Digital Family Justice

From Alternative Dispute Resolution to Online Dispute Resolution?

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Introduction

MAVIS MACLEAN AND BREGJE DIJKSTERHUIS

THIS INTRODUCTION WILL set out the aim and scope of this book, and identify the structure and analytical framework employed in the chapters which follow from Canada, Poland, Turkey, Spain, France, Scotland, Germany and Australia, ending with a look to the future from the editors who draw on analysis of the problems arising from ambitious projects in the Netherlands and the slower developments in England and Wales. We present as our final chapter a short case study from the Ministry of Justice in London, which makes clear the complexity of the task, and the potential for contributing to access to family justice in hard times.

I. AIM AND SCOPE

We begin by exploring the policy and professional context for recent developments.

A. Digital Family Justice: Exploring the Policy Context

The continuing period of financial austerity has led governments in a number of jurisdictions to seek ways of limiting public expenditure and seeking value for money in many areas of activity, not least in the provision of family justice. The support traditionally supplied by lawyers, with varying levels of public funding, was expected in some jurisdictions to be replaced by the less costly provision of help through mediation. This policy, however, appears to have met with limited success. Instead, governments are showing increasing interest in the development of IT in many areas of activity, digital pathways being seen as a route to self help in resolving family problems, offering information and sometimes advice and dispute resolution. In jurisdictions where the policy context can be described as neo-liberal, this policy approach has the attraction of offering not only cost savings but also the prospect of increasing individual responsibilisation, rather than continuing dependence on the state. Access to family justice appears to be moving away from the traditional pathway of access to the services of courts and lawyers and towards new digital systems for support with legal matters.

In this book we present observations and analysis of these developments in a number of jurisdictions in Europe, Canada and Australia as well as the UK (Scotland and England and Wales). Digital procedures which reduce or bypass the role of lawyers and attendance in court may work well. But following the limited success of the previous investment in other alternative methods of dispute resolution (ADR), particularly mediation, we wish to look with caution at the ongoing experience of help by vulnerable parties who are seeking settlement of financial and children issues after divorce without access to the individualised services of courts and lawyers. We aim to address the question of the nature and impact of these changes in a number of settings, which we suggest may represent the continuing search for a 'silver bullet' if we are expecting IT to provide a solution for all problems. We hope to draw attention to the additional need for a careful consideration of the different kinds of pathways through family problems which are likely to need a range of different forms of information and advice, and hopefully conflict avoidance, as well as support with problem solving and dispute resolution.

B. The Professional Landscape: The Observed and Potential Impact on Access to Family Justice of Digital Developments in Relation to Other Recent Innovations in the Family Justice System

Family justice systems in many jurisdictions are finding themselves under increasing pressure as both public and private resources diminish, and the policy context remains dominated by the rolling back of state responsibility for legal help. Parties in family disputes are becoming more likely to turn to the help of volunteers, including both professional lawyers and law students, and also lay advisers, or to public legal education provision through advice services and websites. Where cases still go to court, there are pressures for them to be dealt with more effectively with online filing of documents and video conferencing with witnesses.

We note also how the legal profession is changing its ways of working. A narrower range of casework is being carried out by lawyers in several jurisdictions, and new forms of more specific task-focused activity (known as unbundling or limited brief work) are being carried out in law firms, and also by new occupational groups in an attempt to cut costs. Professional boundaries are becoming more permeable. Lawyers may find themselves arbitrating or mediating for clients to avoid court costs rather than advising or representing. Non-lawyers are being drawn in to give low-cost advice in legal matters, though there is considerable discussion about what constitutes legal advice and what activities may be carried out by lawyers and non-lawyers. For example, a new group of 'decision makers' whose background was not specified appeared in the interactive divorce website Rechtwijzer in the Netherlands, adding a decision-making option when agreement could not be reached.

However, this service recently ceased activity, as it was unable to achieve commercial viability.

The distinction between legal advice and legal information is becoming increasingly blurred. For example, in England non-lawyer volunteers are present in some courts to support unrepresented parties in family cases (known as litigants in person or LiPs) and may be drawn into giving specific legal information which comes close to being advice. The distinction is hard to draw, and is often dependent on the context. For example, the line between helping an unrepresented party fill in a form, and advising on what to say on a form is hard to draw in the heat of the moment with distressed men and women about to walk into a court hearing about access to their children. Similar developments are reported in other professions, particularly in medicine, where nurses are now undertaking work formerly done by doctors, such as prescribing drugs and even carrying out surgical procedures. And the patient also is expected to do more, as clinical decisions are being made jointly by the medical experts together with the patients aided by diagnostic websites.

Such changes are exciting, but when driven primarily by economic constraints, we need to be cautious. The policy maker usually seeks an option which will be quicker, better and cheaper. But usually only two of these three aims can be achieved. If an option is better and quicker it is unlikely to be cheaper … and if cheaper it is unlikely to be both better and quicker. We are concerned that the vulnerable men, women and children involved in family difficulties which are serious enough to lead to family separation, and cannot be resolved by the parties alone or with informal help from friends and family, should be able to access appropriate support in finding fair and informed settlement. Public levels of education have risen, deference in the legal system has decreased, and the internet gives most people access to unlimited information. But information alone, however skilfully provided, is not enough. Parties need advice on how to use information when making decisions. And the information needs to be clear and reliable, and not spread over a multiplicity of websites.

There is a need for caution and careful evaluation as we turn to the rapid development of digital process in family cases. The Rechtwijzer in the Netherlands has now been followed by a private commercial venture called Justice42. There have been rapid developments in civil matters in British Columbia, and an Out of Court Digital Pathway for family matters is being developed in the UK. These changes are accompanied by the development of online information management and support, mediation, and court hearings using electronic paper management and video conferencing in many jurisdictions.

We note a common direction of travel towards acceptance of increased personal responsibility, and privatisation in decision making. Instead of the traditional end-to-end legal service, a lawyer may offer a defined element of work for a fixed fee. While this option is cheaper for the client who may take over some parts of the work for himself, there are risks associated with the lawyer not knowing what he does not know about a matter, and with the client failing

to understand the limits of the lawyer's intervention. The lawyer may no longer take on the central role of the traditional lawyer working face-to-face with the client on the totality of their case. There may be gains in terms of increased personal responsibility and wider acquisition of dispute resolution skills in a community. But there are also risks to the client if the system fails to address the impact of power imbalance between parties, and there may be limited access to optimum results where there is no skilled advice to help in securing the best possible outcome for all concerned, including the children. We must also consider the impact of any reduction in the visibility of clear social norms as embedded in an enforceable legal framework, which may be of even greater importance in more diverse societies.

Digitisation is becoming the policy of choice for a number of reasons. There are clearly substantial benefits to be gained from developing the use of IT in administering legal procedures and in the running of court business. The more sophisticated websites have made great strides in other areas of government activity, such as enabling clients to apply for social security benefits online, thereby cutting administrative costs, though personal support in using the system may be necessary. But there remains a serious difficulty in trying to facilitate online interaction when it is not between client and government but between two parties in dispute. A computer cannot interrogate evidence, or challenge disclosure, as a court can do. And while a website can provide accurate and relevant information, it cannot help the user decide how to respond to it. Recent research in London (Denvir, 2014) involved a controlled experiment using students with good computer skills to test an interactive website designed to help with legal problems. They were given a landlord and tenant problem, familiar to students in many jurisdictions. The students were easily able to find the information they needed on the website. But when it came to making a decision on how to proceed, what to do next, the computer could not help them. The most common outcome was that the students telephoned their parents to ask for advice, that is, they need a trusted intermediary.

II. STRUCTURE AND ORGANISATION OF THIS BOOK

A. An Analytical framework

The starting point for this group of scholars is a shared interest in supporting the Rule of Law through Access to Justice, and the part played by courts and lawyers in making this possible for those with family matters. We come from different starting points, with different issues and concerns. But we are all experiencing a period of rapid change. Following our earlier title in the Oñati Series, *Delivering Family Justice in the 21st Century*, which identified the gradual withdrawal of the state from the private sphere when dealing with couples but maintaining control when dealing with children and parenting (Maclean,

Eekelaar and Bastard (eds) (2015)), in this book we are better able to place the different jurisdictions at different points along this complex multi-route journey, looking carefully at who is doing what and how. For some of us, the court is the place of last resort for dealing with serious conflict, offering both decisions and mechanisms for enforcement. For others, the court is the hub where information on helping services is available, making decisions not about individual behaviour but about how to access the help needed by families in difficulty. For example, in the UK we face the recent restriction of access to justice in the traditional form of courts and lawyers to those who have the resources to pay. In Canada there is a strong focus on community-based private ordering, and in Poland there is interest in the increasing levels of confidence in courts with an independent judiciary after so many years of alienation from state values and policies, but a concern to protect the privacy of the family. In France family matters are moving away from courts into a more private but still legalised sphere, while in Australia lawyers who were previously excluded have begun to work with counsellors in Family Relationship Centres.

The common factor remains the lack of resources, which results in delay, reduction of public funding for various services, the reduced availability of lawyers for those without resources, and the continuing search for alternative and hopefully cheaper methods of dispute resolution. Mediation, as we have noted, has had limited success. The great hope of policy makers now lies in increased use of digital technology.

The chapters which follow are set out in three parts: Part A – Digital Family Justice: Political and Professional Contexts for Change; Part B – The Development of Digital Family Justice; and Part C – The Way Ahead.

Part A starts by looking at the political context, with chapters from Canada, Poland and Turkey which demonstrate the impact of different political settings on ways of approaching the place of the courts in access to family justice.

In chapter one, from British Columbia, Canada, Rachel Treloar describes an extreme form of withdrawal by a neo-liberal state from ensuring access to justice in family matters, even those with complex parenting problems where there will be direct consequences for the children. She describes how, in the context of cutbacks to publicly funded legal aid and other services, parents are now expected to take responsibility for resolving their legal problems without recourse to the courts. In such a context, parents with complex family law problems have few places to which to turn. She presents evidence from her qualitative study of mothers and fathers who experienced high conflict divorce, describing how they interpret and navigate the experience. The chapter first describes how parents experienced ADR, and how they used the internet for self help purposes. The author then goes on to describe MyLawBC, an interactive digital platform introduced in 2016 with the aim of empowering individuals to act on their legal problems. The platform is new, and not fully evaluated, but the author draws on detailed knowledge from her study to reflect on whether it would have helped the parents in her study, noting also that a three-day trial would cost around

40,000 dollars while a mediation costs usually only 3,000 dollars. She suggests that while the platform could provide basic information, those with complex needs will require access to court and social support services. Practitioners and policy makers need to know more about parental needs.

By contrast, in chapter two, from Warsaw, Poland, Jacek Kurczewski and Malgorzata Fuszara present data from their long-term quantitative study of preference for different methods of dispute resolution in Poland in the context of changing political circumstances. In discussing how and if courts are used, they found in earlier work that the current strength of the courts as an institution of justice had been underestimated. They suggest that ADR, or mediation, was not the first method to be considered by the majority of those with justiciable disputes. Although neighbourhood informal justice was regarded positively by those who had used it, these respondents did not advocate using it in future disputes. The authors were concerned to identify why and how the various procedures (mediation, conciliation, arbitration) which offer an alternative to courts for dispute resolution are perhaps leading to simplification and softening of the adjudicative model of justice.

They present data on the general patterns of dispute resolution in Polish popular culture, looking at different types of court experience, according to religiosity and to socio demographic profiles, and in particular look at the effect of regime change on these patterns. Free elections began in 1989, and the position of the judiciary changed to become free from party political control. Surprisingly, in their first study, they did not find that economic freedom had led to more court cases arising from property disputes, but rather the contrary, in that the sense of an increase in private rights seemed to have been accompanied by an increase in the wish for private forms of settlement, particularly in family matters. In this chapter they describe the development of digital procedures to provide, as in other jurisdictions, for speedier and less costly resolution of minor civil disputes, particularly small debts of recent origin. But they note an ongoing reluctance to deal with family matters outside the family circle, and that if it becomes necessary to approach a court, it would not be appropriate for parties to be dealt with by digital procedures but only by a judge who has personally interviewed and formed a view of the people concerned. In earlier work, they also found that those higher up the social scale were more likely to use the courts. And by 2014, when compared with data from 1974, there was more interest in official settlement strictly according to the law among younger people living in towns, while informal mediation remained popular among older people in the country. In family matters, however, there remains a firm preference for a dispute with an individual to be settled informally, though if the dispute was with an institution, the preference would be for court.

Chapter three is by Verda Irtis, who begins by analysing the different norms that govern family justice in Turkey, where the system, despite its local dynamics, is very open to what is transferred or imported from the external world. She describes the unsuccessful short history of family mediation, and considers the

Irsat Offices and Centres for Women's Solidarity as 'alternatives' to mediation. She then describes the Turkish response to the digital environment in public services, including the judicial function, illustrated by interviews with practising lawyers on the impact on their work and more generally on the impact of competing logic, norms and world vision in practice for those working in the family justice system. The author explains how Turkey was awarded the UN public service award largely as a recognition of the development of digital public services. There is a national electronic service covering all court functions: citizens and lawyers can examine files, pay fees, submit documents and claims, and file cases electronically in any court in the country. This process began in the eCourt for Commercial and Labour Law, but it is planned that the Ministry of Justice should extend this to services concerning family matters, including divorce and children cases.

Part A then moves to look at changing professional roles and boundaries in family justice. In chapter four, Lisa Webley describes the part increasingly played by students with the development of Clinical Legal Education (CLE). The role of the student is limited to support and supervised advice in family matters without ongoing assistance or representation, and with referrals to specialist advisers. Sadly, it can do little to fill the gap left by the cuts to legal aid in England and Wales. It is, however, having an important impact on developing the future ability of these students to work with clients, and on their understanding of the political context of family justice. It has also led to the development of new ways of teaching family law. Lisa Webley describes how, as the supervising faculty member, she developed flow charts to demonstrate the demographics of family clients, and the need for binary questions to be interrogated. She also notes the students' need for support in coping with the emotional impact of being unable to solve the problems being brought to them. The level of supervision makes the process labour intensive and costly to the providing college. But the service is highly valued by local courts dealing with unrepresented litigants, and by clients and students.

Chapters five and six look at the situation in Germany and Spain where, although the earlier forms of ADR, including family mediation, have not been widely taken up, there is not yet a major policy interest in developing Online Dispute Resolution (ODR). In chapter five, Barbara Willenbacher and Adelheid Kuhne describe the relatively successful impact of mediation in criminal cases as a form of restorative justice, and within peer groups of school children, where it remains popular, though use is declining. But mediation is not thought to have developed a useful role in interpersonal family conflicts (it is used in only 1% of family cases). In family matters, legal problem solving is preferred. In children hearings, the aim is now to impose joint legal custody. They report that only 3% of cases recently observed resulted in sole custody. A third of cases are contested, and all the relevant professionals, including mediators, attend. But as mediation has been so unsuccessful, the mediators who have little work are now asking for state funding and for mediation to be compulsory, though this is not likely to happen.

For Spain, a wide range of experience across three autonomias is described in chapter six. Professor Piconto begins by setting out the national picture, with independent training and accreditation for mediators on registers within autonomias. Her colleagues follow with short accounts of similar events in three autonomias. The process from Mediation to Collaborative Law in Catalonia is described by Professor Lauroba; for the Basque Country, Cristina Merino describes pre-court extrajudicial mediation organised by social services, with a comment on the intra judicial mediation organised by the department; and finally Professor Loredo describes the absence of mediation but the development of collaborative practice across Spain. There is little interest so far in ODR.

Part B covers the development of digital family justice, and the impact of some examples of digital activity in family justice on the legal profession, the courts and the substantive law. Chapter seven describes the use of digital techniques in managing family cases by courts and lawyers in France, followed by chapters eight and nine which compare developments in England and Scotland.

In Chapter seven, Benoit Bastard describes how from the 1970s until 2017 the pressure on the courts in divorce and family matters led to a speeding up of the process by the judges, who were making twice as many decisions a month (80) as their colleagues in other civil cases. Benoit Bastard describes how the digital initiative came first from the courts. When a digital network was created in 2005, linking court and advocates in civil cases, it was welcomed and was successful. However, it still gives rise to questions, for example about the impact of the decline in personal interaction between lawyers in the courts, and about the future of the profession. In 2017 the law was changed to remove judges from the divorce process where the matter was agreed. The two lawyers now prepare agreements which are lodged with a notary, though a child may request to be heard and represented by a lawyer free of charge, and for the matter to be reviewed by a judge. There are questions about the relationship between these digital developments which Benoit Bastard describes as an aspect of the ongoing managerialisation of judicial process, and this new, so far unevaluated, procedure.

In chapter eight, by contrast, Jane Mair describes how and suggests why Scotland has been slow to turn to digital process, citing the importance of the lawyer's role. The Scottish system presents an ideal framework for the development of ODR, as each element of the process, the divorce itself and the arrangements for children and property division, is relatively discrete. The legal rules are clear, and there is a well-established preference for client autonomy. A simplified divorce procedure is already online, and it is used by the majority of couples. It can only be used where there are no ancillary disputes, which adds an inbuilt incentive for couples to reach agreement. But while there seems to be a good fit and the technology is clear, there is a danger that, by focusing on simplification, what is lost is an understanding of the overarching framework. The rules are easy to explain and therefore digitise. What requires more thought is how to replicate artificially the intelligence of the family lawyer who sees how these simple steps fit together.

In chapter nine Leanne Smith adds to the digital impact picture her account of the discussion taking place online in chat forums among people sharing their experiences of family disputes, enabling us to examine previously invisible approaches to dispute resolution. Analysis of these conversations has the potential to provide rich insights into the extent to which people bargain in the shadow of the law, and why conceptualisations of family justice vary.

This section closes with an account in chapter ten of rapidly growing digital developments in family justice in Australia from Belinda Fehlberg and Bruce Smyth. Their consideration of the extent to which Australia has seen increasing interest in and commitment to the development and use of online family law resources finds that most work, often originating in America, has been done in the area of providing information online. There has been much less emphasis (although some early work) on online advice and dispute resolution options. However, recent moves to online divorce and online court orders suggest that the position is changing, raising concerns regarding access to justice for those who do not have ready access to the internet and digital technology. The authors describe increasing use of smartphone apps in Australia for parents to manage post separation parenting, These post separation apps for parents are also used in Canada (see chapter one) and in the Netherlands.

Part C, looking to the future, describes two very different ways in which governments have supported digital developments in the Netherlands and England and Wales. We have a cautionary tale from the Netherlands, where government enthusiastically supported an interactive website which tried to embrace conflict resolution as well as divorce process. And in England and Wales, we describe a more cautious approach, with constant reference to the needs of the potential users. We end with a proposal for including the best of both worlds … asking digital systems to do what they do well, but inserting the contribution of the experienced lawyer … putting the lawyer into the website.

In chapter eleven, Bregje Dijksterhuis describes the rise and fall of the most famous of all digital developments, the Rechtwijzer, an innovative tool developed by the research centre HIIL and supported by the Dutch Legal Aid Board. The aim was to enable divorcing parties to do more for themselves and work towards a harmonious divorce. The project received a great deal of attention internationally, and an adapted version was implemented in Canada and considered in England. However, the Rechtwijzer was used by only a small number of divorcing couples and was not received with enthusiasm by the majority of the legal profession, including the judiciary. The digital technical expertise in preparation was not fully matched by an understanding of the legal context and the experience of separating couples and their children. It was not commercially viable, and HIIL withdrew. There is now a successor to this scheme Justice42, endorsed but not funded by government which tries to attract more users than before, but faces competition from other services and does not yet have public confidence.

In chapter twelve, Mavis Maclean describes how the Ministry of Justice digital team from London presented their work at a showcasing event in August 2016, describing how work on the role of digital development in the family justice space was being organised and carried out in England and Wales. The value of an interdisciplinary and collaborative approach, drawing on policy, digital and analytical expertise, was highlighted. These digital developments were taking place against the background of the long established policy goal of helping separating parents to avoid court hearings, *where appropriate*, in order to help families resolve disputes in environments which do not exacerbate conflict and lead to poorer outcomes for children. Importantly, however, there was also recognition that there is a real need for some cases to be in court. Policy thinking has been informed by evidence, limited by financial constraints and excited by digital possibilities. The overall aim is to develop user-centred digital and non-digital products to help support separating parents through their journey of making arrangements for their children. Continuous feedback contributes to wider policy work, and facilitates a more nuanced response when a new digital product is not yet fulfilling user needs. The book ends with chapter thirteen, a case study by Buck and Diaz of one specific example of the successful development and implementation of a digital tool, the 'C100' application form for a child arrangements order.

When the Workshop which gave rise to this book was first discussed in 2016, the Rechtwijzer was widely regarded as the path to take, and digital developments were moving ahead with the speed of an Express Train. We were nervous about the speed and direction of travel. The Express appeared likely to bypass traditional courts and lawyers, and to have only one stop at the destination of Digital Dispute Resolution. We have now developed a clearer picture of what digital technology can and cannot provide. Assistance with court management and procedure is clearly able to cut costs and time taken. It may require digital support services for those with limited literacy, language issues or technological skills, but provided that a system is user-centred and legally expert in its development, there is much to be gained. The role of the lawyer, however, becomes less clearly defined if expert systems are able to provide informative websites which may offer advice on the options available and the next step to take. At the same time the lawyers themselves are using IT to develop their own working practices, for example in Australia using a 'Lawbot' to carry out the 'on boarding' process with new clients which takes time but does not require a high level of legal expertise. Digital Justice needs to find a place for the legal and non-legal experience-based expertise of the lawyer. In London, the major advice agency, Citizens Advice, developed a system that does incorporate both in the website 'CourtNav' for divorce application which uses simple questions drawing on practical experience to collect the information needed for a petition. For example, several pages of legally technical questions in the petition about domicile are replaced with the single question 'do you usually live in the UK?'. The information is then checked and used to populate the petitions which can

then be submitted to the court. The process includes a number of pop-up boxes giving the applicant the benefit of the experience of the lawyers who worked on its design by indicating the potential consequences of some of the choices to be made.

While welcoming the recent more nuanced-user centred approaches to digital family justice, we nevertheless suspect that what we are seeing is one more stage in the continuing search for an instant 'fix' to the problems of providing conflict resolution for those with family legal problems. Divorce has been a key focus for both ADR and ODR, partly as a result of two widespread but questionable assumptions; first, that parties can be enabled to achieve self-reliance and, secondly, that experts, particularly lawyers, escalate conflict. Further research is needed to evidence both these ideas. The journey from ADR to ODR has taken us so far … but this is unlikely to be the last stop on the Express journey. Indeed, a single train is unlikely to enable everyone to reach their individual destination.

The chapters in this book, like all the best research, provide more questions than answers. We suggest it is time to learn more about the various pathways through family life before problems arise in order to develop at least some variation in the paths which can best lead separating couples, particularly parents, through the difficult period of change which inevitably accompanies family change. In doing so we need to keep in mind that conflict resolution is not the only goal. We are also concerned with preventing conflict, and with solving problems and post-decision management. If conflict cannot be avoided and must be managed, we then seek not only conflict resolution, which may simply be the victory of the strongest. We seek access to justice. The Ministry of Justice in London has used different 'straplines' to describe the goals for family justice over the years. In 1990 the message was clear and simple and set out a needs-based goal: 'Protecting the Vulnerable'. By 2012 attention had moved to improving delivery and value for money, and spoke of systems for 'promoting fair and informed settlement'. Now the line has become rather abstract and calls quite properly for 'promoting and advancing the principles of justice', but there is no reference to the needs of users. This wide spectrum of goals makes it hardly surprising that one system, whether ADR or ODR, cannot achieve them all.

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