

# Section Name

## Mediation

### Online Dispute Resolution and Cross-Border Family Disputes



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### Introduction

Family disputes are among the most complicated conflicts. Emotions and long personal histories make communication and joint problem-solving much more complex for separating couples. When family disputes cross borders, that complexity is compounded even further. Resolving child custody disagreements can be difficult when separating parents are in the same city, but if the parents are in different countries, the issues involved become even more complicated. These cross-border disputes have complex challenges that must be addressed as part of a comprehensive resolution, including international travel, costs, and fears of potential future child abduction or unilateral relocation. Cross-border family cases also illustrate difficulty with enforcing agreements country to country, because it is unclear what laws apply to the matter, which court has jurisdiction, and where the agreement will be legally recognized. There are also logistics that dispute resolution service providers must address as part of any process to reach a comprehensive resolution, such as managing time zones, travel costs, scheduling in-person sessions, or managing confidentiality across different legal jurisdictions.

Technology is driving the growth in the number of cross-border families and it can be important in helping these families resolve disputes that may arise. Technologies like the Internet enable us to cross borders like never before. We can now communicate with anyone in the world with just a few swipes of our fingers. As a result, our lives also cross boundaries—which means our relationships (and our children) cross boundaries. Perhaps as a result of our jobs, families, new or better opportunities, or just a change of scenery, we are more likely than at any time in history to have connections around the world. In the past, people did not live such global lives, and as a result, the old systems for dealing with family issues were designed to work in specific geographic jurisdictions. Now, as our lives cross borders every day, those old systems are out of sync.

Technological progress is accelerating, and the tools available are becoming more powerful every month. We now have fast bandwidth, sharp video, and wireless access 24/7 through inexpensive devices we carry in our pockets. This new convenience and power mean that technology now permeates all our relationships, especially the relationships that mean the most to us: our children and our partners. It no longer feels alien to communicate our feelings through technology, because

it is omnipresent in our lives, inseparable from everything we do.

As technology becomes more pervasive and society adapts accordingly, it is more evident every day that we need to develop resolution processes that mirror our new digital reality. The key question we face as dispute resolution practitioners is: how can we leverage these new technologies to best assist families through separation and the challenges of co-parenting? The field of Online Dispute Resolution, or ODR, may offer some possible answers to these existing challenges. ODR is the application of information and communications technology to the practice of dispute resolution. ODR is only about fifteen years old,<sup>1</sup> but it has expanded rapidly alongside the increasing digitization of society. ODR originally focused on transactional disputes like electronic commerce and website domain names, but as the tools and technology have evolved, ODR is increasingly being applied to other disputes as well, including more emotional and relationship focused matters that have traditionally been resolved face-to-face.

## Application to Family Disputes

Originally many ODR academics and practitioners resisted working with separating and divorcing couples. They were concerned that technology-mediated communication could not enable the type of emotional, honest exchanges required to effectively resolve family disputes. Over the last ten years, however, these sentiments have evolved. Younger individuals are particularly comfortable with online communication, to an extent that confounds and confuses older generations. Today people make up and break up online, even finding their spouses online through dating websites. It is a natural extension to want to leverage technology when relationship problems emerge. When it comes to children, many parents are discovering that technology is a very effective way to communicate with their kids, because their children feel more relaxed and at ease talking about emotional topics online than they would be offline. It is truly a different world than it was a decade ago.

Family disputes are frequently riddled with emotionally charged accusations, often involving allegations of infidelity, domestic violence, and manipulation of the couple's children. These cases may include screaming matches during mediation sessions and power imbalances that are nearly impossible to balance. ODR can change these dynamics, providing a cooling distance between the parties to allow the dispute resolution provider more opportunities to guide the discussion and avoid unproductive escalation. ODR can also provide disputants the opportunity to more carefully craft their responses to one another, better reflecting a tone that works towards a resolution instead of blaming and shaming. In particular, ODR provides assistance in cross-border cases where parents may be unable to meet in person due to immigration impediments, the

<sup>1</sup> "ODR: A Look at History" by Ethan Katsh, in *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution*, edited by Mohamed S. Abdel Wahab, Ethan Katsh and Daniel Rainey (Eleven International Publishing, The Hague, Netherlands) 2012. Full text: <http://www.ombuds.org/odrbook/katsh.pdf>, last visited 1/6/2015.

cost of travel, strict timeframes of any parallel court action, or possible criminal charges if one parent moved the child across borders. While original arguments against ODR in family disputes focused on a dispute resolution provider's inability to assess a party's non-verbal cues or to establish rapport, improved technology and increased comfort with technology has alleviated these concerns.

The first technology that comes to mind for most mediators is video conferencing. It is not difficult to see how an in-person meeting could transition to an equivalent meeting over webcams. However, ODR encompasses much more than just video links between geographically separated parties. ODR can enable ongoing text-based, asynchronous communications that can be helpful resolving a variety of issues, from financial coordination to co-parenting management. It can help with many of the most complex aspects in family disputes, from information sharing to scheduling, while offering online wizards and guides to aid in self-education and option generation. It also enables the construction of resolution processes not tied to geography or legal jurisdiction. It can transcend physical distance and time zones, and it may offer the only option if a couple is not able or willing to convene in person.

## ODR in Practice

While the application of ODR to family disputes may be relatively new, ODR is based on more than fifteen years of theory and practice in other areas.<sup>2</sup> Many national governments and international agencies have identified ODR as the future of redress in cross-border cases. UNCITRAL, the UN agency responsible for harmonizing global trade laws, has a permanent Working Group on ODR, and the European Union recently adopted a regulation requiring all member states to implement ODR for cross-border consumer cases by the end of 2015.<sup>3</sup> Legal jurisdictions around the world are concluding that ODR offers the best promise for effective cross-border resolution, and treaties are being written to provide for reciprocal enforcement.

The provincial government of British Columbia recently adopted a law, the Civil Tribunal Act, that aims to move most low dollar-value civil disputes from the courts to online dispute resolution systems.<sup>4</sup> British Columbia has been on the cutting edge of applying ODR to family disputes for some time, and it completed the most in-depth study of ODR and family disputes conducted to date.<sup>5</sup> Now the British Columbia Legal Services agency has announced that it will be constructing an online system for divorcing couples that will lever-

<sup>2</sup> "Online Dispute Resolution and the Development of Theory" by Leah Wing and Daniel Rainey, in *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution*, edited by Mohamed S. Abdel Wahab, Ethan Katsh and Daniel Rainey (Eleven International Publishing, The Hague, Netherlands) 2012. Full text: [http://www.ombuds.org/odrbook/wing\\_rainey.pdf](http://www.ombuds.org/odrbook/wing_rainey.pdf), last visited 1/6/2015.

<sup>3</sup> <http://www.slaw.ca/2013/07/23/the-european-regulation-on-consumer-online-dispute-resolution-where-are-we-now>, last visited 2/26/15.

<sup>4</sup> <http://www.slaw.ca/2013/10/07/bcs-new-civil-resolution-tribunal>, last visited 1/6/2015.

<sup>5</sup> <http://www.mediatebc.com/About-Mediation/Mediating-at-a-Distance.aspx>, last visited 1/6/2015.

age ODR to expand services to low income families in the province.<sup>6</sup>

The most expansive test of the utility of ODR in family disputes is currently underway in The Netherlands. In conjunction with the Hague Institute for Innovations in Law (HiIL), the Dutch Legal Aid Board has recently launched the Rechtwijzer, which is an end-to-end online divorce platform available to any Dutch couple.<sup>7</sup> The Rechtwijzer offers rich diagnosis and education wizards for free to anyone who visits the website. Once the filer elects to proceed with the process, they can register and go through a thorough intake process that walks them through all aspects of separation, dynamically building a series of questions based on the particulars of the couple. Once the filer completes the intake process, the other spouse is contacted to enter their perspectives and preferences. The intake process walks the parties through a series of 25 to 30 questions designed to aid self-reflection, clarify issues in the separation, and develop a vision for the post-separation relationship between the separating parties. In some cases, the intake process will even offer pre-designed options (e.g. 50/50 co-parenting split) or calculators (e.g. for spousal support or child support).

Once both sides have completed the intake process on Rechtwijzer, each party can review the selections of the other party and begin a discussion about any differences that remain. If the parties cannot reach agreement through online communication, a mediator can be invited into the platform to assist the negotiation. If a mutually agreeable outcome cannot be reached, a judge from the family courts can come in to listen to both sides and make a decision. Once all of the issues in question have been closed, the Rechtwijzer platform generates a summary document that will be reviewed by the Legal Aid Board for appropriateness, and then can be easily transformed into a separation agreement to be filed with the courts.<sup>8</sup> Experts in psychology, conflict resolution, and family law have designed the platform from inception, and the user interface is very modern and intuitive. Several other countries are currently in negotiation to implement a version of the Rechtwijzer for their citizens as well, so we may see this model expand quickly over the next few years.<sup>9</sup> This innovative ODR platform is gaining traction in domestic family disputes in the Netherlands, but one can easily foresee its application to cross-border disputes, where the separating couple may be in different geographies and jurisdictions.

The Rechtwijzer platform may be unable to resolve jurisdictional issues, but it can help the parties organize their thoughts, and ensure that certain issues are addressed by the parties, even if left unresolved. For instance, an ODR platform may be able to more ably question each parent about their preferences around relocating a child, their citizenship, the location of their child's passports, and their source of funds, without sounding accusatory or implying that the other parent

<sup>6</sup> <https://www.cle.bc.ca/PracticePoints/LIT/14-GrowthODR.pdf>, last visited 2/26/2015.

<sup>7</sup> <http://www.hiil.org/project/rechtwijzer>, last visited 2/26/2015.

<sup>8</sup> <http://www.hiil.org/project/rechtwijzer>, last visited 2/26/2015.

<sup>9</sup> <http://www.hiil.org/project/rechtwijzer>, last visited 2/26/2015.

is threatening abduction. An ODR platform also takes human error out of the equation by ensuring that a laundry list of questions is asked of every participant, and a full set of disclosures are available in each case, creating a more comprehensive and informed agreement.

## Other Applications

Online dispute resolution is not only relevant in the separation process. Long before separation takes place, individuals will likely turn to the Internet to educate themselves about the divorce process, their options, and legal rights. Online wizards can be extremely helpful in educating divorcing spouses about their rights, legal obligations, and effective co-parenting structures. Post-separation, long-standing platforms like OurFamilyWizard are aimed at co-parenting coordination and helping divorced couples coordinate things like finances, pickups, and vacation schedules.<sup>10</sup> Some family courts are even requiring the use of OurFamilyWizard in high conflict separations. Other tools, like SupportPay, make the tracking and payment of child support much easier to manage.<sup>11</sup>

A natural caveat to this enthusiasm, however, is that ODR is not necessarily the best process for every case. Even platforms like the Rechtwijzer have a mechanism where a human can be brought into the process if necessary. ODR is a tool, and it may prove extraordinarily useful in some family disputes, especially those that transcend borders. But ODR does have some limitations, and despite the power of the tools currently available, introducing technology into the dispute resolution process can create challenges. For example, if a dispute resolution provider is physically present in one location while the disputants are each in a second and third location, there can be questions as to what location's rules for ethics, privacy, and confidentiality apply to the dispute resolution sessions. Also, if the parties sign a contract to engage in dispute resolution, there may be confusion around which jurisdiction's rules interpret that contract, and the enforceability of the contract in different regions. These wrinkles introduced by ODR are clearly questions that the dispute resolution community will need to discuss, and perhaps resolve, prior to ODR being used more widely in family disputes, particularly because family disputes are less regulated and clear cut than most commercial issues.

## Conclusion

Whatever one thinks of the technology available today, it is certain that technology will continue to improve and become more powerful each year. Ten years ago we did not have smartphones, and today almost everyone in the developed world has the equivalent of a computer in their pocket with them at all times, wirelessly connected to the Internet. Technology is changing our world in ways that can be overwhelming, but technology is also creating new options for couples to make the changes they need to make in their relationships. We do not know what may be waiting for us

<sup>10</sup> <http://www.ourfamilywizard.com/ofw>, last visited 3/1/2015.

<sup>11</sup> <http://supportpay.com/>, last visited 3/1/2015.

around the corner, but we can be certain that there are more innovations to come. Even though not all these tools are designed to specifically help separating couples and families, if we think creatively, we can find

ways to leverage them to make the divorce process easier to navigate and less angst-inducing for everyone involved.