

RESEARCH ARTICLE

# Where the wild things are: the challenges and opportunities of the unregulated legal services landscape in family law

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## Abstract

This paper connects two trends in contemporary legal scholarship that do not often intersect, namely commentary on the increasingly diverse nature of family law advice and support services, and calls for a refresh of the regulatory environment in which legal services in general are provided. Focusing on the law and landscape in England and Wales, we argue that regulatory challenges are particularly acute in the field of family law, where the range and reach of services provided by non-lawyers is extraordinary. We illustrate how particular aspects of debates over regulating and diversifying legal services apply to the family law context, noting that such concerns as there are have not always been well targeted. Finally, we identify a sub-set of innovative ‘extra-legal’ services that set private family law even further apart from other sub-fields of law when it comes to regulatory and professional challenge. These services clearly sit inside the landscape of family dispute resolution but equally clearly fall outside the boundaries of what is usually considered ‘legal’. This, we suggest, highlights the need for a concerted effort to define the contours of family law and family legal services so that a holistic approach might be taken to understanding and managing the standards and effectiveness of different service and support types.

**Keywords:** family; practice; profession and ethics; unregulated legal services

## Introduction

It is no secret that the terrain in which family law operates is changing. The shift is likely being felt across many jurisdictions, but is certainly visible in England and Wales, on which this paper focuses. From the advent of digital dispute resolution and online divorce services, to the emergence of divorce coaching services and fee-charging McKenzie Friends, to the centring of mediators, the diversification of services and support for private family disputes has been nothing if not extensive. This has not gone unnoticed. Maclean and Eekelaar, for example, have mapped a range of non-lawyer information and advice sources for family disputes existing in the post-LASPO landscape.<sup>1</sup> Their work builds a picture of a geographically and substantively uneven maze of services that gives a whole new possible meaning to the ‘normal chaos of family law’ epithet.<sup>2</sup> Recognition that swathes of individuals who cannot access affordable legal advice are now forced to navigate this maze has also informed other commentary. Hitchings, for example, has described a new policy-endorsed phenomenon of ‘outsider justice’ in

<sup>1</sup>‘LASPO’ connotes the Legal Aid Sentencing and Punishment of Offenders Act 2012 that withdrew legal aid for professional legal advice in the majority of private family disputes: M Maclean and J Eekelaar *After the Act: Access to Family Justice After LASPO* (Oxford: Hart Publishing, 2019).

<sup>2</sup>From J Dewar ‘The normal chaos of family law’ (1998) 61(4) *Modern Law Review* 467.

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family disputes.<sup>3</sup> And Webley has noted that emergence of an unregulated legal services market relevant to family law disputes has the potential to both undermine and enhance access to family justice.<sup>4</sup>

In this paper we go further, arguing that the range and reach of diverse and unregulated services in this field is extraordinary and that the very boundaries of what it means to be a family justice professional are being extensively challenged. This ought to prompt fundamental reflection on what family law services are and what the definition means for the training, regulation, and competency requirements of family justice professionals, as well as for the nature of their role. We argue that the full scale of the changes in this field has not been acknowledged.

We begin by outlining the extraordinary scale of both unmet need and diverse services that have evolved in the field of family law. In section 2, we reflect on several types of non-lawyer legal service relevant to family disputes, noting that dialogue about the regulatory challenges presented by these services is limited in its ambitions, as well as being skewed in its focus. We proceed in section 3 to identify a sub-set of services that, while peripheral and tangential to legal procedures, undoubtedly play a role in family dispute resolution. These ‘extra-legal’ services, we argue, are unique to family law and set the field apart from other sub-fields of law when it comes to innovation and the challenges it poses for professional practice and regulation. They stretch the contours of what is normally considered ‘legal’ beyond what even those most deeply engaged in reflecting on the general diversification and regulation of legal services have considered. As such, they reveal a gap in broader literature around responses to diversification of legal services and raise important questions for the future of family law as a practice and as a profession.

## 1. Unmet need, unregulated services and family justice

An abundance of evidence points towards high levels of unmet legal need in relation to private family disputes. Levels of self-representation in the family courts are stratospheric, with legal representation for both parties occurring in only 19% of private law cases.<sup>5</sup> The recent, large, and representative survey of the *Legal Needs of Individuals in England and Wales*<sup>6</sup> highlights family problems as the type of problem most likely to cause high levels of personal distress and difficulty,<sup>7</sup> and the most likely to generate a legal need.<sup>8</sup> Although family problems are among the problems for which people are most likely to obtain some professional help, there is nonetheless most likely to be unmet legal need in relation to them.<sup>9</sup>

The problem of unmet legal need has received plenty of attention from scholars, practitioners and policy-makers working in the area of family law.<sup>10</sup> In 2017, the Law Society undertook a post LASPO review, finding that many who need legal aid no longer have access to it and those individuals who are eligible, find it hard to access.

Large numbers of people, including children and those on low incomes, are now excluded from whole areas of free or subsidised legal advice – valuable advice which they cannot realistically be expected to afford themselves. Changes to the means test have been counter-intuitive, meaning

<sup>3</sup>E Hitchings ‘Official, operative and outsider justice: the ties that (may not) bind in family financial disputes’ (2017) 29(4) *Child and Family Law Quarterly* 359.

<sup>4</sup>L Webley ‘When is a family lawyer a lawyer?’ in M Maclean and B Bastard (eds) *Delivering Family Justice in the 21<sup>st</sup> Century* (Oxford: Hart Publishing, 2015).

<sup>5</sup>Ministry of Justice *Family Court Statistics Quarterly: July to September 2021* (24 June 2021).

<sup>6</sup>YouGov *Legal Needs Survey of Individuals in England and Wales: Technical Report 2019/20* (2020), <https://legalservices-board.org.uk/wp-content/uploads/2020/01/Legal-Needs-of-Individuals-Technical-Report-Final-January-2020.pdf>.

<sup>7</sup>*Ibid*, pp 16–18.

<sup>8</sup>*Ibid*, p 90.

<sup>9</sup>*Ibid*, p 91.

<sup>10</sup>See the special issue on ‘The post-LASPO landscape: challenges for family law’ (2017) 39(2) *Journal of Social Welfare and Family Law*; Maclean and Eekelaar, above n 1; Law Society *Access Denied? LASPO Four Years On: A Law Society Review* (June 2017), <https://www.lawsociety.org.uk/en/topics/research/laspo-4-years-on>; Ministry of Justice *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)*, CP 37, February 2019.

some of those who are on benefits are perversely deemed able to pay for their own advice.<sup>11</sup> And for the few who are still eligible, availability of legal aid is drying up, resulting in legal aid deserts.<sup>12</sup>

However, unmet legal need is usually defined with reference to the accessibility of traditional lawyer advice. This is only one half of a bigger picture in relation to family disputes, albeit the part of the picture that has attracted most attention in policy and scholarship to date. In the other half of the picture sits a host of diverse and largely unregulated services.

There is a range of explanations for the existence of these unregulated services, some general and some particular to family law. The first explanation derives from the highly permissive regulatory regime for legal services in England and Wales. Under the Legal Services Act 2007, only a narrow range of ‘reserved activities’ are preserved for qualified and regulated legal professionals. Other services, including the general provision of legal advice, may be provided by anyone without regulatory oversight. This permissive regulatory environment provides fertile ground for the development of new services designed to meet legal need. Secondly, unregulated services have undoubtedly evolved in response to the increase in unmet legal need that occurred when legal aid was withdrawn for most private family disputes by the LASPO Act 2012. Capturing these two explanations, Stephen Mayson’s work charts what he describes as an accelerating liberalisation of legal services that began in the UK with the Legal Services Act 2007 but has gathered pace in response to continuing unmet need and developing technology.<sup>13</sup> Maclean and Eekelaar’s study of professional support for family disputes describes a disorienting smorgasboard of resulting legal information and advice provision in this field.<sup>14</sup> They focus almost entirely on lawyer-led, third sector and advice agency provision but they also briefly cover a more maverick category of provider, the fee-charging McKenzie Friend.<sup>15</sup> The McKenzie Friend is probably the most widely discussed provider of unregulated services for family disputes. As will become clear later in this paper, they have met with much opprobrium from the legal professions. Yet, we will show that they are merely the tip of the iceberg in terms of unregulated service providers in this area. One of the factors giving McKenzie Friends the confidence to provide support for private family disputes is a widespread perception that there is not much law in family law.<sup>16</sup> As Smith and Hitchings have noted, this perception that there has been a de-emphasis of the law in family law disputes is shared by some academics and is directly promoted at policy level.<sup>17</sup> Indeed, the Lord Chancellor and Legal Aid Agency seem to base the case against legal aid for private family disputes partly on assumptions about the ‘relatively straightforward legal issues in many family cases’.<sup>18</sup> Added to the scale of unmet legal need in this area, this perception provides a third explanation for the hefty and burgeoning range of unregulated services related to family law. A final possible explanation is that family law – the ‘hybrid profession’ – has long afforded space for people other than lawyers to contribute, including mediators and child welfare experts, such as social workers and Cafcass.<sup>19</sup>

In 2016 research for the Legal Services Board estimated that between 23,000 and 30,000 individuals were using unregulated online divorce services in England and Wales each year.<sup>20</sup> In fact, that data

<sup>11</sup>Law Society *Access Denied?*, ibid, p 11. The Government is currently reviewing responses to a consultation on revising the stringent thresholds used in the legal aid merits test: Ministry of Justice *Legal Aid Means Test Review*, CP 646, March 2022.

<sup>12</sup>Law Society *Access Denied?* above n 10, p 2.

<sup>13</sup>S Mayson *The Future for Legal Services Regulation* (September 2014) p 2, <https://stephenmayson.com/downloads/>.

<sup>14</sup>Maclean and Eekelaar, above n 1.

<sup>15</sup>Traditionally, a McKenzie Friend provides informal support in the courtroom, which can include note-taking, providing emotional support and quietly advising.

<sup>16</sup>L Smith et al *A Study of Fee-charging McKenzie Friends and Their Work in Private Family Law Cases* (The Bar Council, June 2017), [https://research-information.bris.ac.uk/ws/portalfiles/portal/124869490/Final\\_MF\\_Report\\_090617.pdf](https://research-information.bris.ac.uk/ws/portalfiles/portal/124869490/Final_MF_Report_090617.pdf).

<sup>17</sup>L Smith and E Hitchings ‘Professionals and partisans: lessons for family lawyers from a study of fee-charging McKenzie Friends’ (2019) 19(4) *Child and Family Law Quarterly* 343.

<sup>18</sup>Ministry of Justice *Lord Chancellor’s Exceptional Funding Guidance (non Inquests)* (updated version 28 January 2021) para 45, <https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance>.

<sup>19</sup>G Davis and J Pearce ‘The hybrid practitioner’ (1999) *Fam Law* 547.

<sup>20</sup>J Harvey and S Williams ‘Unregulated legal service providers: understanding supply-side characteristics’ (April 2016), *Economic Insight*, pp 33 and 35.

shows that people are considerably more likely to report using unregulated services to help them resolve a family problem than any other type of legal problem.<sup>21</sup> On top of this, the range of digital tools designed to support family dispute resolution in some way is recognised to be growing.<sup>22</sup> It would of course be a mistake to presume that this unregulated service provision does not help to fill the unmet legal need gap to some extent. Many commentators have noted the potential for non-lawyers to provide quality legal services in the past.<sup>23</sup> However, a YouGov survey for the Legal Services Board reported strikingly higher rates of dissatisfaction with unregulated legal services than with traditional legal services.<sup>24</sup> The information provided in their report is not sufficiently granular to work out why this is, or whether a particular type of service accounts disproportionately for the difference. But the figure does highlight how the access to justice benefit of the permissive framework for unregulated legal services in England and Wales carries a potential cost in terms of risk to the consumer. The need to balance this risk/benefit equation lies at the heart of much existing scholarship and debate on unregulated services.

This scholarship has gathered pace in recent years as organisations like the Legal Services Board have published extensively on the need to reshape legal services and legal services regulation to ensure unmet legal need is in future met by diverse but appropriately regulated, high quality services.<sup>25</sup> Mayson's recent independent review of legal services regulation echoes these concerns, stressing the need to facilitate an expanded range of legal services in the interests of delivering broader access to justice, but through an approach to regulation that is properly calibrated to deal with risk to consumers.<sup>26</sup> He concluded that, 'it is time to make a regulatory reality of the 30-year-old statement that 'most services which are legal may also be performed by non-lawyers'.<sup>27</sup> He proposes a shift to a more flexible and nuanced form of regulation that is focused on legal services rather than lawyers.<sup>28</sup>

Part of our purpose in writing this paper is to highlight the pertinence of the insights of general scholarship on unregulated legal services to family law, where the need to balance the risk and benefit of such services is particularly acute. This reality might be expected to generate a good deal of discussion about the future of family law services, yet we have seen little focused discussion so far. Maclean and Eekelaar recently observed that 'there is still little consensus on how legal help may be provided safely and affordably outside the regulated professions'<sup>29</sup> but they did not go further. In the sections that follow we look more closely at different types of unregulated legal service for family disputes. We flag problematic areas of advice provision that are likely to be touched in future by regulatory change as the boundaries of legal regulation or oversight inevitably stretch to encompass services and professionals who do not currently fall within them.

As will be seen, we agree with those who advocate a rethink of the current regulatory framework, in order to provide greater legitimacy for these services and ensure they are provided within a structure capable of protecting consumers. As we proceed through the discussion, though, we reflect on another issue, namely the impact that diverse and growing unregulated services could and should have on the work of traditional, regulated family law professionals – solicitors and barristers. It seems inevitable

<sup>21</sup>Ibid, pp 4–5; 10–13% reported using an unregulated service for family issues.

<sup>22</sup>M Maclean and B Dijksterhuis (eds) *Digital Family Justice: From Alternative Dispute Resolution to Online Dispute Resolution?* (Oxford: Hart Publishing, 2019).

<sup>23</sup>S Mayson 'Reforming legal services: regulation beyond the echo chambers. Final Report of the Independent Review of Legal Services Regulation' (UCL Centre for Ethics and Law, June 2020); R Moorhead et al 'Contesting professionalism: legal aid and nonlawyers in England and Wales' (2003) 37(4) *Law and Society Review* 765; R Sandefur 'Elements of professional expertise: understanding relational and substantive expertise through lawyers' impact' (2015) 80(5) *American Sociological Review* 909.

<sup>24</sup>Above n 6.

<sup>25</sup>For example, Legal Services Board *Reshaping Legal Services: A Sector-wide Strategy* (March 2021) [https://legalservices-board.org.uk/wp-content/uploads/2021/03/Strategy\\_FINAL-For-Web2.pdf](https://legalservices-board.org.uk/wp-content/uploads/2021/03/Strategy_FINAL-For-Web2.pdf).

<sup>26</sup>Mayson, above n 23.

<sup>27</sup>Ibid, p 8.

<sup>28</sup>Ibid, p 11.

<sup>29</sup>Maclean and Eekelaar, above n 1, p 117.

that the role of these legal professionals is unlikely to loom as large as it does currently in the future landscape of legal services, either generally or in family law. As Mayson says, regulated lawyers ‘are just a significant group among a range of alternatives used by individuals and businesses. It is not realistic to think that their regulated share will grow significantly, either. The nature and extent of what is currently unregulated can only grow in relative importance and market penetration’.<sup>30</sup>

Thus we argue that the time has come for purposeful engagement with the challenges posed by diversification of family justice services. Currently there is much unexplored potential, as well as barely conceived challenges deriving from therapeutic services targeting family dispute resolution outside of the justice system.

## 2. Into the wild: recognised non-lawyer legal services for private family disputes

In this section, we will examine three types of family law oriented, non-lawyer legal services, namely fee-charging McKenzie Friends, divorce coaching, and online legal advice platforms. These merit close attention as significant parts of the shifting landscape of private family law services. Not only do they present regulatory challenges but they also disrupt orthodox understandings of what it means to be a family justice professional in ways that merit serious reflection.

### (a) ‘Here be dragons’: McKenzie Friends

In the English and Welsh courts, litigants presenting without the assistance of a lawyer are entitled to the support of a lay person, known as a McKenzie Friend. The term comes from a 1970s case in which this right was confirmed by the courts.<sup>31</sup> Traditionally, McKenzie Friends provided informal support in the courtroom, which could include note taking, quietly advising, and providing emotional support on a one-off basis, usually to someone known personally to them. Today, a small group of individuals operate as ‘professional McKenzie Friends’, charging a fee for their support and making a living from doing so. Most operate in the area of family law.<sup>32</sup> Of the many types of non-lawyer provided legal support in the area of family law, this is the one that has attracted most attention.<sup>33</sup> Research has found that most fee-charging McKenzie Friends do a lot more than provide quiet courtroom support. Other tasks include giving legal advice outside of the court and helping litigants to prepare their paperwork.<sup>34</sup> It is possible for McKenzie Friends to do all this without oversight because the regulatory regime in England and Wales permits legal advice to be given by unqualified individuals. Rights of audience (ie addressing the judge and speaking on behalf of the litigant in court) are a reserved activity under the Legal Services Act 2007 – meaning they can only be exercised by qualified, authorised and regulated individuals. But court procedures even allow for permission to address the court to be requested on a case-by-case basis and it has been found that McKenzie Friends often seek – and are allowed – to do this in family proceedings.<sup>35</sup>

Given that paid McKenzie Friends conduct similar work to that undertaken by qualified lawyers, while operating outside the boundaries of regulation, it is unsurprising that the legal professions have objections to them. In 2016, the Lord Chief Justice published a Consultation Paper seeking views on proposals that would limit the ability of McKenzie Friends to charge a fee for services conducted within court on the basis that they pose a threat to effective administration of justice. The paper highlighted many concerns regarding the work of McKenzie Friends. Responses to that Consultation were mixed and the final publication stopped short of recommending a change to the court approach to

<sup>30</sup>Mayson, above n 23, p 39.

<sup>31</sup>*McKenzie v McKenzie* [1970] 3 WLR 472

<sup>32</sup>Smith et al, above n 16.

<sup>33</sup>Mediation has of course attracted much research and policy attention over the years but we discuss this below, distinguishing it from non-lawyer *legal* services as a form of support that is essentially therapeutic in nature.

<sup>34</sup>Smith et al, above n 16.

<sup>35</sup>*Ibid*, pp 63–65.

McKenzie Friends. However, it restated that the authors remained ‘deeply concerned’ about the presence of McKenzie Friends and their provision of ‘professional services for reward when they are unqualified, unregulated, uninsured and not subject to the same professional obligations and duties... as are professional lawyers’.<sup>36</sup> The concerns are echoed in legal and general media stories about McKenzie Friends,<sup>37</sup> which focus almost exclusively on those who have exploited litigants, doing damage to their cases, wallets, and the reputation of the justice system more generally for enabling such practice to occur.<sup>38</sup> These high profile, ‘rogue’ McKenzie Friend cases which occupy media stories mainly relate to private family proceedings. The message transmitted is that those who make money as McKenzie Friends are not only unscrupulous charlatans, but that many are men with a negative past experience of the family court – that they are ‘crusaders’ for their own particular brand or version of family justice. Thus, a legitimate grievance with a regulatory framework that permits them to work risk-free, and with an unfair advantage on regulated lawyers, has been more broadly transmuted into an attack on the ‘class’ of McKenzie Friends as a whole.

However, research suggests a more complex picture,<sup>39</sup> revealing that McKenzie Friends operating in family disputes are not a homogenous group.<sup>40</sup> The most extensive study to date, completed by the authors, provides detail of sufficient diversity in background, motivations and objectives to inform a typology comprising five categories, with the first being the most prevalent and the last the rarest: the business opportunist; the redirected specialist; the good Samaritan; the family justice crusader; and the rogue.<sup>41</sup> This suggests that, on the best evidence we have, while examples of rogue McKenzie Friends might be memorable and newsworthy, they are not typical. Through exploring responses to vignettes representing typical issues arising in a child arrangements scenario,<sup>42</sup> our study also found that McKenzie Friends had sufficient procedural and substantive knowledge to improve on the capacity of litigants in person to manage their cases;<sup>43</sup> only a minority demonstrated questionable judgements or errors and misunderstandings of the law. Such findings echo broader work which warns against the assumption that legal work done by non-lawyers is inherently bad. Mayson, for example, warns us that,

<sup>36</sup>Lord Chief Justice of England and Wales *Reforming the Courts’ Approach to McKenzie Friends: Consultation Response* (February 2019) p 3, <https://www.judiciary.uk/wp-content/uploads/2016/02/MF-Consultation-LCJ-Response-Final-Feb-2019.pdf>.

<sup>37</sup>See, for example, the David Bright case reported in the *Law Society Gazette*: ‘McKenzie friend jailed for “deceit in family court”’ (*Law Society Gazette* 17 October 2016) and ‘News focus: my McKenzie friend nightmare’ (*Law Society Gazette* 21 November 2016).

<sup>38</sup>For example, in 2019 the case of George Rusz was reported widely by both the mainstream and legal press. This McKenzie Friend ran a ‘litigation firm’ and was found by the High Court to be professionally negligent in the handling of his client’s clinical negligence case. He was held to the same standard as a qualified lawyer as he had sold his expertise as a qualified legal adviser. ‘Rogue lawyer warning’ (*New Law Journal*, 20 March 2019); ‘Unqualified legal adviser to pay £337,000 in negligence ruling’ (*The Law Society Gazette* 18 March 2019). Meanwhile in 2017, the BBC’s Victoria Derbyshire programme focused on problems with paid McKenzie Friends in light of the high-profile conviction of paid McKenzie Friend David Bright for perverting the course of justice. He was found guilty of submitting a false psychologist’s report to court that was written by his partner. This programme first aired on 13 February 2017: <https://www.bbc.com/news/uk-38912378>.

<sup>39</sup>Smith et al, above n 16.

<sup>40</sup>*Ibid.* The point had also been made in Civil Justice Council *Access to Justice for Litigants in Person: A Report and Series of Recommendations for the Lord Chancellor and Lord Chief Justice* (November 2011) p 53. Angela Melville has also reflected on the heterogenous nature of McKenzie Friends: A Melville ‘Giving hope to fathers: discursive constructions of families and family law by McKenzie Friends associated with fathers’ rights groups’ (2017) 31(2) *International Journal of Law, Policy and the Family* 147.

<sup>41</sup>Smith et al, above n 16.

<sup>42</sup>The vignette covered issues that Trinder et al identified as common problems that litigants in person struggle to present at court: L Trinder et al *Litigants in Person in Private Family Law Cases* (Ministry of Justice Analytical Series, 2014) eg potential child safety risks in relation to an allegation of drug use and a safe environment for contact; potential domestic abuse history; the confidential nature of family proceedings; the purpose and structure of a First Hearing Dispute Resolution Appointment; drug testing protocols and the potential for a section 7 welfare report.

<sup>43</sup>Smith et al, above n 16, pp 54–58.

[A] fallacy is that ‘non-lawyers’ cannot be trusted to be competent or ethical in the provision of legal services, and must therefore be excluded from practice. It is a fallacy because they are not all charlatans. ... There may well be legal elements to citizens’ needs; but this does not mean that only qualified lawyers know the applicable law and can help.<sup>44</sup>

Our point here is not to negate the case for taking steps to reduce the risks posed by ‘rogue’ McKenzie Friends. This is an area of work that is wide open to abuse by unscrupulous individuals and it cannot be right that all the risk is borne by (often very vulnerable) litigants and by the justice system. Mayson himself has proposed bringing this type of non-lawyer work into the purview of some form of regulation to safeguard consumers, and we would back implementation of his proposal as both necessary and pressing. Rather, we are pointing out a clear skew towards the negative in the discourse on this subject which is not fully reflective of the potential benefits of this non-lawyer legal service. Defining the contours of a regulatory framework that is sufficiently protective but not so restrictive that it chokes off this type of work altogether is a challenge, but it is only one part of a broader challenge.

There are two ways in which discussion around the work of McKenzie Friends in private family cases ought to develop, each relating to the need for reflection on the boundaries of family law practice and professionalism. First, thoughtful scrutiny of McKenzie Friends offers broader lessons for the nature of professional practice. A key finding of our research on McKenzie Friends related to the flexibility and accessibility of their services. They described very flexible and informal working relationships. This extended to meeting clients outside office hours and at the weekend, as well as responding to client concerns and worries at all hours, through texts, emails and phone calls. Even before the pandemic and its implications for increased working from home, the vast majority of the McKenzie Friends we interviewed worked from home, often offering a choice of communication in person, by telephone or online. This flexibility went beyond being appreciated by McKenzie Friend clients for its convenience; its responsive nature aligned with the intense emotional needs they often experienced in connection with their family dispute, and it increased their sense of having a dedicated ally available to support them. There is much that family lawyers could learn from McKenzie Friends about the communication style and service model that family litigants respond to, much of it corresponding to deficiencies in family law practice that have been repeatedly revealed through research.<sup>45</sup>

Secondly, fixation with the risks posed by fee-charging McKenzie Friends has diverted attention from more ambitious, but difficult, questions about whether and how the type of non-lawyer support they provide might usefully be tamed and brought into the mainstream of family justice. The increasingly diverse nature of family law advice and the widespread need for affordable private family law legal services in the wake of cuts to legal aid, underpin the need for such questions to be asked. Our research indicated that, even if the substantive advice of the McKenzie Friend was limited relative to what a lawyer might offer, litigants saw independent value in their work, often viewing them as a trusted, knowledgeable ally who could help guide them through the legal maze and dilute the stress of navigating the process alone. Beyond England and Wales, much has been made of the potential benefits of affordable, mid-tier legal services along precisely these lines.

The Law Commission of Ontario, for example, has lauded the value of ‘trusted intermediaries’<sup>46</sup> who are not qualified lawyers and advocated wider use of them. In the United States, a stricter regulatory regime which prohibits the unauthorised practice of law precludes McKenzie Friend equivalents from emerging. However, recent years have seen many calls to create space for non-lawyer services on the basis that they could greatly increase access to justice. Scholar Gillian Hadfield memorably and

<sup>44</sup>S Mayson *Legal Services Regulation: Turning Point, or Point of No Return?* FB Wickwire Memorial Lecture 2021 (Schulich School of Law, Dalhousie University, 17 March 2021) p 6, <https://stephenmayson.files.wordpress.com/2021/03/wickwire-memorial-lecture-2021-final.pdf>. See also the references in n 23 above.

<sup>45</sup>Smith and Hitchings, above n 17.

<sup>46</sup>Law Commission of Ontario *Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity* (Toronto, February 2013) pp 63–65, [www.lco-cdo.org](http://www.lco-cdo.org).

compellingly argues the need for ‘nurse practitioner’ equivalents in legal services.<sup>47</sup> Effort has also been invested in piloting non-lawyer roles that operate within a framework of training, supervision and accountability. Examples include the Court Navigator and Licensed Legal Technicians Programmes.<sup>48</sup> In relation to the former, a recent study examined the use of ‘nonlawyer’ navigators who assisted litigants in person with their civil legal problems. It reported that,

**[W]ell-trained and appropriately supervised navigators** can perform a wide variety of tasks. For example, they help SRLs [self-represented litigants] find their way around the court; get practical information and referrals to other sources of assistance; or complete their court paperwork. Navigators also accompany SRLs to court to provide emotional back-up, help answer the judge’s factual questions, or resolve a matter with opposing counsel. (Emphasis added)<sup>49</sup>

It is striking that the tasks felt to be useful in this study mirror closely the tasks that paid McKenzie Friends often undertake. The emphasised words are, of course, important. It is the system of training and supervision provided through the Navigators project that lends legitimacy and trustworthiness. The Ontario Law Commission has similarly stressed the need to create a formalised role for ‘trusted intermediaries’ to provide non-lawyer legal support with ‘appropriate training and access to resources to help them fulfil these responsibilities’.<sup>50</sup>

McKenzie Friends do not come with the safety net of approved training and oversight. But it seems odd that this jurisdiction should revile and talk of expunging them even as other jurisdictions invest effort in creating the space for a trusted and legitimised version of their role. This is particularly true given that evidence suggests good support is often being provided by McKenzie Friends, even without any safety net. In the US, it has similarly been observed that the informal work of non-lawyers who are permitted in domestic violence courts,

is difficult to distinguish from the type of nonlawyer advising that is routinely prohibited as [unauthorised practice of law] in other contexts; on the contrary, it looks much like the ‘strategic expertise’ that lawyers provide in navigating relationships, norms, and procedures in court.<sup>51</sup>

How much more beneficial would such support be if we were to follow the approach of other jurisdictions by creating a formalised role for a non-lawyer legal adviser? In this jurisdiction McKenzie Friends provide a ready-made template, as well as evidence of the appetite for such services, particularly in the area of family justice.

Moreover, it is not necessarily the case that the training required to underpin a reliable non-lawyer legal service is extensive. In her synthesis of findings from studies about lawyers’ impact on civil case outcomes, Rebecca Sandefur concluded that the efficacy of lawyers is greatest when they assist litigants in navigating legal and court procedures rather than substantive law and that this appears to be a key feature of lawyers’ impact and advantage.<sup>52</sup> Consequently, she argues that ‘only modest levels and only

<sup>47</sup>G Hadfield ‘The cost of law: promoting access to justice through the (un)corporate practice of law’ (2014) 38 *International Review of Law and Economics* 43.

<sup>48</sup>R Sandefur and T Clarke *Roles beyond Lawyers: Report of an Evaluation of the New York City Court Navigators Program and its Three Pilot Projects* (December 2016), <https://www.srln.org/node/1320/roles-beyond-lawyers-evaluation-new-york-city-court-navigators-program>.

<sup>49</sup>M McClymont ‘Nonlawyer Navigators in State Courts: An Emerging Consensus – A survey of the national landscape of nonlawyer navigator programs in state courts assisting self-represented litigants’ (Justice Lab, Georgetown Law, June 2019), <https://georgetown.app.box.com/s/t2zf6mjv2x74w944t8ejbsku7i2jc7mc>.

<sup>50</sup>Ontario Law Commission report, above n 46, p 2.

<sup>51</sup>J Steinberg et al ‘Judges and the deregulation of the lawyer’s monopoly’ (2021) 89 *Fordham Law Review* 1315 at 1335–1336.

<sup>52</sup>R Sandefur ‘Elements of professional expertise: understanding relational and substantive expertise through lawyers’ impact’ (2015) 80(5) *American Sociological Review* 909 at 909.

some kinds of legal expertise may be required'.<sup>53</sup> Sandefur's conclusions are thought-provoking in the context of family justice. As noted earlier, this is an area widely considered to be relatively accessible in terms of legal technicality. Indeed, Lynn Mather et al have observed 'the limited relevance of technical legal knowledge to the work of divorce law', describing family lawyers as 'especially vulnerable' to attacks from rival service providers 'because it is difficult to claim their skills as either esoteric or exclusive'.<sup>54</sup> It is finally worth noting that our research uncovered a strong appetite for training and development among McKenzie Friends, with some reporting that they had already sought training and even that they were trying to establish training.<sup>55</sup>

In light of all this, and increasing unmet legal need, there is a strong case for greater openness and more constructive dialogue about the work of McKenzie Friends in family cases. Failure to create the conditions in which an important, and apparently desired, type of non-lawyer legal service could be legitimised and flourish seems like a lost – even squandered – opportunity.<sup>56</sup>

### (b) Lawyer free divorce coaching services

Paid McKenzie Friends constitute only a portion of the unregulated legal services and non-lawyer support being provided in relation to family disputes. Research for the Legal Services Board has found that unregulated providers of online divorce services have a substantial share of the divorce services market.<sup>57</sup> The leading provider of online divorce services in the UK is currently *amicable* [sic]. Though delivered online, the USP of this particular service is not entirely derived from its tech-based medium. Rather it lies in the avoidance of lawyers. On its website, '*amicable*' describes itself as a legal services company which 'helps couples who want an *amicable* divorce using a combination of psychology, technology, legal and financial information'. Its legal services, which include managing the divorce process and helping couples make finance and child arrangements, are delivered through 'divorce specialists' rather than lawyers. The divorce specialists are said to 'have expertise in divorce, conflict resolution and separated parenting' as well as 'access to a wealth of legal, financial and parenting resources'.

In contrast to McKenzie Friends, the work of *amicable* appears to be held in high regard and it has received positive media coverage in many mainstream media outlets. The legality of the company's lawyer-free online divorce services was questioned by a court and then unsuccessfully challenged in the case of *JK v MK & E-Negotiation Ltd*.<sup>58</sup> The challenge was based on a claim that conflict of interest rules might be being breached as a result of *amicable* serving husbands and wives jointly, and a concern that it might be straying into the territory of reserved legal services.

Both challenges failed. In his judgment, Mostyn J observed that the unregulated service provided by *amicable* has 'greatly improved access to justice for many people effectively disenfranchised from the legal process' and provides 'clear social benefit'.<sup>59</sup> Meanwhile he implicitly noted the risk inherent in the proliferation of such unregulated services, which are 'not regulated either by statute or voluntarily' by highlighting the 'policy questions' they raise, while declining to express an opinion on them.<sup>60</sup> The case aside, there has been little visible comment from the legal professions on this particular non-

<sup>53</sup>Ibid, at 926.

<sup>54</sup>L Mather et al *Divorce Lawyers at Work* (Oxford: Oxford University Press, 2001) p 14.

<sup>55</sup>See Smith et al, above n 16, pp 30–32 on training opportunities offered and undertaken by McKenzie Friends in the research sample. Clearly the question of who would devise and deliver training is important. Mayson suggests that professional bodies should be responsible for the training of their own members, much as the different family mediation bodies, such as National Family Mediation, have been: Mayson, above n 23, p 15. This does not necessarily mean that standards and compliance would be entirely left to a self-regulatory body, however.

<sup>56</sup>'Squandered' is the term chosen by Steinberg et al, above n 51, at 1317, to describe a similar situation.

<sup>57</sup>Harvey and Williams, above n 20, p 5. See discussion on p 4, above.

<sup>58</sup>[2020] EWFC 2.

<sup>59</sup>At [15].

<sup>60</sup>Ibid.

lawyer legal service, or others like it. This is interesting given that the arguments we set out in favour of some degree of training, scrutiny and regulatory oversight of the legal services provided by McKenzie Friends could equally apply to *amicable's* work.

More interesting still is the gauntlet that the apparent success and appeal of the *amicable* model throws down for traditional family law professionals. The 'two clients – one lawyer' solution for family disputes has begun to catch on in recent years, with the establishment of barrister-led service, 'The Divorce Surgery' in 2018 and several solicitor firms recently following suit.<sup>61</sup> Since *amicable* appears to have been the first to journey into this territory in 2016, though a contemporaneous recommendation that it should be considered was made by researchers,<sup>62</sup> this is a clear indicator of the potential for non-lawyer legal services to prompt broader change.

It would be naïve to think that the growth of single lawyer divorce services would be the last example of such change. Indeed, we suggest that further innovation still could derive from the *amicable* model alone. It is clear from the above description of its divorce specialists that *amicable's* service is pitched as a holistic one, in which law is relevant but not central, and the relational context of the disputes drives the approach to resolution and frames the support provided. Founder, Kate Daly, reinforces this view in an interview for *The Times*, saying 'Divorce is fundamentally about emotions. I wanted to create an approach driven by divorce coaches rather than solicitors... a mix of tech and psychology'.<sup>63</sup> Yet, rather than focusing exclusively on relational support, *amicable* explicitly couples it with legal information and legal services; its model thereby seeks to alter the experience of obtaining a divorce and/or making formalised finance and child arrangements rather than shunning the legal process altogether. The emphasis on redefining *and broadening* the nature of the problem to be solved is reminiscent of Moorhead et al's work, which identified a 'paraprofessional paradigm' in which non-lawyers 'assert similar competencies to lawyers' as well as 'useful difference' that implicitly problematises some of what lawyers do while supposedly elevating the value of their own approach.<sup>64</sup>

In the context of family disputes, it is difficult to argue with the view that a relational approach to advice that is rooted in genuine conflict-resolution expertise might enhance the value of legal services. In future, the work and training of family lawyers might well revolve around holistic service provision that combines expertise in conflict, psychology, technology and law. Or the impact of innovative services like *amicable* on the work of family lawyers could take a different turn. Family lawyers of the future might find themselves playing a less central part in a holistic, multi-strand service that is partly, or even largely, delivered by non-lawyers. Or perhaps there will be opportunities in scrutinising and advising organisations such as *amicable* on the quality of the legal elements of their services. Or perhaps all three of these roles will exist. One way or another, given that the trail is already being blazed by non-lawyer legal services like *amicable*, it seems likely that what it means to be a family justice professional could change dramatically, with services being delivered differently and legal professionals being differently skilled and performing different tasks. This, we argue, highlights a need for proactive conversations about the training, competencies and practice of family law in future.

### (c)B2C ('business to consumer') legaltech

As noted above, a notable feature of *amicable's* services is that they are delivered through online technology. Its success in this regard is unsurprising given that B2C (business-to-consumer) legal tech solutions<sup>65</sup> have

<sup>61</sup>N Hilborne 'National firm backs trend to offer single lawyer divorce service' (*Legal Futures* 17 February 2022).

<sup>62</sup>M Maclean and J Eekelaar *Lawyers and Mediators: the Brave New World of Services for Separating Families* (Oxford: Hart Publishing, 2016).

<sup>63</sup>C Bullock 'Amicable sets out to show the friendly face of divorce' (*The Times* 9 April 2021).

<sup>64</sup>Moorhead et al, above n 23, at 768. It is worth noting Moorhead et al's conclusion that there is little evidence that para-professionals perform less well than professionals when it comes to various types of legal advice (at 794–796).

<sup>65</sup>B2C legaltech describes 'business-to-customer' solutions, that are designed to assist members of the public in solving their problems, as distinct from the arguably better developed B2B ('business-to-business') solutions that are designed to help companies providing legal services improve their business or service models.

been recognised as particularly prevalent in family law.<sup>66</sup> Depending on the type of technology they utilise, resources that assist with family justice problems have the potential to qualify as a new type of non-lawyer legal service. The use of AI in chatbots that guide users towards solutions or strategies, or in algorithm-based tools that predict or suggest solutions is the most obvious means of lawyer-substitution.<sup>67</sup> While *amicable* itself talks of ‘blending technology and human support’, it uses a chatbot based on natural language processing to help advise its clients and is also developing new tools that use data ‘to build algorithms to narrow negotiation ranges and predict settlement outcomes’ for divorcing couples’ finances.<sup>68</sup> Wikivorce already offers an online calculator that suggests a fair split of divorcing couples’ assets based on their circumstances and legal principles.<sup>69</sup> Such tools undoubtedly have potential but the importance of ensuring the reliability and consistency of the technology, as well as the accuracy of the underlying data, is obvious. In a slightly different vein, the much-discussed and celebrated Dutch Rechtwijzer used data-driven, interactive online pathways to support separating couples towards constructive resolution of their disputes through self-help supplemented by Online Dispute Resolution (ODR).<sup>70</sup> Again, it is vital that the thoroughness and appropriateness of data-driven processes is understood and monitored. Rechtwijzer, which was initially funded by the Dutch Legal Aid board, turned out not to be financially viable and ceased to operate; attempts by the charity *Relate* to establish a similar platform in England and Wales were subsequently abandoned.<sup>71</sup> However, many consider that it left a legacy, in terms of a smaller, privately-funded Dutch service and influence over other initiatives, such as British Columbia’s interactive, online self-help pathway, MyBC.com.<sup>72</sup> Further forays into interactive online advice and ODR are almost inevitable in the family justice sphere.

As observed by Mayson, lawtech services ‘increase the regulatory gap’, in which legal services may be provided without accountability for their content or avenues of redress for unhappy consumers. This gap is particularly pertinent to family law because, across jurisdictions, this is the area in which the most notable examples of lawtech targeted at consumers and unmet legal need have been found to lie.<sup>73</sup> Moreover, it is concerning that the types of service being developed, like some of those described above, are the very embodiment of the lawtech situations in which Mayson argues that the stakes, and therefore the risks, are high. For example, he says, where:

... personal assets might be determined by an algorithm, or where there is the potential for inconsistency or unconscious bias in supposedly independent and objective systems, the lack of regulation and of accountability or liability for the technology could be particularly challenging.<sup>74</sup>

With the need to identify proportionate means of regulating lawtech already very much on the agenda of bodies such as the Legal Services Board and the Solicitors Regulation Authority,<sup>75</sup> we can be

<sup>66</sup>A Hook *The Use and Regulation of Technology in the Legal Sector beyond England and Wales: Research Paper for the Legal Services Board* (Legal Services Board, 2019) p 26.

<sup>67</sup>Mayson classifies this type of service as ‘substitutive legal technology’, on the basis that it ‘provides self-service direct access to legal services for consumers. As such, it substitutes for a lawyer’s input, and can be experienced by the consumer without the need for any human interaction in the delivery of the service’: Mayson, above n 23, p 134.

<sup>68</sup>J Goodman ‘Self-service solution’ (*The Law Society Gazette*, 21 June 2021).

<sup>69</sup><https://divorce.wikivorce.com/divorce-calculator/divorce-calculator.html>.

<sup>70</sup>For information and reflection on Rechtwijzer see B Dijksterhuis ‘The online divorce resolution tool ‘Rechtwijzer uit Elkaar’ examined’ in Maclean and Dijksterhuis, above n 22, p 193.

<sup>71</sup>See R Smith ‘The fate of Rechtwijzer’s English daughter: Relate suspends online dispute resolution project’ *Law, Technology and Access to Justice* (28 September 2017), <https://law-tech-a2j.org/odr/rechtwijzers-english-daughter-relate-suspends-online-family-dispute-resolution-project/>.

<sup>72</sup>See R Smith ‘Goodbye Rechtwijzer; hello justice42’ *Law, Technology and Access to Justice Blog* (31 March 2017), <https://law-tech-a2j.org/advice/goodbye-rechtwijzer-hello-justice42/>; Dijksterhuis, above n 70.

<sup>73</sup>Hook, above n 66, p 26.

<sup>74</sup>Mayson, above n 23, p 135.

<sup>75</sup>See the Legal Services Board series of papers on this series, <https://legalservicesboard.org.uk/our-work/ongoing-work/technology-and-innovation/developing-the-next-phase-of-our-work-on-technology-and-innovation/papers>; The Law Society *Lawtech Adoption Research* (February 2019), <https://www.lawsociety.org.uk/Topics/Research/lawtech-adoption-report>; M

confident that there will be developments in the not-too-distant future. However, it is striking that there is no strong or obvious contribution to the lawtech regulation debate from the family law profession. This could be attributable to lack of insight into lawtech issues among family law professionals, and/or to a reluctance to engage with a trend that undoubtedly threatens to erode the traditional workbase of family lawyers. Either way it is unfortunate, as there is clearly a case for particular watchfulness in relation to the need for and potential impact of lawtech regulation in this field. Moreover, it has been noted that most lawtech services are not being developed by lawyers but by non-lawyers who are more able 'to re-engineer legal problems'.<sup>76</sup> Yet the best lawtech solutions of the future will undoubtedly benefit at both design and oversight stages from the input of experts in family law.

Lawtech presents further challenges and opportunities for family law professionals. *amicable's* chief executive describes its service as 'blending technology and human support' because its service packages do include the offer of personal support from human divorce coaches. Similarly, the Rechtwijzer model integrated online tech-driven advice with online, human-mediated dispute resolution. These models demonstrate that, when it comes to family justice, even in lawtech services there remains a place for human professional input. Neither is this simply a matter of satisfying client preferences. Rather, as Brownsword warns, there is a need to avoid over-reliance on technological tools in the development of lawtech, 'in a way that is corrosive of human autonomy and human responsibility'.<sup>77</sup> In other words, there is a role for human professionals in monitoring, scrutinising and reflecting on the outcomes generated by lawtech tools, as well as providing services for those aspects of family dispute resolution where a human element is indispensable. As such, opportunities remain for specialist family law practitioners, whether as scrutineers and auditors of the legal components of family lawtech, or as trainers of the providers of lawtech, or as collaborators in the development and provision of lawtech. These opportunities are all far removed from the domain of traditional family law practice and taking them up will not be without challenge.<sup>78</sup> But it is a challenge that must be met as it is clear that the growth of family lawtech is a trend that cannot be reversed or dodged. Neither should we want it to be since it brings genuine, albeit not universal, access to justice gains.

In this section we have demonstrated that there is an expansive wild side to the legal services provided for family disputes, with unregulated, non-lawyer provision being unusually prevalent and taking many forms. We have shown how the ramifications of Mayson's assertion that we must 'move beyond regulation of lawyers to regulation of legal services'<sup>79</sup> apply to the family justice context. But we have also argued that regulatory challenges are supplemented by more existential challenges, and opportunities, for family law professionals. The reality is that family lawyers cannot be confident that they will retain the same share of family dispute resolution services as they historically did. But this does not mean that there is no role for family law experts; willingness to engage with the challenge and to explore the opportunities is needed, however. To underscore this, we conclude the section with the words of one commentator on the Dutch Rechtwijzer experience, who noted a similar trend:

Rechtwijzer uit Elkaar and similar online dispute resolution tools offer a valuable opportunity to reflect on the role of the legal professions in the field of divorce. The lawyer's role changed – he became a reviewer. Mediators became adjudicators and so on. The critical attitude of the... Dutch

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Sako and R Parnham *Technology and Innovation in Legal Services: Final Report for the Solicitors Regulation Authority* (University of Oxford, 2021).

<sup>76</sup>Hook, above n 66, p 7.

<sup>77</sup>R Brownsword *The Regulation of New Technologies in Professional Service Sectors in the UK: Key Issues and Comparative Lessons* (Legal Services Board, 2019) p 10.

<sup>78</sup>On the immense challenges that lawtech poses for professionals generally see L Webley *Ethics Technology and Regulation* (Legal Services Board, 2020), as well as other papers referenced above in n 75; D Remus and F Levy 'Can robots be lawyers?' (2017) 31 *Georgetown Journal of Legal Ethics* 501.

<sup>79</sup>Mayson, above n 23, p 11.

Bar meant that they were forced to explain why their contribution was crucial to help people in a divorce process.<sup>80</sup>

### 3. No-man's land: extra-legal support services and family justice

So far, the discussion has highlighted the professional and regulatory challenges presented by family law services that are provided by non-lawyers, but which nonetheless have a discernibly legal flavour. In this section we shift the focus to less obviously legal services which are prevalent in the field of family justice. We are talking here of services that target the unavoidably relational dimension of family dispute management. Programmes and resources designed to support post-separation communication and planning, particularly in relation to co-parenting, have an undeniable presence in the terrain on which family justice professionals operate and are allied, if tangential, to the core business of family justice. Following the lead of Davis in his 1988 study of mediators, we term these 'extra-legal' services.<sup>81</sup> Though not obviously legal, we believe they should nonetheless prompt reflection and debate within the legal profession on quality assurance, accountability and professional responsibilities, and on the appropriate parameters of the lawyer's role. In other words, the boundary of what counts as a legal service in relation to family services is blurry, and the question of whether, what and how to regulate practice at that boundary is an important one.

Providers of therapeutic and relationship-focused services are hardly strangers in the world of family disputes. Scholars have for years noted that the work of family lawyers is vulnerable to challenge by such service providers, given the indisputably emotional and relational context of family disputes.<sup>82</sup> As Maclean and Eekelaar have said, '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'.<sup>83</sup> Certainly this view has driven a long-standing policy drive to orientate people away from family lawyers and towards mediators.<sup>84</sup> Widespread recognition that law cannot provide a true solution to many family disputes also lies behind the decision to give judges power to direct parents to attend Separated Parents Information Programmes.<sup>85</sup>

In this jurisdiction, mediation is explicitly excluded from the definition of legal services in the Legal Services Act 2007. In his recent independent review of legal services regulation, Mayson challenged this characterisation. The exclusion of mediation from the purview of legal services subject to (compulsory) regulation<sup>86</sup> has, he noted, been justified on the basis that it is a type of alternative dispute resolution, the 'alternative' marking it as distinct and separated from the legal process. The supposed voluntary basis of mediation, along with the lack of advisory or representative functions on the part of the mediator, are also sometimes thought to distinguish it from legal services. Family mediators might claim that their work is quite distinct from legal processes on the basis that they are just as concerned with improving parties' communication as they are with facilitating dispute resolution.<sup>87</sup> Be that as it may, Mayson is unconvinced by claims that family mediation is always non legal. It is a service that is now explicitly woven into the fabric of family law and family justice process<sup>88</sup> with the result that parties are all but

<sup>80</sup>Dijksterhuis, above n 70, p 211.

<sup>81</sup>G Davis *Partisans and Mediators* (Oxford: Oxford University Press, 1988).

<sup>82</sup>Davis, *ibid*; Mather et al, above n 54; Smith and Hitchings, above n 17.

<sup>83</sup>Maclean and Eekelaar, above n 1, p 181.

<sup>84</sup>See summary in Smith and Hitchings, above n 17, at 350–351.

<sup>85</sup>This power exists under Children Act 1989, s 11A. See L Smith and E Trinder 'Mind the gap: parent education programmes and the family justice system' (2012) 24(4) *Child and Family Law Quarterly*.

<sup>86</sup>There is, of course, self-regulation of family mediators, though the adequacy of this has been repeatedly questioned: J McEldowney *Family Mediation in a Time of Change: FMC Review Final Report* (Family Mediation Council, 2012); A Barlow 'Rising to the post-LASPO challenge: how should mediation respond?' (2017) 39 *Journal of Social Welfare and Family Law* 203.

<sup>87</sup>See discussion of mediation models in Maclean and Eekelaar, above n 62.

<sup>88</sup>Attendance at a Mediation Information and Assessment Meeting is mostly mandatory before issuing proceedings for a private family dispute: Family Procedure Rules 2010, Practice Direction 3A. The position is further consolidated by the

compelled, by legal authority, to engage with mediation. Not only does this arguably negate claims of its essentially voluntary basis, but it also brings into sharp relief the fact that family mediation is, in Mayson's words, 'assisting a party to a dispute for which the governing law is that of England & Wales in reaching or progressing a resolution of that dispute'.<sup>89</sup> Mayson's recommendation is that such assistance should be regarded as a legal service and should in future attract some form of compulsory regulatory oversight. His concerns resonate with those of some family law scholars. Anne Barlow, for example, has noted that the fragmented self-regulation of family mediation is inadequate.<sup>90</sup>

In the context of family dispute resolution there are other extra-legal services to which Mayson's definition of assistance that amounts to a legal service could apply, which have not yet featured in discussions about modernising legal service regulation or provision. One such service is separated parenting coaching. A quick Google search reveals numerous co-parenting coaching services offering to support separated parents in navigating routes through their separated parenting difficulties. We distinguish these from *amicable*, which we discussed above and which does offer co-parenting coaching, only because *amicable* explicitly ties its services to the legal mechanics of obtaining a divorce, and offers assistance with the legal process of making formal child arrangements. Co-parenting coaching, by contrast, is normally presented without reference to legal process. In many cases, of course, co-parenting coaching might have nothing to do with law at all – if it is sought, for example, by parents who simply wish to optimise their future planning within the context of uncontested goals and harmonious communication. But where used as a means to assist parties in dispute over their co-parenting arrangements, it is, like mediation, assisting in the resolution of a dispute that is legally justiciable.<sup>91</sup>

Another extra-legal service of interest in the field of family justice is the burgeoning co-parenting apps market. A quick Google or app store search will reveal numerous such apps, which are designed to support separated parents in planning and/or managing their co-parenting responsibilities. They are wide-ranging in scope. Many are at least partly focused on relationship-management, offering functions such as messaging facilities, with some seeking to educate parents in techniques to manage conflict, communication and the co-parenting relationship.<sup>92</sup> Most offer organisational tools, utilising functions such as shared calendars, chat facilities and parenting expenses trackers. Some have an explicitly legal dimension. For example, although focused on relationship communications, *Our Family Wizard* offers optional facilities (add-ons) for users to record and manage evidence for family law cases, and to allow lawyers to monitor and intervene in the parents' communications. In a 2018 Australian study, Smyth and Fehlberg identified 43 co-parenting apps, noting that the number and features of the apps was 'surprising, significant and bewildering'.<sup>93</sup>

In their examination of post-LASPO family justice options, Maclean and Eekelaar observed that co-parenting apps 'might be very useful in avoiding conflict' but stopped short of engaging further with them, questioning whether they really have anything to do with law.<sup>94</sup> But some of these apps explicitly market their relevance to the legal process. For example, at the time of writing, the website of *Our Family Wizard* advertises the fact that its app is often included in court orders across the United States, Canada and other countries, and even includes text of a draft court order

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availability of legal aid for mediation but not for legal services: Legal Aid Sentencing and Punishment of Offenders Act 2012, Sch 1, para 14.

<sup>89</sup>Mayson, above n 23, p 119.

<sup>90</sup>Barlow, above n 86.

<sup>91</sup>Indeed, it is notable that a number of co-parenting coaches are accredited by at least one family mediation organisation.

<sup>92</sup>See for example the co-parenting advice and co-parenting goals that the *amicable* co-parenting app includes, and *Our Family Wizard*'s appealing sounding 'Tonemeter' function that allows parents to check the tone of messages before sending them.

<sup>93</sup>B Smyth and B Fehlberg 'Australian post-separation parenting on the smartphone: what's appening?' (2019) 41(1) *Journal of Social Welfare and Family Law* 53 at 56.

<sup>94</sup>Maclean and Eekelaar, above n 1, p 168.

recommending its app on its website.<sup>95</sup> While the app doesn't give legal advice,<sup>96</sup> it is arguably being promoted in a way that would bring it under the umbrella of Mayson's definition of services that are 'assisting a party to a dispute for which the governing law is that of England & Wales in reaching or progressing a resolution of that dispute'.<sup>97</sup>

Should any revised formal regulatory requirements for legal services apply to co-parenting coaching or co-parenting apps? We are not necessarily talking here of the full regulatory regime that currently applies to reserved legal services, but of one of the more light-touch sets of requirements anticipated under the sort of tiered, risk-based approach to future regulation that has been proposed by Mayson. In relation to this sort of service that might entail mandatory registration, along with 'requirements for accreditation, professional indemnity insurance, continuing professional development adherence to a code of conduct and complaints handling'.<sup>98</sup>

In response to those who think this would be unnecessary, and a regulatory overreach, we make three points. First, if it is felt that the net of the Mayson recommendations on the scope of legal services regulation could be cast too wide in the context of family disputes, it behoves us to be alert to the direction of the debate and how it applies in our field, so that we might argue against any proposed developments that might be problematic. Secondly, if the idea that these services should fall within the remit of some types of legal services regulation is thoughtfully rejected, it remains the case that there are important discussions to be had about the obligations and responsibility of legal professionals in relation to recommending them. At the time of writing, we found that particular co-parenting coaching services and at least one co-parenting app were signposted as a resource for parents by Cafcass<sup>99</sup> and/or promoted by *Resolution* (a membership organisation for family justice professionals). Occasionally, we have seen family law solicitors promoting certain services in the environs of social media.

It is unsurprising that family law practitioners would recommend these services, given that good practice in the field is synonymous with private settlement, conflict diffusion and constructive dispute resolution.<sup>100</sup> But Mayson highlights one potential problem, noting that when regulated advisers recommend such services to clients, 'they are effectively removing them from a regulated environment (legal services) into an unregulated one'.<sup>101</sup> Add to this the trust one might expect to follow a professional recommendation for a particular service and it is clear that professional recommendation should happen only against a backdrop of due diligence around clear quality assurance standards. Legal professionals, we argue, ought to be confident of the evidence-base and quality assurance processes behind any extra-legal family relationship service they recommend. We note that at present, *Resolution's Good Practice Guide for Family Lawyers*<sup>102</sup> expressly endorses referrals to extra-legal services such as family therapists but does not set out any expectation that a lawyer should understand the quality and benefits of the service first. Neither are specific obligations related to knowledge or due diligence when signposting extra-legal services to be found in the Solicitors Regulation Authority's Statement of Solicitor Competence.<sup>103</sup> Filling these gaps ought to be contemplated.<sup>104</sup>

<sup>95</sup><https://www.ourfamilywizard.co.uk/practitioners/model-order-language>.

<sup>96</sup>In that sense this and other apps are distinguishable from lawyer-free divorce services provided by the likes of *amicable*, which combine relational support directly with traditional legal services.

<sup>97</sup>Mayson, above n 23, p 119.

<sup>98</sup>*Ibid.*

<sup>99</sup>Child and Family Court Advice and Support Service.

<sup>100</sup>The Resolution Code of Practice, see <https://resolution.org.uk/membership/our-code-of-practice/>.

<sup>101</sup>Mayson, above n 23, p 117.

<sup>102</sup>See <https://resolution.org.uk/resolutions-good-practice-guides/good-practice-guide-for-family-lawyers-working-with-clients/>.

<sup>103</sup>See <https://www.sra.org.uk/solicitors/resources/continuing-competence/cpd/competence-statement/>.

<sup>104</sup>It is interesting that awareness of the need for legal professionals to possess reliable knowledge on the quality of tools they use and recommend does seem to exist in relation to lawtech discussions. See, for example, Sako and Parnham, above n 75, ch 6.

Within appropriate boundaries, it is entirely appropriate for family law professionals to recommend extra-legal services, possibly more often than they do now. As Sandefur notes, there are many justice problems for which lawyers' services are 'the wrong treatment for the problem',<sup>105</sup> an observation particularly pertinent to the inherently relational and emotional character of family disputes. Like Sandefur, however, we believe that extra-legal support for the resolution of justiciable disputes is acceptable on the condition that it is informed by justice norms. From this stems our third reason for suggesting that family justice professionals should contemplate the appropriateness of regulatory responses to extra-legal services; even if traditional regulation is not considered appropriate, it is important to consider whether some other form of professional accountability should be imposed on those who provide them.

On this, we share some ground with family justice commentators who have bemoaned the fact that family mediators are not obliged to foreground, or even to know, legal norms when supporting family dispute resolution. Barlow et al for example, have highlighted the need for 'just settlement', ie settlement according to recognised family justice norms, to be fostered by family mediators following their research which showed unfair or unjust mediation agreements to be widespread.<sup>106</sup> Maclean and Eekelaar have called for mediators' codes of practice to require that mediated settlements fall 'within the principles of the law'.<sup>107</sup> However, there is a point on which we depart from these commentators, namely that we do not think that inserting a role for lawyers into extra-legal services is the same thing as ensuring they deliver support that is consistent with key justice norms. Barlow et al suggest that best practice entails solicitors playing a role in family mediation by supplementing it with legal advice and Barlow has proposed that mediators should 'work on a joined up solution with lawyers' to engineer mediated settlements that are legally valid and endorsed.<sup>108</sup> *Resolution*, the membership organisation for family lawyers, responded to the need for more accountability in mediation by piloting 'Family Matters Guides'.<sup>109</sup> This involved lawyer-mediators delivering legal information alongside mediation. Clearly such approaches would improve the extent to which mediated settlements adhere to family justice norms, and they would undoubtedly be positive in some instances.<sup>110</sup> But the tendency for lawyers to feature at the centre of proposals to improve extra-legal family dispute resolution support seems rather self-referential. To us it avoids the key challenges posed by extra-legal dispute resolution services. These include the inherent challenge to the territory of lawyers who might have to cede some ground to other types of professional, and finding an effective means to ensure that extra-legal services are conversant in and compliant with important justice norms when that is appropriate to their work.

The closest recognition of this reality we have seen is Maclean and Eekelaar's proposal for 'legally-assisted family mediation'.<sup>111</sup> They call for the development of a hybrid professional who delivers a package of legal advice and mediation but suggest that either lawyers qualified as mediators, or mediators licensed to advise on the relevant law (much like a licensed conveyancer) could provide this. The challenge of establishing bespoke training and authorisation schemes to enable providers of extra-legal dispute resolution to deliver their services in compliance with the legal justice norms is one we would like to see fleshed out in further discussion. However, thanks to the sheer range of extra-legal support provided in the no-man's land of family disputes this could be more challenging than even Mayson has contemplated. In fact, the family justice landscape might call for a completely different

<sup>105</sup>R Sandefur 'Access to what?' (2019) 148(1) *Daedalus* 49.

<sup>106</sup>A Barlow et al 'Mapping paths to family justice: briefing paper and report on key findings' (University of Exeter, 2014) p 27, [http://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/familyregulationandsociety/pdfs/Mapping\\_briefing\\_paper\\_final\\_post\\_conference\\_version\\_\\_\\_ISBN.pdf](http://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/familyregulationandsociety/pdfs/Mapping_briefing_paper_final_post_conference_version___ISBN.pdf).

<sup>107</sup>Maclean and Eekelaar, above n 62, p 134.

<sup>108</sup>Barlow, above n 86, at 214.

<sup>109</sup>See C Skinner 'One lawyer acting for two clients: implications arising from an experimental practice model "Family Matters"' (2019) 41(3) *Journal of Social Welfare and Family Law* 265.

<sup>110</sup>Barlow et al's research does identify a tendency for parties to be more confident in agreeing and mediating if they feel they understand their legal entitlements.

<sup>111</sup>Maclean and Eekelaar, above n 62, p 129.

approach to standard setting and quality assurance to generate norms and standards across professional boundaries, and to set the terms for interprofessional collaboration. In relation to technologically complex lawtech, it has been observed that the ‘product governance’ approach adopted in the fields of finance and medicine should be explored. A study for the Solicitors Regulation Authority notes that this ‘requires product and service providers to implement a set of internal processes that govern the development, testing and marketing of products which ensure that consumer benefits are realised’, with those requirements being overseen by a regulator.<sup>112</sup> Extra-legal family services are not generally as technically complex as most lawtech, but demanding rigour in the design and testing of them would nonetheless be appropriate. As social scientists we know that these tools might shape behaviours in diffuse ways, influencing dispute resolution and aiding or obstructing the achievement of just outcomes. As such, we must ensure that their capacity to deliver just solutions is scientifically established. Regulated and responsible legal professionals should require no less before endorsing them.

## Conclusion

In this paper we have demonstrated that the terrain of family dispute resolution is occupied by a diverse range of service providers that goes far beyond lawyers, and even beyond what is normally thought of as legal support. We have discussed the challenges and opportunities presented by non-lawyer legal services, lawtech and more therapeutic, extra-legal dispute resolution services, as well as the upheaval that all these present to the traditions and territory of family lawyers. It is ironic, however, that the issue that has attracted the most attention and concern, namely fee-charging McKenzie Friends, is the one that least threatens to subvert the traditional ways in which family justice advice and support is delivered. This reality typifies the narrow focus that has resulted in some important and dramatic features of the family justice landscape being missed altogether. We have sought to highlight reasons why the full spectrum of non-lawyers in this territory should not be left to operate in an under-explored wilderness, free from standards and ill-understood. We have also demonstrated that the terrain of family lawyers is being challenged in ways which cannot and should not be dismissed as inappropriate or unhelpful. All this presents important questions for the future of family law as a practice and a profession. The question of whether, when and on what terms family law professionals should cede, or share, territory with other types of service provider is an important one that is only likely to become more pressing as, inevitably, the landscape of legal service provision further diversifies.

There are signs that the shifting boundaries and increasing diversity of the family justice landscape are being recognised. Maclean and Eekelaar stated that the future of family justice requires us to look beyond professional boundaries, though they did not explore the practical or regulatory ramifications of this that we have begun to set out here.<sup>113</sup> A recent report from the Family Solutions Group (FSG)<sup>114</sup> promisingly called for evolution of a national ‘Family Solutions’ service, incorporating family courts and a range of more relationship-based dispute resolution services.<sup>115</sup> Among other things, the Group recognised the need for closer working practices between solicitors, mediators and other professionals and the need for family lawyers to be better trained in non-legal issues such as the psychology of family breakdown.<sup>116</sup> Yet there is nothing in their recommendations that recognises the thorny issues of regulatory and professional challenge that might manifest in this sort of

<sup>112</sup>Sako and Parnham, above n 75, p 127.

<sup>113</sup>Maclean and Eekelaar, above n 1, p 171.

<sup>114</sup>This is a subgroup of the Private Law Working Group, founded in 2018 by the President of the Family Division, Sir Andrew McFarlane, to review the approach to private family disputes.

<sup>115</sup>*What about Me? Reframing Support for Families Following Parental Separation: Report of the Family Solutions Group* (12 November 2020), [https://www.judiciary.uk/wp-content/uploads/2020/11/FamilySolutionsGroupReport\\_WhatAboutMe\\_12November2020-2.pdf-final-2.pdf](https://www.judiciary.uk/wp-content/uploads/2020/11/FamilySolutionsGroupReport_WhatAboutMe_12November2020-2.pdf-final-2.pdf).

<sup>116</sup>*Ibid.*, p 81.

multi-disciplinary future. Neither do they contemplate the potential impact of non-lawyer legal services, or the full spectrum of extra-legal services that support family dispute resolution, even though they present as highly supportive of the latter in principle.

In some respects, the FSG proposals are already behind the times. The extra-legal services they advocate for, and more, are already on offer, if not yet always in spaces where they connect and overlap with family lawyers. Consequently, their proposals for change to the training and practice norms of family lawyers fail to capture the scale of the change that is likely to be needed. Finally, the FSG exhibits the same lawyer-centric tendency that we noted earlier in relation to proposed improvements to mediation; its proposals do not contemplate the reality of justifiably shrinking territory for family lawyers if extra-legal services are enabled to evolve in evidence-based ways compatible with core justice norms. Indeed, were the FSG proposals to be implemented, the marginalisation of family lawyers would certainly be hastened as extra-legal services would acquire the policy and funding levers to capture more of the family dispute market.

Of course, we are not the first to note the atypical nature of family law practice. The claim that family law is a 'hybrid profession' emerged with the suggestion that lawyers needed to be counsellors as well as technical experts. As mediation challenged lawyers' professional territory and intellectual dominance,<sup>117</sup> the hybrid professional moniker served to shore up the value of lawyers by downplaying the distinctiveness of the rival mediators' contribution. As the range of rivals bringing new techniques and skills to bear on family dispute resolution expands, it is unlikely that claims to lawyer 'hybridity' (which have never been substantively evidenced anyway) can stand as a firm bulwark against the tide of change. The retreat from legal aid, the entry of multiple models of non-lawyer provision, and the potential to scale these through technology elevate the challenge to something potentially profound: the remaking of family lawyers as family justice professionals, with law and legal expertise no longer necessarily central to the resolution of family disputes. Regulators and family law professionals must respond to the changing landscape. We need new structures and processes which facilitate work by hybrid, collaborative and parallel professionals, many of whom are not lawyers, and some of whom are lawyers fulfilling hitherto unfamiliar professional roles.

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<sup>117</sup>A Abbot *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: University of Chicago Press, 1988).