One lawyer acting for two clients: Implications arising from an experimental practice model ‘Family Matters’

Christine Skinner

Department of Social Policy and Social Work, University of York, York, UK

Department of Social Policy and Social Work,

University of York, York, UK. YO10 5DD

Email: christine.skinner@york.ac.uk

One lawyer acting for two clients: Implications arising from an experimental practice model ‘Family Matters’

**Abstract**

The legal services market faces unprecedented change following implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Alternative business models and wider use of digital technologies have developed alongside debates about the future of legal practice in family law. Arguments have been made for new hybrid models that combine legal advice with mediation and for solicitors to be enabled to work with two clients. This paper contributes to that debate by highlighting implications for such practice innovations based on new research evidence of solicitors’ experiences of delivering an experimental model of practice: ‘Family Matters Guides’. This model, piloted by Resolution, involved the Guides providing intensive support and legal information (not legal advice) to both separating parents to help them reach agreements. This paper is timely as the professions await the new regulations from the Solicitors Regulation Authority (autumn 2018) making flexible practice models a reality.

Keywords: practice innovation; professional boundaries; mediators; solicitors; regulations; family law.

# Introduction

The family justice system has undergone the most radical reforms seen in a lifetime. According toSir James Munby, President of the Family Division, the Family Justice Review and the Legal Aid Reform programme were nothing less than a revolution (2014, p. 587). Both were implemented in 2013-14 with the former introducing a single Family Court system for public and private family law cases and the latter introducing the Legal Aid, Sentencing and Punishment of Offender Act, 2012 (LASPO) which withdrew legal aid for private cases (with a few exceptions). This was the final blow to legal aid and was delivered by the Conservative led Coalition government following a long decline in funding levels. The impact following implementation of LASPO in April 2013 was immediate: there was an 80 percent drop in workloads related to ‘legal help’ matters in family law cases (from 50,754 cases in Jan-Mar 2013, to 10,221 in April-June 2013) and a two third’s reduction in the number of mediation assessments (from 9,267 to 3,960) (LAA, 2016: Tables 5.1 and 7.1 respectively). The reduction in mediation was unexpected. This was intended to be the lower cost alternative dispute resolution service for family matters outside of court and indeed, a rise in mediation assessments of 74 per cent was predicted, not an initial fall of 38 per cent (Public Accounts Committee, 2015, p.5).

To halt the decline, in April 2014 parents’ attendance at a Mediation Information and Assessment Meeting (MIAM) was strongly encouraged. This was intended to help decide whether the parents might be suitable to undergo formal mediation sessions before proceeding to court. Since then, according to the Legal Aid Agency, trends have stabilised. In Jan-March 2016, MIAM’s are at 60 per cent of the pre LASPO levels. However, by Oct-Dec 2017, MIAMs show an underlying downward trend with the latest figures showing the lowest quarterly number ever recorded since LASPO (1,500 cases, LAA, 2018, p.8). Legal help cases relating to family law show a similar trajectory, with a rapid fall post LASPO and a slower, but still downward trend up to December 2017 (LAA, 2018, p.8). As well as these reductions however, there was a concomitant rise in in litigants in person (LIP’s) cases going to court without legal representation. By January to March 2016, the figures stood at around one third of all private law cases, a rise of 12 percentage points post LASPO (MoJ, 2016, p.14). The latest figures show that by December 2017 around 35 per cent were without legal representation, an increase overall of 22 percentage points since 2012 (MoJ, 201, p.7).

Not surprisingly, many concerns were raised about access to justice for family matters as well as the considerations about the wider reaching consequences regarding the very nature of professional practice itself. Much debate ensued among legal practitioners and their representatives about the future of practice in private family law disputes within this new context (See Family Law, notably Stevenson, M. (2013, pp.135-256) Maclean, (2014, pp.177-182) Walker and Barlow, (2014, pp.1412-1419), Trinder (2016, pp. 827-832). Speculation about the future was fuelled further when the Ministry of Justice and the Department of Work and Pensions (DWP) began exploring new service innovations under their ‘Help and Support for Separated Families Fund’ introduced in 2012. The fund offered £20 million to innovative projects that provided services/ interventions to support separated parents to work more collaboratively for the sake of their children. Over 17 projects were funded between the summer of 2013 and September 2015. The DWP’s involvement would not normally be expected in this area of family law, but as the DWP is the government department responsible for child maintenance arrangements in separated families, they had gathered recent evidence which suggested that the best way to improve compliance with maintenance payments was to improve the quality of parental relationships to enable them to co-parent more effectively (Andrews et al., 2011). A general acceptance emerged from these policy changes that the sector had to innovate, not least because as Maclean and Eekelaar (2016, p. 27) observed, family lawyers were ‘shocked’ at the sudden withdrawal of legal aid and two years post LASPO the landscape of family legal services ‘could be likened to a wartime panorama of destroyed edifices’ (2016, p. preface).

The Law Society (LS) produced a report on ‘The Future of Legal Services’ in January 2016 and the Solicitors Regulation Authority (SRA) consulted on phase one of a reform package outlined in ‘Looking to the Future’ (September 21st 2016). Since then, responses to the consultation on phase two have also finished (December 2017) and are being analysed (SRA 2018). For the first time under the SRA proposals, lawyers will have the freedom to provide reserved and non-reserved legal services outside of law firms, freeing them up to work in the growing alternative legal market (SRA 2018). The aim is ‘to address the problem of access to justice - the widespread unmet need of the public and small businesses’ (SRA, 2016, p.2). Other ideas being explored within the SRA consultations include relaxing the ‘conflict of interest’ requirements, this should make it easier for individual lawyers and firms to work with two clients involved in the same case, providing both parties agree (SRA 2017). At the same time the SRA launched research on family law consumers to better understand their service needs and it found that overall, the legal services sector was not working well and was not competitive enough (CMA 2016, p.4). SRA actions from both phases of the reform package will be implemented together and will not be in place until autumn 2018, when this is expected to cause quite a bit of disruption for practitioners and law firms (SRA 2017, p.7).

Arguably, these responses lag behind changes that have already occurred in the sector. Many new business innovations are currently in place, including; unbundling of services, charging fixed fees rather than an hourly rate and a plethora of new online services have emerged. Maclean and Eekelaar’s (2016, p.32) small survey of websites of legal firms also show that a variety of alternative dispute resolution services are on offer, including; mediation, arbitration, collaborative law, ‘round table’ discussions and ‘early neutral evaluation’ (where both parties and their solicitors sit with a barrister who will give a view of the likely outcome if the case went to court). There are also a multitude of online divorce and legal services, although the professional status of the providers is confusing and often unregulated (Maclean and Eekelaar 2016, p.38; Barlow 2017). That said, the loosening up of regulations for lawyers is a vital step in developing innovative business models and new service infrastructures, but some fraught and tricky questions remain. For example, what kinds of professional practitioners are needed in the private family law sector post LASPO? Would a model of lawyers and solicitors being able to work with both parents enable more private agreements outside of court (a one lawyer two client model)? What should happen about the professional boundaries between lawyers and mediators? Should they remain separate as is mostly the case currently (although many family lawyers are also mediators or have mediation training), or is there a third way, a kind of hybrid model that would bring their practices together more effectively to help separating couples reach out-of-court agreements? Is a hybrid model even desirable at all? These questions reflect some of the hotly contested debates occurring within the sector.

This paper will contribute to the debate about the future of professional practice by providing unique research evidence from an experimental service ‘Family Matters’ piloted by Resolution. The research findings will be juxtaposed with two of the latest proposed new models of practice made by Maclean and Eekelaar (2016) and Barlow (2017) as solutions to some aspects of the LASPO Act. The former argue for ‘Legally Assisted Family Mediation’, a hybrid model combining the skills of lawyers and mediators in one professional and the latter Barlow (2017) for ‘Mediation Plus’ where mediators work alongside others legal professionals in a kind of bundled, one stop service. The paper begins with an explanation of the historical development of the Family Matters Guide service and its connection with the Department of Work and Pensions’ (DWP) fund ‘Help and Support for Separated Families’ (HSSF). It will then describe in detail the two sets of propositions before presenting the research evidence that explored the professional practice of the Family Matters Guides. The conclusion will draw out the implications for future practice innovations and reflect on ideas that intend to combine the practice of lawyers and mediators, or have lawyers working for two joint clients.

**Background: Policy developments in relationship support services for separating families**

Around the same time as LASPO, the Department of Work and Pensions (DWP) set up the Help and Support for Separated Families (HSSF) fund to encourage innovation in ‘relationship support’ services more broadly. Although the initial policy driver underlying HSSF was to increase the number of private child maintenance agreements, recent research had demonstrated it was the quality of parental relationships that was the most important factor in making financial commitments (DWP 2011b; Andrews et al., 2011) confirming much of the earlier ground breaking research in this field (Bradshaw, et al., 1999; Wikeley et al., 2008; Skinner, 2009). Under the weight of this evidence, policy makers finally acknowledged that a broader approach was required which focused on co-parenting relationships and the practical and emotional consequences of relationship breakdown. Radical reform of the child maintenance system was proposed in the 2011 Green Paper consultation ‘*Strengthening families, promoting parental responsibility: the future of child maintenance*’ (DWP 2011a). The aim was to encourage parents to make private child maintenance agreements outside the statutory system, and these obligations were to be regarded as belonging to a broader set of family needs and not to be considered in isolation. This marked an important sea change; it was the first time child maintenance policy had adopted a more holistic stance regarding the needs of separating families since the 1991 Child Support Act. Also, whilst led by the DWP, it was a cross government initiative involving the Department for Education and the Ministry of Justice and thus there were calls for ‘an integrated model of relationship and family support services’ to help parents reach private agreements (DWP, 2011a, p.5).

To meet the goal of helping parents reach private agreements, the DWP created a `Family Support Service Expert Steering Group[[1]](#footnote-1) which included representatives from the voluntary and community sectors and academia. The group set out ‘a vision’ for new relationship support services and the development of a web application ‘Help and Support for Separated Families’[[2]](#footnote-2) and a quality mark. These were announced in the July 2012 command paper *‘Supporting separated families; securing children’s futures’* and it committed the HSSF fund to ‘test and evaluate innovative projects that support parents and help them to collaborate.’ (DWP 2012, p.5). Later, following the official evaluation, the ambitions for the HSSF fund were said to include a preventative element: described by Thomas et al., (2016, p.12) as aiming ‘to help parents avoid adversarial approaches upon separation and collaborate in the best interests of their children’. Taken together, the LASPO Act and the child maintenance policy reforms show how the Conservative led coalition government of 2010-2015 drove the most radical shake up of policies relating to family separation ever seen in a lifetime. HSSF was a vital component used to discover what might work in practice in helping parents reach agreements in the best interests of their children.

The HSSF programme funded 17 projects through a competitive tendering process between the summer of 2013 to September 2015. A range of ‘talk based’ services were included (mediation or a therapeutic intervention) and ‘information based’ services (legal advice, information and signposting) and services that assisted contact arrangements for non-resident parents. The projects were all unique in the support they provided, and a range of modes of delivery were covered across the programme as a whole, including; face-to-face sessions, telephone and online services. Resolution, a membership organisation with 6,500 family lawyers and other legal professionals, designed and managed one of the projects. Committed to a non-adversarial approach, Resolution developed a new innovative service called ‘Family Matters’[[3]](#footnote-3). The aim was to provide holistic support to help separated and separating parents deal with all their problems relating to their family separation and to help them communicate more effectively to achieve better outcomes for their children. It was a free service targeted at separating parents on a low income (defined as in receipt of income-related state benefits or with incomes below the Living Wage or with no income). It was delivered by Family Matters Guides (trained lawyer-mediators) who were blending their legal ‘know how’ with mediation skills in order to work with both parents to help ‘guide’ them through separation. They provided holistic support and legal information (not legal advice) and parents were signposted to other local services such as health services, housing and other welfare services. Family Matters was delivered by six Guides based within legal firms in three locations: Oxford, Crewe and Newcastle upon Tyne. The service structure followed three planned steps: first, parents referred to the service had individual face-to-face meetings with a Guide to establish their support needs and develop an action plan; second, following this session contact was made with the other non-presenting parent and a similar one-to-one session was offered to them, and if deemed appropriate, parents were invited to attend a joint session with a Guide and longer term action plans established; third, parents were provided with follow-up support by phone and email if needed (Family Matters 2016). As lawyers, the Guides professional code of practice at that time prohibited them from giving legal advice because lawyers could not normally act for both parties, and the main aim of the service was to help parents communicate effectively. Thus, the Guides were restricted to giving legal information. This was explained in detail to clients to help them understand the nature of the support that was offered and that Guides were not acting in the capacity of a lawyer. Clients signed an agreement acknowledging that, but this did not mean that in principle at least, Guides could not be sued for giving wrong ‘information’. There were however quality assurance and complaints procedures in place for dealing with any such instances. Nonetheless, the Guides were operating a kind of hybrid model combining their legal expertise to provide legal information alongside applying mediation skills and referring parents to other services for independent legal advice if needed.

As an experimental pilot, Family Matters provided a unique opportunity to consider the experiences of practising lawyers trying to work with two clients. An independent research study conducted by the author, explored the Guides’ experiences and the challenges they faced. This research provides a rare opportunity to consider how as Family Matters Guides, qualified lawyers changed their practice in order to provide legal information (not legal advice) in combination with mediation skills to work with both parents to help them reach their own solutions. Prior to presenting the results of the study, the next section describes two new models of future practice proposed by Maclean and Eekelaar (2016) and Barlow (2017). The Family Matters Guide model was akin to aspects of both of these models. The research findings go on to highlight the implications of what might happen in practice if hybrid models were adopted, and casts light on the more hidden and complex challenges inherent within a practice model of one lawyer and two clients. The concluding discussion draws out some of the lessons for future practice.

**Proposed new models of practice: A hybrid professional**

According to Maclean and Eekelaar’s (2016) book that examined the everyday practice of lawyers and mediators, we are now in a ‘brave new world of services for separating families’. Their book aimed to provide an account of the practical effects arising out of LAPSO on the practice of lawyers and mediators and involved a small qualitative study that observed the practice of both (17 lawyers in legal practices and 25 lawyer and non-lawyer family mediators in 18 settings). They found complex and overlapping practice operating between mediators and lawyers, with the former providing legal information and sometimes also legal advice, and the latter providing mediation with legal information and advice. Indeed there was a wide continuum of professional activities, with non-lawyer mediators operating within non-legal settings at one end and lawyer–mediators operating everyday within legal firms at the other. Despite the Family Mediation Council Code stating mediators cannot give legal advice, Maclean and Eekelaar (2016) argue that maintaining a distinction between legal advice and information is a fallacy. In reality they found it was impossible to maintain and practice mostly depended on the context.They were keen to point out however, that this finding was not an indictment of the professionalism of mediators, but rather that the distinction ‘has all the hallmarks of a formula whose function it is to maintain professional boundaries’ (2016, p.124). They proffer a new approach ‘Legally Assisted Family Mediation’. This is envisioned as a ‘one stop service’ combining two sets of skills; legal expertise and mediation communication skills. It is ‘a form of one stop mediation with legal uplift, whether the mediation is carried out by a lawyer or non-lawyer mediators.’ (2016, p.136): in this kind of hybrid approach, the professional boundaries would dissipate. It would be open to mediators to undertake specialist legal training and for lawyers to train as mediators and for both professionals to be allowed to provide legal advice and work with both clients in the same case. In this way one single professional would utilise both sets of skills and give legal advice to work with both parties (as distinct from lawyer-mediators who cannot give legal advice). However, they note that the cases suitable for this type of hybrid approach would need to be carefully prescribed and the current regulatory and practice frameworks altered to allow both professions to operate in this way.

Certainly, as is well known (Barlow et al., 2017), mediation remains the government’s choice as the best alternative to litigation for resolving family disputes outside the courts, but arguably it is a professional practice in the UK that is still in its infancy. Indeed the drastic reduction in mediation take-up without lawyer supported explanations and referrals seem to partly attest to this. As Barlow (2017) notes:

‘…the mediation sector remains fragmented and in competition with itself as well as an increasing number of other low-cost partisan providers. Whilst standards have been developed and accepted across the sector, lack of central regulation means mediation is not set clearly apart from other sections of the post-LASPO market, risking it not having the acknowledged expertise and credibility of regulated solicitors, yet not clearly distinguishing itself from other unregulated providers.’ (Barlow 2017, p.212).

Clearly, all is not well in the mediation sector and especially post LASPO. Barlow (2017) provides a detailed set of prescriptions for the profession (especially within the not-for-profit sector). These include solutions to deal with the fall-off in referrals by improving marketing, advertising and new routes of referrals. A formidable challenge in itself, Barlow (2017, p.212) tackles this by offering the following solutions: directly targeting MIAM’s at ‘mothers’ and ‘fathers’ as individuals not as couples (allowing them a space to air their own views to the mediator first before working on ways to draw in the other party); and by advertising by type of ‘case’ (showing which type of mediation would best fit needs or preferences); and by building online communities of former clients and linking their experiences to different types of mediation service. The sector, she argues, also needs more specialist training and accreditation to deal with more complex cases, high conflict situations and child inclusive mediation (2017, p.212).

More controversial perhaps is the idea for a ‘Mediation Plus’ model. Barlow suggests that unlike lawyers offering ‘unbundled packages’ mediators should do the opposite and offer ‘bundled packages’ with mediation sitting alongside other out-of-court dispute resolution services. A couple of examples are given in the form of collaborative law and lawyer supported mediation (Barlow, 2017, p.214). This kind of joined-up plus package should be offered to all separating couples and be supported by legal aid. Potentially, she argues it could provide a better solution to compulsory MIAMs (which have a high rejection rate for mediation starts) and could help deal with the crisis in the rise in LiPs faced by the courts, as well as support resolution of more complex cases involving addiction or mental health problems for example.

Barlow’s (2017) ideas seem to be pulling in a similar direction to Maclean and Eekelaar’s (2016) and indeed she fully supports their position that mediated settlements should be made within the principles of the Law. But she steps further into the online world to argue that a ‘simpler system’ to obtain court approval of mediated agreements could be found through this means. Barlow’s model however, does not argue for a new type of ‘hybrid’ professional per se, but rather for a range of services to be made available to a better informed group of clients from which they can make a choice to best suit their needs and preferences. Maclean and Eekelaar (2016) and Barlow (2017) offer some carefully considered and research informed solutions at the cutting age of innovation. However, there remain important challenges for the sector as a whole when dealing with separating parents. One is engaging both parents in services that aim to help them reach agreements – whether that be through a ‘Legally Assisted Family Mediation’ approach or a bundled ‘Mediation Plus’ type service. Another is to understand some of the challenges that might exist in shifting ideologies of practice and professional identities, that is if a new ‘hybrid professional’ that could give legal advice were seen as desirable as implied in Maclean and Eekelaar’s model, although similar models have been considered controversial. We turn now to the findings from the Family Matters study.

**Research findings: Family Matters Guides**

The Family Matters service was an experimental model of practice, designed by Resolution, and based on an amalgam of ideas arising out of innovations in the field of dispute resolution, including collaborative law and family arbitration. Family Matters was however mostly aligned to mediation and to a one lawyer working with two clients’ model (Skinner and Forster 2016). It bears similarities to the hybrid professional model of ‘Legally Assisted Family Mediation’ posited by Maclean and Eekelaar (2016), but it differed in one key respect, the Guides could not deliver legal advice, only legal information. Even so, a consideration of Family Matters Guides’ practice provides a unique opportunity to explore what it was like for practising lawyers to work with two clients. The findings now presented are based on a qualitative research study which explored key aspects of the service from the Guides’ perspectives. The study considered: the uniqueness of the FM Guide role, the challenges in delivery and how the model fits within the wider legal landscape. In this paper, three key sets of findings are drawn out: The triage and mediation readiness aspects of the service, the challenges of engaging both parents and the effect of their professional identities as lawyers on working with both parents as two clients in one case.

***Triage and mediation readiness***

The evidence shows the Guides felt their role was unique. They could offer a holistic and flexible service that freed them up from the traditional legal or mediation processes (including not having to keep accurate accounts for billing clients as the service was free). Additionally, they could think more broadly about their clients’ needs by taking into account their emotional, practical and legal information requirements and they had the time to ‘unpick’ the complex underlying issues which they claimed often made the big presenting problem easier to resolve. In essence the Guides were offering a triage service, and they believed they were reaching people in the early stages of separation when they were often in crisis or overwhelmed by what was happening to them. When comparing their practice to that of lawyers’, the Guides felt they were better able to deal with the client as a ‘whole person’, to go at the client’s ‘own pace’, and able to keep the parent’s relationship ‘on an even keel’ by providing a ‘neutral voice’ on their situation. Most importantly, they felt this reduced the potential for conflict. Parents could also come back anytime to see the Guides when they were ready to move on, and unlike their practice as lawyers, the Guides thought they were less ‘end focused’ and helped parents reach their own solutions and action plan.

Because of the nature of the client base (all low income families) the Guides believed they filled the gap left in legal aid following the LASPO Act. They gave tailored information to parents to help them understand out-of-court alternatives and in particular, they provided personalised support and worked closely with them to explain the process of mediation in-depth. The Guides variously explained how important it was to get parents into the right ‘mind set’, to help ‘sensitise’ them or ‘soften them up’ to the possibility of mediation. As one Guide stated (Skinner and Forster 2016, p.31):

‘[Family Matters helps parents] to know their kind of legal rights and the parameters of what they are working in, and to have the kind of reality check about what it is that they are trying to achieve is realistic, and if they can have that thought process before they go into mediation, I think it is more likely for mediation to be successful than for to go into mediation with a view that ‘you’re never going to see your kids again’, oh right, ‘I’ll take you to court then’, oh right, ‘bye’, you know it, it, it, it’s just completely positioning. And I think if you can get them to having that thought and working through that process before they enter mediation, I think the chances of success of mediation are higher than if you’re taking people cold off the street with no idea or knowledge of their options, where they go next, what you know, you know, where mediation fits into the whole picture’.

Indeed getting parents ready to start formal mediation sessions provided by expert mediators was often seen as the real value of the Family Matters service. Of those parents who participated in Family Matters and were referred to other services, over half were referred onto mediation (Family Matters 2016, p.23).

Certainly, preparing parents for formal mediation is recognised as an important part of the ‘triage’ process in the newer online mediation support services. For example, Oneplusone were aiming to launch an ‘emotional readiness tool’ in 2017, which would have allowed parents to individually assess their state of readiness to reach an agreement and at that stage they could be screened in or out of mediation. Also, there was Relate’s project to introduce a new online family dispute resolution service (OFDR) model, based on the Dutch ‘Rechtwijzer’ model. Both models planned by Relate were highly innovative, but problematic regarding funding. Launched in 2015, the Rechtwijzer 2.0 product was a web-based service which facilitated an interactive negotiated settlement service for separating couples. However, it folded in July 2017 as the ambitious international business model was not financially sustainable. It will be replaced with the pared back Justice42 model, which will focus mainly on the Dutch market (Smith 2017a). Relates’ OFDR project, though tested and received good feedback, has been postponed due to resource issues (Smith 2017b). Barlow (2017, p. 215) notes the great potential around these online innovations, but is also cautiously optimistic, as it remains to be seen if they will be effective at providing triage, screening for mediation, or delivering mediation as an alternative to face-to-face approaches. Face-to-face was the main method used by the Family Matters Guides in the study reported here, though they would follow-up with phone calls and emails and would sometimes contact the non-presenting parent by phone or email. This was another unique aspect of the service, working with both parents, but engaging the other parent was a real challenge for the Guides.

***Engaging both parents***

The Guides tried to engage the other parent in the service, but how best to do that was less well understood than preparing parents for mediation. Guides adopted different approaches to make first contact with the non-presenting parent (most commonly the father). These included leaving it to the presenting parent to inform the other parent, sending a formal letter as first point of contact, or telephoning or emailing, or a mix of these. Each had its advantages and drawbacks. A letter could fully inform the other parent and provide reassurance about impartiality, but it could also appear very official, be wrongly perceived as a solicitor’s letter and could frighten the recipient, or be easily ignored. Alternatively, phoning the other parent as the first point of contact was efficient and the Guides could provide a lot of reassurance on the phone, but it was not without risks. As the Guides said, they never knew what kind of reception they would receive, sometimes parents were very angry and sometimes they felt ‘ambushed’ partly because the call came ‘out of the blue’ and partly because the Guide had spoken to the presenting parent first.

Family Matters Guide’s experience shows that ‘how’ you approach the other party is very important. The Guides explained, that if the non-presenting parent got even the slightest hint the Guides were on the side of the other parent, then they refused to engage any further. Despite reassurances of impartiality, the non-presenting parents were more often than not lost to the process. The Guides suggested a number of reasons for this: as stated above the belief the Guides’ might be biased, or at least ‘hooked into’ the other parent’s story, that the Guides might perceive them to be a ‘bad parent’, or the non-presenting parent did not believe there was a problem, or there was nothing in it for them by getting involved. The presenting parent could also make things difficult: they were in effect the gatekeepers to the other parent having contact with their child and they could make contact difficult to achieve, or they could make matters worse by implying to the other parent the Guide was on ‘their side’. Some other factors meant it could be inadvisable to make contact, such as fear of domestic violence or where the current situation between the parents was particularly volatile at that time. As a key goal of the service was to work with both parents, these obstacles required considerable effort and tenacity to overcome. But in the end, only 12 per cent of parents had joint meetings with a Guide by the time the project finished (Family Matters 2016, p.22).

This fits with similar findings from the Mapping Pathways to Justice Project (Barlow et al., 2014, p.30), but part of the explanation for this phenomena is rather counterintuitive. Barlow (2017, p. 211) suggests it is precisely the language of impartiality and neutrality re mediation that is the problem, it puts couples off. Parents feel they need to have someone on ‘their side’ to hear their individual story in the first instance before they can engage with the idea of working together. Barlow (2017, p.211) goes onto suggest there is a need for expert ‘communication skills training’ borrowing from expertise within ‘Conversation Analysis Role Play Method (CARM) to find ‘often simple tactics’ to engage couples with mediation. The evidence from the Family Matters Guides however, would suggest that in this unique type of ‘hybrid professional model’ at least, more expert communication skills may not be sufficient on their own to engage couples. That is partly because the ability to work with both parents was closely tied up with the Guide’s professional identities as lawyers and this could have an inhibitory effect on trying to engage the other parent.

***Professional identities***

The goal of engaging the other parent in the service created considerable complexity and tension for the Guides in their new role. Not only had the Guides to overcome the considerable obstacles as described above, they had to make professional judgements about which cases were suitable to engage the other parent. But even if the decisions had been made to go ahead, the Guides also needed considerable resilience to handle the reactions of the other parent on first contact. As one Guide put it, they had to be very ‘thick skinned’, but they also had to exercise great skill to bring in the other parent and build rapport. Thus, it was said to be very hard work to maintain impartiality in the face of such problems, and even more so when the Guides were faced with a case which had obvious injustices between the parties. Not surprisingly, these complexities and tensions influenced the Guides’ behaviours resulting in some reluctance to engage the other parent either because they felt uncomfortable in doing so, or did not want to do it, or because it created a kind of passiveness where they hoped the other parent would not respond at all to their first contact. Working with the presenting parent alone therefore was much more straightforward. The Guides did not have to maintain the same level of impartiality and they also believed it was valuable as working with the presenting parent alone could help them cope with the behaviours of the other parent and thus the Guides felt they were still impacting on both parents.

Certainly, working with both parents in this context was new and unknown territory for the Guides and there were no well established guidelines to follow. One key task to master was to convert the legal advice they may have given previously as lawyers into legal information as Guides. This was described as a process of ‘neutralising’ advice into information, which they did not find too difficult after some experience of working as a Guide. This seems to contradict the evidence provided by Maclean and Eekelaar (2016) where they found the distinction was impossible to maintain in practice. But their research methods were based on observations of practice, whereas the study reported here is based on respondent’s perceptions of their practice. Some of the Guides however, did report that sometimes they gave ‘information’ that could be considered as running close to the wire of giving legal advice, and as such this tends to concur with Maclean and Eekelaar (2016). Therefore, arguing about whether there is a clear distinction made between giving advice or information in practice could be a bit of a red herring and it could relate exactly to the point made by Maclean and Eekelaar (2016) that the distinction is mainly a device for maintaining professional boundaries. It is likely that when working with clients, the distinction is less important for practitioners. The same cannot be said of the other task the Guides had to master, that of maintaining impartiality when working with clients. This proved to be much more complex and challenging.

The Guides were all lawyers, so they had to adapt to this new hybrid model of being a Guide by adopting impartiality as a key principle underpinning their practice within the mediation aspect of their role. This was seen as vital in order to successfully engage the other parent and to work with both parents as a couple and also, as Barlow notes, is fundamental to successful mediation (2017, p.211). However, not only was this hard to do because of the obstacles of engaging the other parent described above, but also because it created a tension in their practice which seemed to relate directly to their professional identities as lawyers. For example, the Guides not only had to develop new ways of working, but also new *ways of* *being* as a hybrid professional. In other words, they had to make the *transition* from being a lawyer into beinga Guide, the key challenge of which was not turning legal advice into information as expected, but rather more unexpectedly developing and maintaining impartiality to allow them to work with both parents. This was a new skill which required practice and involved the Guides trying to *suppress* their natural inclination and professional training to work on the basis of one client’s interest. There is no intention here to offer a criticism of the Guides, nor to ignore the successes they had in working with both parents, but rather to highlight the considerable complexity involved.

There is a lack of knowledge and understanding around how best for legal practitioners to work with both parents in this new kind of hybrid model. This left the Guides having to work it out for themselves and rely on their training as lawyers and their mediation knowledge in order to decide what the best thing to do was in the individual circumstances. It seemed their professional identities as lawyers were deep rooted and it could be they found it harder to adapt to impartiality than expected, especially in the face of so many obstacles, including fighting against the common misconceptions of the presenting parent that they would act as their solicitor. Another possible explanation could relate to the particular context in which they were working, that is because they were operating in a time-limited experimental project, they would most likely revert to being full-time lawyers at the end of the project. Seen in this light and considering the unique experimental context of the service, the path of least resistance was therefore to revert to familiar practice and work with one parent. This raises some important considerations for future practice innovations such as one lawyer working with two clients.

**Concluding discussion**

The family law sector has faced a period of unprecedented change following the 2012 LASPO Act. Much debate has ensued about the future of professional practice and how best to deliver the right services to help separating parents resolve disputes outside of court. As part of that debate, hybrid models of practice that combine legal expertise with mediation have been mooted as one of the best ways forward. This paper contributes to that debate by presenting research evidence from a unique experimental model of professional practice delivered by Resolution: Family Matters Guides. Guides worked with both parents in a new intensive way to provide legal information and tailored support to help them reach their own agreements. The evidence from Guide’s experiences of delivering this experimental model is reflected upon in relation to two proposals made by key experts in the field. One proposition from Maclean and Eekelaar (2016) is for a new ‘hybrid professional’ who will combine legal expertise with mediation skills to provide ‘Legally Assisted Family Mediation’. The other from Barlow (2017) proposes a model of ‘Mediation Plus’ in which mediators will work alongside other services to deliver ‘bundled packages’ that can provide legally recognised mediated settlements. What they share in common is an assumption of working with both parents. The research evidence on the experience of Family Matters Guides draws out some important implications for both propositions.

First, deciding how and when best to engage both parents in the resolution process is crucial. Understanding the challenges of doing this will be especially important if there is an increased demand to offer services to couples who do not willingly present together. Engaging such parents has to be handled very carefully and indeed, for the longer term, it is recognised that mediators need more expertise and skills in this regard (Barlow 2017, p.212). Even Barlow’s (2017) idea of targeting MIAM’s at parents individually in the first instance needs careful consideration given the evidence here shows that it matters very much to parents if one of them gets the chance to tell their story first. The Guides in their new role tried various approaches to engage the other non-presenting parent, but the success rate was much lower than expected. The emotional readiness tool developed by ‘oneplusone’ and other tools such as CARM as suggested by Barlow (2017) will no doubt be helpful. Second, and closely related to the problem of engaging both parents, is the potentially inhibiting effect of pre-existing professional identities. Practitioners who may wish to operate as a hybrid professional, or lawyers who want to work with two clients, may need to learn new *‘ways of being’* in order to work effectively with both parents which involves more than just acquiring new skills. The evidence here provides some insights into the possible processes that might be involved in doing so.

Within the Family Matters experiment, the Guides engaged in a process of ‘neutralisation’ to turn legal advice into information. Not only did the Guides seem to find this relatively straightforward but the distinction seemed to matter less when working in dialogue with clients face-to-face. Of course the Guides were arguably at less risk of litigation from clients, because they were not providing ‘reserved’ legal services and this could have made it easier for them to adapt their practice. More crucial however, were the apparent processes of ‘suppression’ and ‘transition’. Guides had to make the ‘transition’ from *being* a lawyer to *being* a Guide and in doing so, it seemed, they had to ‘supress’ their inclination to work in the interest of one client in order to maintain impartiality.

It is a cautionary lesson from this research, that the power of pre-existing professional identities should not be underestimated. The closely related processes of transition and suppression need to be more fully understood within whatever practice models might emerge in the future. Certainly, it is important to understand how these processes might operate at the level of the individual practitioner – but perhaps even more vital is to understand how these processes (and possibly others) might work at the broader level of principle and professional ethics. Legally based innovations that aim to work with both parents to help them reach agreements in the best interests of their child are leaning more towards a social welfare model, rather than a litigated or mediated agreement model. Conceivably, this sets up a tension for any hybrid type of professional in deciding the best thing to do in practice. Perhaps this tension between professional principles is also what the Guides had to circumnavigate in reality, adding to the challenges they faced in trying to engage both parents. The key point is that professional identities and the principles on which they rest are powerfully embedded and not so easily overridden to work in new ways with both separating parents. The Family Matters experiment would suggest that despite the extensive will and desire for innovation, there are unlikely to be any quick fixes for delivering new professional hybrid type models of practice or for lawyers working with two clients. At least that is, not without a greater understanding of the processes that might be involved in making such adaptations ‘to practice’ as well as adaptations to delivering them ‘in practice’.

**Acknowledgements:**

Grateful thanks must go to Ida Forster, Jane Wilson and Claire Easterman from Resolution for their support throughout and to all the respondents who took part for their time and candour. Many thanks also to Susan Clarke acting as Research Fellow.

**Disclosure Statement:**

No potential conflict of interest was reported by the author.

**Funding:**

This work was funded by the Economic Social Research Council under the ‘Impact Acceleration Account’ held by the University of York and it was also supported by Resolution (formerly known as the Solicitors Family Law Association (SFLA)).

Note: Views expressed in this report are entirely the responsibility of the author; they do not reflect those of Resolution, or its membership.

**Note on Contributor:**

Christine Skinner is Professor of Social Policy and has extensive experience in the field of family policy with particular expertise in researching the lives of separated families, parental obligations following separation and child support policies both nationally and internationally.

**References:**

Andrews S., Armstrong, D., McLernon, L., Megaw, S., and Skinner, C. (2011) *Promotion of Child Maintenance: Research on Instigating Behaviour Change,* Child Maintenance and Enforcement Commission, Research Report No, 1, Volume I, Main Report. Leeds: Corporate Document Centre.Accessed 4.7.2017: <http://webarchive.nationalarchives.gov.uk/20120716161734/http://www.childmaintenance.org/en/pdf/research/Main-Report-Vol-I.pdf>

Barlow, A., (2017) ‘Rising to the post-LASPO challenge: how should mediation respond?’, Journal *of Social Welfare and Family Law.*

Barlow, A., Ewing, J., Hunter, R. & Janet Smithson (2017*) Creating Paths to Family Justice: Briefing Paper & Report on Key Findings.* Exeter: University of Exeter. *Accessed 4 August 2017:* [*http://socialsciences.exeter.ac.uk/law/research/groups/frs/projects/creatingpathstofamilyjustice/*](http://socialsciences.exeter.ac.uk/law/research/groups/frs/projects/creatingpathstofamilyjustice/)

Bradshaw, J., Stimson, C., Skinner, C. & Williams, J. (1999) *Absent Fathers?* London: Routledge.

DWP (2011a) Green Paper consultation *Strengthening families, promoting parental responsibility: the future of child maintenance*’ Command of Her Majesty, London: DWP.

DWP (2011b) *Government's response to the Green Paper consultation Strengthening families, promoting parental responsibility: the future of child maintenance*. Presented to Parliament by the Secretary of State for Work and Pensions by Command of Her Majesty July 2011, London: DWP.

DWP (2012) *Supporting separated families; securing children’s futures.* Presented to Parliament by the Secretary of State for Work and Pensions by Command of Her Majesty July 2012.’ London: DWP.

Family Matters (2016) *Family Matters: Project evaluation report*, London: Resolution.

Law Society (2016) *The Future of Legal Services,* London, The Law Society.

Legal Aid Statistics (2016) *Legal Aid Statistics in England and Wales April to June 2016*. London: MoJ.

Legal Aid Statistics (2018) *Legal Aid Statistics quarterly, England and Wales, October to December 2017; Ministry of Justice Bulletin*. London: MoJ.

Maclean, M. and J. Eekelaar (2016) *Lawyers and Mediators: The Brave New World Of Services For Separating Families*, Oxford: Hart Publishing.

Maclean, M. (2014) ‘The Changing Professional Landscape’*, in Family Law,* Jan 2014: 177-182.

MoJ (2016) *Family Court Statistics Quarterly, England and Wales; July to September 2016*. London: MoJ.

MoJ (2018) *Family Court Statistics Quarterly, England and Wales, Annual 2017 including October to December 2017*. London: MoJ.

Munby (2014) *The Family Justice System: Remarks by Sir James Munby, President of the Family Law Division and Head of Social Justice in the Presidents Court 29 April 2014*. Accessed 15 April 2018: <https://www.judiciary.gov.uk/wp-content/uploads/2014/05/family-justice-reforms-29042014.pdf>

Public Accounts Committee (2015) *Implementing reforms to civil legal aid, HC 808, thirty-sixth report of session 2014–15.* London: House of Commons Public Accounts Committee.

Skinner, C. and Forster, I. (2016) *Guiding Families Through Separation: Family Matters- An innovative support service from Resolution*, London: Resolution.

Skinner, C. (2009) ‘Understanding Willingness to Pay Child Support’ in *Persistent Problems, Finding Solutions: Child Maintenance in The Netherlands and the UK.* Nijmegen: Wolf Legal Publishers, pp.111-125, 2009.

Smith, R (2017a) ‘Goodbye, Rechtwijzer: hello, Justice42’ in *Law, Technology and Access to Justice. Accessed 17.4.18* [*https://law-tech-a2j.org/advice/goodbye-rechtwijzer-hello-justice42/*](https://law-tech-a2j.org/advice/goodbye-rechtwijzer-hello-justice42/)

Smith, R (2017b) ‘The Fate of Rechtwijzer’s English Daughter: Relate Suspends Online Family Dispute Resolution Project’in *Law, Technology and Access to Justice. Accessed 17.4.18* [*https://law-tech-a2j.org/odr/rechtwijzers-english-daughter-relate-suspends-online-family-dispute-resolution-project/*](https://law-tech-a2j.org/odr/rechtwijzers-english-daughter-relate-suspends-online-family-dispute-resolution-project/)

Stevenson, M. (2013) ‘Dispute Resolution: Mediation: a distinctive approach to problem-solving’ in Family *Law,* Jan 2013:135-256.

SRA (2016) *Looking to the future- flexibility and public protection: A consultation summary, London: SRA.* Accessed 17.4.18:[*http://www.sra.org.uk/sra/consultations/code-conduct-consultation.page*](http://www.sra.org.uk/sra/consultations/code-conduct-consultation.page)

SRA (2017) *Our response to consultation: Looking to the Future - flexibility and public protection*

SRA (2018) *Closed Consultations -Looking to the future:  phase two of our Handbook reforms.* Accessed 17.4.18: <https://www.sra.org.uk/sra/consultations/lttf-phase-two-handbook-reform.page#download>

Thomas, A., Harding, C., Cordes, A., Brind, R., Cheesbrough, S., Bryson, C., Purdon, S. and Gavan Conlon (2016). *Help and Support for Separated Families Innovation Fund Evaluation: Research Report 929,* London: DWP. Accessed 4.7.17: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/555192/RR929-help-and-support-for-separated-families-innovation-fund-evaluation.pdf>

Trinder (2016) ‘Reforming family justice: is the only way Essex?’, in *Family Law,* July 2016: 827- 832.

Walker, J. and Barlow, A. (2014) ‘Changing The Dispute Resolution Landscape’ in *Family Law*, October 2014, 1412-1419.

Wikeley, N., Ireland, E., Bryson, C., & Smith, R. (2008) Relationship separation and child support study. DWP Research Report No. 503. Norwich: HMSO.

1. The author was one of the academic experts in the steering group. [↑](#footnote-ref-1)
2. Launched in November 2012 [↑](#footnote-ref-2)
3. Not to be confused with another project under HSSF called ‘Family Matters Mediate’. The Family Matters Guides innovation was labelled as ‘Resolution’ in the HSSF evaluation conducted by the DWP. [↑](#footnote-ref-3)