

THE VIRTUAL DIVORCE

*Edward Cooke explains why
family law professionals must
embrace training opportunities
to meet new digital challenges*



Having already brought about major transformation to the practice of family law and divorce in the UK, the covid-19 pandemic is now leading to major developments in the way family law professionals are trained – changes that are, in my view, here to stay.

Changes that have been accelerated and, in some instances, brought about by the pandemic, point to a future need for both family lawyers and mediators to have a far greater range of skills and experiences at their fingertips in order to navigate a fast-changing digital world.

How this training is delivered will also be significantly different.

Almost every aspect of divorce and family law has been transformed by the pandemic, given the now widespread use of the HM Courts and Tribunals Service (HMCTS) online divorce and consent orders process by solicitors in recent months; the fact that the vast majority of family hearings are being dealt with online; and the use of Zoom (and similar platforms) for almost all family mediations at present.

ONLINE OR FACE-TO-FACE?

Some matters will undoubtedly be dealt with face-to-face again in the weeks and months to come.

In his briefing note in June 2020, the president of the Family Division, Sir Andrew McFarlane, spoke of a move towards dealing with court hearings as ‘hybrid’ hearings, with one or more party attending in person and another remotely. However, he made clear in the same document that it was unlikely family courts would return to anything approaching a normal service until spring 2021.

Notwithstanding positive news about vaccinations, I think this timescale is rather optimistic. It is highly unlikely that things will return to how they had been in the family courts prior to the pandemic.

According to the Nuffield Family Justice Observatory (an organisation which has undertaken surveys on remote hearings during the pandemic) the experience of remote hearings has been mixed, particularly for more vulnerable litigants. But many family lawyers have welcomed remote hearings when it comes to the more straightforward cases.

Most lawyers seem to be of the view that there is no reason at all why directions appointments in most financial remedy and

private law Children Act proceedings should not be held online going forward.

These hearings are often short; and all the evidence from the pandemic is that these sorts of hearings are highly effective when dealt with online.

More complex cases requiring either significant dispute resolution, or where the parties are required to give evidence, the likelihood is that many of these may lend themselves better to face-to-face hearings in future.

That said, during the pandemic there has also been a significant shift towards non-court dispute resolution, in the shape of private financial dispute resolution hearings (FDRs), hybrid mediation – family mediation involving lawyers – and arbitration.

MEDIATION BY ZOOM

The most transformational aspect of the pandemic in family law is the impact of online technology in resolving disputes out of court.

At the beginning of 2020, I had only undertaken a couple of mediations online via Skype in cases where the parties lived in different countries. The perceived wisdom in the mediation profession seemed to be that one would only mediate a case virtually where one absolutely had to. The pandemic has completely changed this.

The vast majority of mediators I know have been successfully mediating cases on Zoom over the last few months. It is not uncommon for agreements to be reached over three to five sessions of an hour or so each, meaning the whole process is saving couples thousands of pounds compared to a divorce through the courts.

The lesson being learned is that while ‘divorce by Zoom’ isn’t right for everyone, or suited to every case, it is an approach that can offer real benefits for many people. Online dispute resolution has proved to be highly successful at reducing conflict, enabling couples to reach an agreement more quickly and, as a result, reducing legal costs.

Not having to be physically in the same space, and the opportunity to benefit from virtual break-out rooms for a breather when things get heated, can help couples to diffuse high conflict situations.

Zoom gives people who don’t want to sit together the opportunity to have some space. For example, in cases involving couples who may



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struggle to control their emotions, or where one person may feel uncomfortable being in the room physically with the other person, video mediation can actually be better.

I have seen quite a number of couples successfully resolving their disputes via Zoom, particularly in high conflict scenarios, where it might conceivably have been more difficult to resolve matters in an environment where they were actually sitting in a room together.

HYBRID MEDIATION

Another trend that has been accelerated by the pandemic is the increased use of hybrid mediation for family cases. Hybrid mediation is a process that draws some aspects from the civil mediation model. Solicitors tend to be involved during mediation sessions (this is unusual in the traditional family mediation model). Importantly, the mediator can also keep confidences from each party given in private meetings.

The hybrid mediation model is excellent for high conflict and the more complex cases. Many of these cases may be difficult, if not impossible, to mediate through the traditional mediation route. The involvement of both parties’ solicitors at the heart of the hybrid mediation process, and the ability (through confidences) of the mediator to understand each parties’ underlying interests, is hugely beneficial.

Resolution has trained a significant number of hybrid mediators in recent months; and there has been a dramatic increase in the use of hybrid mediation. Given the major issues facing the courts at present, the hybrid mediation model is a highly attractive alternative in terms of speed, solicitor involvement and its ability to deliver constructive outcomes for the parties. It is also invariably substantially cheaper for the clients.

A NEW WORLD FOR TRAINING

The new working landscape brought on by covid-19 does, however, present new challenges for family law professionals, as well as the need for a skilled-up workforce to address them.

The skills required to support clients in achieving the best possible outcomes from a digital divorce are not now merely legal, but also multi-faceted, requiring professionals to adapt and upskill quickly.

Active listening, using language to reduce conflict and knowing how to encourage parents to keep the needs of children at the forefront of online discussions, are all essential and, indeed, increasingly important when family law professionals are working online.

The reality is that courts are overwhelmed by trying to cope with a huge backlog of cases. For this reason, it is vital we are equipped with the skills to support clients through non-court options, such as mediation, arbitration and collaborative law; and to help support clients effectively in the online world – a new world which has become the norm in family law (certainly for now, at least).

At the moment, only a small proportion of Resolution’s family lawyer members have advanced training in non-court resolution, for example, as mediators and collaborative lawyers. This means many could find themselves struggling to keep up in a fast-changing world, particularly at the more junior end of the profession.

In a recent sector poll conducted by Resolution, two thirds of junior practitioners said they had felt isolated from their peers in the legal community since the start of the pandemic. Nearly half of those polled said their professional development had been affected.

In Autumn 2020, the organisation substantially stepped up its programme of online essential skills training courses for junior practitioners, covering topics such as online advocacy; how to engage more effectively with clients; managing the dynamics of conflict; understanding the use of language; and the psychology of family law.

Making sure junior practitioners are offered ongoing development is an important part of responding to a working and learning environment changed by covid-19. Beyond the pandemic, I have no doubt client expectations will also be changed.

People increasingly want – and need – to resolve matters online rather than in person; and given this and the continuing restrictions brought about by the ongoing pandemic, methods of non-court resolution such as mediation, collaborative law and arbitration are likely to become increasingly popular.

We need to ensure our profession is equipped to support clients in a wide range of situations in the best way possible, now and in the future.

SKILLS TRAINING

There is increasing awareness of the vital role that essential skills training can play in ensuring family professionals, including solicitors, are able to adapt in the changed environment precipitated by the pandemic.

A report was recently published by the Family Solutions Group, a sub-group of the president’s private law working party tasked with looking at improvements to the family justice



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system to reduce the number of parents resorting to using the family courts upon divorce and separation. One of its key recommendations suggested that all solicitors practising family law, who wish to work with families with children going through separation, should be required to complete a training module focused on a range of skills courses.

Among the topics which the report flagged for inclusion in such a module were:

- Training focusing on the harmful effects on children of parental conflict.
- Enabling the voice of the child to be taken into account in decisions being made which affect the child.
- Screening and awareness of the high incidence of domestic abuse (including controlling and coercive behaviour).

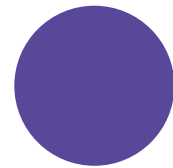
The report also suggested a focus on training around the psychological aspects surrounding divorce, including mental health, personality disorders and addiction issues, which are increasingly a feature of high conflict cases.

The report also recommended training around the benefits of parenting programmes and upskilling lawyers to support their clients more effectively across the full range of alternatives to court proceedings, including in mediation, arbitration and other forms of non-court resolution.

It also suggested training focusing on the need for family lawyers to work in an interdisciplinary way with other professionals, embracing not only mediators, but also financial advisors and therapeutic professionals working in the family law sector.

While the report has not yet been endorsed by the private family working party, at its launch the president made clear his enthusiasm for the work undertaken by its authors. There's a huge amount to consider and no doubt some changes will happen more quickly than others.

As we enter 2021, Resolution will be rolling out more skills training, which I believe is vital; as well as looking to further develop a programme of training which we hope will enable all family lawyers to receive the support they need to adjust in our new increasingly digital environment. [SJ](#)



Edward Cooke

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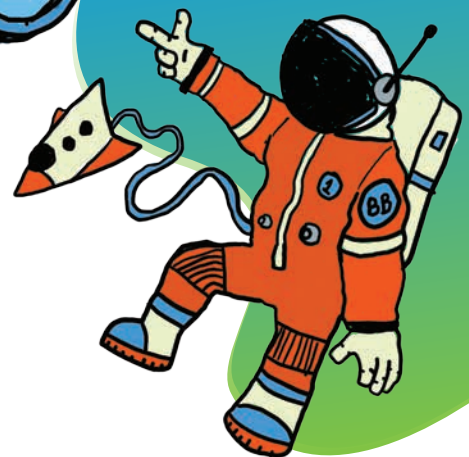
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