge of and respect for the principle in section 1 of the Children Act 1989 which requires the best interests of the child to be paramount in regard to child arrangements, and also of the direction to courts that 'unless the contrary is shown' the involvement of each parent in the life of the child concerned will further the child's welfare and that 'involvement means involvement of some kind, either direct or indirect, but not any particular division of a child's time' could point the parties towards, or away from, certain outcomes they might otherwise agree. As regards financial and property matters, appreciation of the well-established legal principle that, despite an assumption that equal sharing of marital assets is fair, financial and property arrangements must as far as possible meet the needs of those involved, especially the children, could be very important in affecting the substance of any agreement reached.

iii. They Provide Standards by which Fairness and Safety may be Evaluated

Discussion of these standards falls outside the scope of this book. But we are concerned with how they do or do not come to bear when people seek solutions

[42] Ferrand, ibid, 200.
[43] See n 35.

to their specific problems. This will of course happen if a matter reaches adjudication, or even before that in the preliminary stages of the adjudicative process, where judges can become involved in 'facilitating' an agreed outcome.[44] It may also happen where agreed outcomes are subject to judicial scrutiny, as when a draft Consent Order is presented for approval and conversion to an order of the court. In practice a court is unlikely to delve too deeply into financial agreements especially those made with legal advice,[45] but paragraph 6 of the Practice Direction 12J (December 2017) states that:

> In all cases it is for the court to decide whether a child arrangements order accords with Section 1(1) of the Children Act 1989; any proposed child arrangements order, whether to be made by agreement between the parties or otherwise must be carefully scrutinised by the court accordingly. The court must not make a child arrangements order by consent or give permission for an application for a child arrangements order to be withdrawn, unless the parties are present in court, all initial safeguarding checks have been obtained by the court, and an officer of Cafcass or CAFCASS Cymru has spoken to the parties separately, except where it is satisfied that there is no risk of harm to the child and/or the other parent in so doing.

If parents reach agreement on arrangements for the children before coming to court, and submit these as a draft Consent Order, this will be subject to safeguarding checks by Cafcass before the judge decides whether to convert the draft into an order of the court. This involves checking records to see whether the arrangements raise any concerns concerning the children's safety. However, this only happens if the parents want the arrangements incorporated into a court order, which they may do to make enforcement more secure. There is no requirement that they do this. At one time, before a divorce could be granted, any arrangements for children had to be submitted to the court for certification that they were 'satisfactory or the best that could be devised in the circumstances'.[46] But the court's role was later reduced to a duty to consider only whether the proposed arrangements called for a court order,[47] and was eventually removed completely,[48] so there is now no requirement that arrangements made for the children need be presented to the court at all when divorce is sought.

In this respect, while the new French divorce procedure mentioned above allows a divorce to be obtained without going to court, it does *require* the participation of two lawyers, one for each party, and the lawyers are expected to remind them of the importance of the children's interests. Additionally, the parents must inform the child that the child has a right to be heard by a family judge and they can

[44] See J Eekelaar and M Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Oxford, Hart Publishing, 2013) 82, where our data suggested that nearly 30% of activities of family judges could be described as 'facilitating an agreed outcome' and 'providing information'.

[45] *B-T v B-T (Divorce: Procedure)* [1990] 2 FLR 1.

[46] Matrimonial Proceedings (Children) Act 1958; subsequently Matrimonial Causes Act 1973, s 41.

[47] Children Act 1989, Sch 12, para 31.

[48] Children and Families Act 2014, s 17.

proceed without this only if the child certifies that he or she does not wish to make use of the opportunity. As this is unsupervised, it seems the parents are in a strong position to control the outcome. As Ferrand observes,[49] this 'does not replace a preliminary check of the compatibility of the agreed divorce consequences with the children's best interests', and the child's certification whether he or she wishes to be heard by a judge could place a heavy burden on the child. It remains to be seen how far this procedure sustains the place of legal norms in the process.

iv. Transparency Issues

There are other risks attached to moving decision-making and enforcement outside the court system and into a diverse market place. Apart from issues of regulation and quality assurance, in civil justice there is widespread concern about the lack of cases coming to trial, where justice can be seen to be done and the shadow of the law can reach out and support private agreements. In family law, private ordering makes it difficult to see whether the vulnerable are protected, whether fair and informed settlement is reached, and on what basis outcomes are reached. As Lucinda Ferguson observed regarding family arbitration, 'the very idea of confidential family arbitration makes supervision and development in accordance with public policy concerns difficult' and she warned that the growth of such 'private' determinations risked the development of a two-tier system of default family justice norms.[50] The first tier would be that set by legislation and the courts, and the second would comprise the norms applied by arbitrators for wealthy individuals wanting matters to be resolved privately and the norms that may influence outcomes for less well-off individuals unable to access the law whose issues undergo informal processes.

All this underlines the importance of having a legal framework within which unique arrangements can be made. But the fact that the parties may disregard it, or one might be overborne by the other, shows that support as well as knowledge may be necessary. This support need not necessarily be provided by professional lawyers. In very many circumstances, trained non-lawyers, who can also assist in other matters (whether relationship issues or concerning other practical matters) should be able to do this. Sometimes mere online information may suffice, but we should be aware of the limitations of that.

v. The Rule of Law

It will not be possible to eliminate such risks where issues are settled out of court. But they can be reduced. This requires that it is not only accepted that legal norms

[49] Ferrand, n 41, 203.

[50] L Ferguson, 'Arbitration in financial dispute resolution: the final step to reconstructing the default(s) and exception(s)?' (2013) 35 *Journal of Social Welfare and Family Law*, 115, 137.

have relevance in those contexts, but that parties should have access to them. It is for this reason that the fundamental approach underlying the severe restrictions on legal aid (and therefore access to law for many) must be unacceptable. In *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)*,[51] the Supreme Court gave a strong constitutional reason for objecting to this when it held that exorbitant government-imposed fees that deterred the use of Employment Tribunals were unlawful. The Court explained:

> 68. At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.

Further, the law sets standards of behaviour for the whole community and, while it is perfectly reasonable to expect the burden of the costs of its application to fall more heavily on those who can bear it better, those less able to do this are equally entitled to its protection. Frederick Wilmot-Smith has articulated an elaborate set of arguments for the importance of 'equal justice', which requires equal access to legal resources. He maintains that public expenditure on the legal system should not be seen as in competition with demands for other welfare benefits, but rather as foundational to securing those other benefits by underpinning them through a functioning and accessible legal system which ensures equality of *status* between individuals, irrespective of their de facto power or wealth.[52]

This applies to family relationships as much as it does to dealings between people, whether within the private or public sphere, outside them. It cannot be rational to exclude from this issues resulting from a person's 'own decisions in their personal life'. Some of the most far-reaching consequences in people's lives (and those of others, such as their children) follow from such decisions, and for that reason are subject to a degree of legal regulation. Moreover, unlike some major commercial decisions, which are usually made by people of financial means, people of all levels of wealth take decisions in their personal life, and can be seriously adversely affected if they go wrong. In any event, problems in people's personal lives are often caused by the behaviour of other people, including their partner. As we remarked earlier when the provisions retaining legal aid in cases of violent and

[51] [2017] UKSC 51.
[52] F Wilmot-Smith, *Just Justice* (Harvard University Press, 2019).

coercive behaviour were discussed, power imbalances exist in most relationships, and these can become particularly acute when the parties are in conflict. It is therefore precisely in respect to such matters that the community interest in ensuring protection of the law for all becomes of the highest importance.

These remarks, however, only establish the importance of a legal framework within which these issues can be resolved. They do not mandate its use in every case, or demand the use of legal institutions, or even of lawyers, for the process. It is possible that the needs of those with family matters may be better addressed through welfare services, as is often the case in Germany and Scandinavia, or by enhanced advice services in the way we have suggested. It should be possible for such services and advice to be legally informed and provided by appropriately trained personnel, who may not necessarily be lawyers, but would have sufficient knowledge of the law to know when professional legal assistance is needed. This need may occur at a late stage in the process, but may be even more effective earlier at the stage where a problem has not yet become an entrenched conflict.