

# DESIGNING A SYSTEM FOR THE ONLINE RESOLUTION OF CROSS-BORDER CUSTODY DISPUTES

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## ABSTRACT

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Resolving disputes around custody and co-parenting when the two parents are in different countries can be quite challenging. Fortunately, technology can help to bridge the gap and provide effective options for managing and resolving cross-border family disputes. In this paper, the authors introduce some of the concepts from the emerging field of Online Dispute Resolution (ODR), and present a framework for Dispute System Design (DSD) to envision how such an online system could operate. The authors then provide a detailed walkthrough of a sample ODR system for building co-parenting agreements, and evaluate it using the DSD framework.

As any experienced dispute resolver will tell you, family disputes are an example of what can be the most complex type of dispute to resolve. Since the parties know each other with such intimacy, and because there is such an extensive shared history, resolving family disputes is often far more emotional, involved, and complex than dealing with more transactional disagreements between strangers or professional colleagues.

Family disputes, though, become even more complicated when the parents are in two different countries. Negotiating co-parenting and custody may be difficult when the parents are located in the same city, but when parents reside in different countries—each with different laws around parental rights,

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parenting time, and child support—reaching an agreement becomes much more challenging. Cross-border disputes introduce knotty complexities around accessibility including scheduling, physical location, language, information, and counsel—plus broad issues of culture and trust.

For example, proposed arrangements concerning cross-border child support may involve additional factors like currency conversions and fluctuating exchange rates, as well as delays in wiring funds and a lack of transparency into international bank accounts. Parents may fear that judges or jurors will be more sensitive to the needs of the parent who is the local citizen while the non-citizen parent may be disadvantaged. Travel expenses can be costly, and every time a child is put on a plane, worries about unilateral relocation re-emerge. Fears of potential abduction can put parents constantly on edge and make them less amenable to agreement. Finally, geographic distance can compound the stress experienced by the children who feel like they are being shuttled between two different worlds.

Simply just determining which laws apply when legal jurisdictions around the world offer different protections for mothers and fathers can be a complex challenge. Each parent may want to litigate any disagreement in their home court in which that parent's respective values are reflected. If a parent must address custody in an unfriendly forum, or one that has a dysfunctional court system, the challenges are compounded.

Cultural differences are particularly difficult to navigate. Each region around the world may have different expectations about the appropriate roles for mothers and fathers, the age of emancipation for the children, the appropriate level of child support, and the social acceptability of divorce. There may also be different expectations as to the role of extended family, or how easy it should be for parents to divorce and remarry. There may also be different expectations around employment for men and women and different levels of support provided through government social programs. Those differences can complicate the drafting of separation agreements and co-parenting plans, and thus undermine the adherence of the parents to those plans over time.

Dispute resolution services that assist divorcing couples in these types of situations must consider all of these challenges in

designing an appropriate resolution process. In addition to discussions about child support, vacation, school schedules, and transportation, international parenting plans must also consider time zones, international travel, in-person counseling and therapy, and the management of confidential and private information through communication processes that cross various legal jurisdictions.

### I. TECHNOLOGICAL CHANGE AND FAMILY DISPUTES

There is little doubt that technology is changing global society at a rapid pace. New pieces of hardware and software seemingly come onto the scene every week, and we now upgrade our existing tools (e.g., phones, laptops) every year.<sup>1</sup> Innovations continually arise that were unimaginable just a few years before. People now carry supercomputers around in their pockets that connect to global networks at high speeds with clear audio and sharp video available from every corner of the planet. Some countries are leap-frogging intermediate technologies and installing only the newest systems; in countries with few wired connections (and fewer telephone poles), many people are skipping wired telephones and relying only on mobile technology to communicate. While it is true that not all regions have reliable Internet, access to the Internet is continuing to grow around the world at a rapid pace.<sup>2</sup>

These new technologies have integrated themselves so much into daily lives that it no longer seems strange, foreign, or inappropriate to utilize them for emotional communications. People now use tools like Skype to interact with their family members no matter where they are in the world. Geographic separation no longer means that one cannot have a regular, emotionally meaningful, intimate interaction on a regular basis with loved ones. People also now use technology so seamlessly in

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<sup>1</sup> *How Often Do Mobile Users Upgrade Their Devices?*, EMARKETER, <https://www.emarketer.com/Article/How-Often-Do-Mobile-Users-Upgrade-Their-Devices/1011839> (last visited Feb. 9, 2019).

<sup>2</sup> Jacob Poushter, *1. Internet access growing worldwide but remains higher in advanced economies*, PEW RESEARCH CTR., <http://www.pewglobal.org/2016/02/22/internet-access-growing-worldwide-but-remains-higher-in-advanced-economies/> (last visited Feb. 9, 2019).

their working lives that they may communicate with others in a dozen time zones over the course of several days and barely notice. People complete purchases facilitated by technology on a nearly inconceivable scale every day through websites like eBay and Amazon.<sup>3</sup>

There is no question that technology is expanding access to others around the world. Aided by the Internet and mobile phones, lives now cross borders regularly, which means relationships and families also cross borders. The technological tools that enable individuals to communicate easily around the world are also leading to an expansion in the number of cross-border relationships. Many people now find their spouses through technological channels, which makes relationships beyond one's immediate geographic area more of a possibility. Long distance relationships between individuals in different countries are no longer unsustainable when mobile phones and video chat facilitate low or no cost interaction on a regular basis.<sup>4</sup>

The key question is how to leverage these technologies for complex cross-border family disputes. Old systems for handling family disputes were very dependent on geography because the presumption was that all families lived together in the same region, and, therefore, were subject to the same set of laws. Since our newly connected world more easily transcends borders, we need to design dispute systems that mirror this cross-jurisdictional reality. Our old redress processes were constrained by legal jurisdictions, but our new redress processes must work the way the Internet works: fast and reliable. If disputes cross borders, our redress systems must cross borders as well.

## II. EVOLVING THE PRACTICE OF DISPUTE RESOLUTION

Dispute resolution needs to meet parties where they are located. If dispute resolution continues to work the same way as society digitizes, the perceived utility of dispute resolution services will decline, and parties will look elsewhere for redress

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<sup>3</sup> *Amazon - Statistics & Facts*, STATISTA, <https://www.statista.com/topics/846/amazon/> (last visited Feb. 9, 2019).

<sup>4</sup> *8 Ways to Make A Long Distance Relationship Last If You Meet Online*, MODERN LOVE LONG DISTANCE, <https://www.modernlovelongdistance.com/make-long-distance-relationship-last-meet-online/> (last visited Feb. 9, 2019).

processes that they feel better fit into their lives. Technological advances are transforming many areas of our economy—from medicine to finance to entertainment—so it is not a surprise that technology is now transforming and disrupting both the law and the practice of dispute resolution. The challenge is envisioning how dispute resolution can utilize these new technologies to better meet the needs of parties, increase accessibility and transparency, and deliver more durable agreements.<sup>5</sup>

Some answers are available in the burgeoning field of online dispute resolution (“ODR”). ODR is the use of information and communications technology to help parties better prevent, manage, and resolve their disputes. The ODR field came into existence in the mid-1990s as a result of the expansion of eCommerce. Many disputes were arising between buyers and sellers over the Internet, and it was clear that face-to-face dispute resolution was of little value to disputants who had never met each other and never would meet each other in person. It was clear that dispute resolution services needed to be online so that these disputants in low-value, high-volume eCommerce transactions could obtain fast and fair resolutions to their problems. Additionally, it was the expectation of the parties that the resolution process would be online because the transaction that triggered the dispute in the first place had also taken place online.<sup>6</sup>

ODR can assist in addressing some of the challenges present in cross-border family disputes. For example, divorcing parents in different geographies may find it very difficult to arrange in-person meetings to work out key disagreements. Travel costs, mutually acceptable locations, and scheduling challenges can make meeting in person an obstacle, especially if the parties are not that excited to see each other in person in the first place. ODR can assist in tackling these challenges by minimizing cost, providing a neutral meeting space through technology, and minimizing dislocation in the lives of the disputants by reducing their time away from work and family. There may be circumstances that further complicate the ability of the parties to

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<sup>5</sup> Colin Rule, *Technology and the Future of Dispute Resolution*, DISP. RESOL. MAG. (Winter 2015), <http://www.colinrule.com/writing/drmag.pdf>.

<sup>6</sup> Aura Esther Vilalta, *ODR and E-Commerce*, in ONLINE DISP. RESOL. THEORY AND PRACT. (Mohamed Abdel Wahab, Ethan Katsh & Daniel Rainey eds., 2013).

meet in person such as immigration challenges, arrest warrants, or domestic violence accusations. Technology can provide an option for interaction that ameliorates those potential concerns.

In addition, if parents have already filed with the courts, the judicial process may impose strict timelines that make progress towards resolution imperative on an accelerated schedule. There may also be related court cases that are happening along a parallel track that provide a strong incentive for the disputants to reach an agreement (e.g., if there are possible or pending criminal charges against one parent for moving a child across the border without authorization). ODR can help generate options that move the process along quickly, even when the parties are separated, enabling parties to meet any aggressive timelines established by a judge.<sup>7</sup>

Initially, ODR processes just replicated off-line dispute handling processes, utilizing the same approaches and techniques.<sup>8</sup> However, as ODR practice has evolved and matured it has become clear that there are new capabilities introduced by technology that make ODR work in significantly different, and sometimes more effective, ways.

One important difference is the ability for parties to communicate asynchronously via text. Most face-to-face dispute resolution occurs synchronously in that the parties are speaking to each other directly, and they must respond immediately. Whereas, when communicating online, much of the interaction is via textual communication meaning the parties have time to fully compose their messages and submit them to the other side as a fully expressed thought. Asynchronous interaction is more like email or postal letters meaning that each party can take as much time as they need to compose their response fully before sharing it with the other side. That can enable participants to work through complex emotions like anger or sadness, or to consult

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<sup>7</sup> For example, European programs have approached this situation by urging participants to meet with a mediator in-person in a place and at a time preceding a scheduled court hearing.

<sup>8</sup> Federico Ast, *Colin Rule - The Godfather of Online Dispute Resolution Speaks to Kleros*, KLEROS (Oct. 22, 2018), <https://blog.kleros.io/the-godfather-of-online-dispute-resolution-speaks-with-kleros/> (last visited Feb. 9, 2019).

with outsiders (such as a lawyer, counselor, or family member) prior to communicating with their counter-party. Research into ODR has revealed that this kind of asynchronous interaction can provide the parties a cooling distance that can help them to be at their best in the dispute resolution process. These more reflective interactions can increase the likelihood of an amicable resolution, as well as improve the quality of the resolutions eventually achieved.

ODR can enhance accessibility and communication between the parties, but it can also enable third-party processes like mediation and arbitration—subject to finding competent neutrals at a cost that parties can afford. The parties can benefit from the participation of a neutral mediator who helps them exchange information and develop ideas for resolving the issues in their dispute. The online tools described above can aid mediators in many of the same ways these tools can assist parties.

When ODR was first introduced to mediators in the late 1990s, there was an instinctive resistance to the concept. Many mediators are in the business of promoting face-to-face interaction between disputants, so the suggestion that technology could play a helpful role in helping find resolutions to disputes was confounding. The idea that parties could log into a website, complete a few forms, and craft an effective resolution was alien to most mediators who saw their primary role as promoting in-person communication, connection, and empathy between the disputants. However, as our society has changed and technology-based communication has become more commonplace, it no longer feels stilted and inhuman. People now communicate online about emotional topics all the time, and it no longer feels odd to discuss complex emotional and relationship matters through a technology-based channel. If parties are willing to use technology to find their spouse in the first place (for instance, through online dating sites), it probably feels natural for them to utilize technology when a relationship is ending, as well.

### III. A FRAMEWORK FOR DESIGNING ODR SYSTEMS

In this article, we define “system” to mean one or more processes that anticipate, manage, resolve, and learn from a stream of disputes. If we are to incorporate these new ODR tools and techniques into the existing system for handling cross-border

family disputes, we need a framework to ensure we factor all of the relevant concerns into our design. The field of Dispute System Design (“DSD”) offers such a framework, enabling us to consider cross-border family disputes at multiple inter-related levels.<sup>9</sup> DSD research has demonstrated that effective resolution systems involve:

- Multiple process options, including rights-based and interest-based options, for parties that have the flexibility to move between them.
- Substantial stakeholder involvement.
- Education and training of stakeholders on use of available process options.
- Participation that is voluntary, confidential, and assisted by impartial third-party neutrals.
- System transparency and accountability.

Any ODR-based system to handle cross-border family disputes must offer these features. But DSD frameworks also encourage us to more deeply examine six additional elements to ensure effectiveness of any resolution system: goals, stakeholders, context and culture, structures and processes, resources, and accountability.<sup>10</sup> We will now describe these elements and apply them to existing systems for cross-border family disputes to help us further refine our ODR system design criteria.

#### A. Goals

DSD suggests that in designing a system, the decision-maker<sup>11</sup> must deliberate on what goals she seeks to achieve and what

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<sup>9</sup> WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988); CATHY COSTANTINO & CHRISTINA S. MERCHANT, DESIGNING MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1995); Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute System Design*, 14 HARV. NEGOT. L. REV. 123 (2009).

<sup>10</sup> Smith & Martinez, *supra* note 9; Lisa Blomgren Amsler, Janet Martinez, & Stephanie E. Smith, *Christina Sickles Merchant and the State of Dispute System Design*, 33(S1) CONFLICT RESOL. Q. s7-s26, s18 (2015); LISA BLOMGREN AMSLER, JANET MARTINEZ & STEPHANIE E. SMITH, *Chapter 2: Analytic Framework for Dispute System Design*, in DISPUTE SYSTEM DESIGN (Stanford University Press forthcoming 2019).

<sup>11</sup> By “decision-maker,” we mean one or more individuals or entities with the authority to commission and implement the design.

types of conflicts the system seeks to address. Possible objectives are myriad; for example, conflict prevention, efficiency, working relationships, public safety, public recognition, justice in outcomes or procedures, reputation, organizational improvement, or sustainable resource management. Each objective is likely desirable, but establishing priorities will enable a more focused system design as well as a metric for evaluating the system's effectiveness.

*In the case of cross-border family disputes, particularly those involving custody and co-parenting, the goals are set forth in the Hague Convention on 25 October 1980 on the Civil Aspects of International Abduction ("The 1980 Hague Convention") to provide a return remedy; prevent abduction; and help parents come to an amicable resolution of their differences. Additionally, our ODR system should strive to improve viability of agreements and continuing adherence to agreements reached over time.*

#### B. Stakeholders

The second framework element is the identification of stakeholders and the analysis of their relationships and relative power.<sup>12</sup> Stakeholders include the people and organizations that create, host, use, and are affected by a system.<sup>13</sup> In addition to the immediate parties in conflict, stakeholders can include individuals or entities subsidiary to or constituents of those parties, as well as others directly or indirectly affected by the outcome of the dispute.

*For our purposes, the stakeholders are the children, siblings, parents, judges, court staff, counsel, nonprofit social services, schools, religious organizations, and federal, state, and local government officials in the U.S. and abroad. Government and judicial officials may hold the most power but the least context for each case. Parents have the most context and children the least power. The role of a child in a mediation is critical. Some countries incorporate a child through an independent mental health professional who interviews the child and then does a report during*

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<sup>12</sup> Smith & Martinez, *supra* note 9; LISA BLOMGREN AMSLER, JANET MARTINEZ & STEPHANIE E. SMITH, *Chapter 3: Analytic Framework for Dispute System Design*, in *DISPUTE SYSTEM DESIGN* (Stanford University Press forthcoming 2020).

<sup>13</sup> Smith & Martinez, *supra* note 9, at 162.

*the mediation. It may be valuable for the child to be represented by counsel but, if parents do not have counsel, the power balance will be affected. In some countries, mediators push for direct inclusion of children in the mediation or at least to have the mediator speak with the children.*

### C. Context and Culture

Context and culture comprise the third element of the framework. By “context,” we mean the circumstance or situation in which a system is diagnosed and designed; by “culture,” we mean the implicit assumptions and values held by the surrounding community that help to define the dispute.

*In the context of cross-border custody disputes, the geographical and cultural context may present significant barriers to resolving such disputes. Professor van Loon<sup>14</sup> describes in this volume the changing socio-legal changes that have affected assumptions around custody, including increased participation of women in the labor market, increased mobility for international travel, increased joint custody, greater variety of legal cultures and languages, and increased significance of human and children’s rights laws. Any effective ODR system is going to need to factor in these unique contexts and cultural expectations in order to be effective.*

### D. Structures and Processes

The fourth element pertains to the processes used to prevent, manage, and resolve disputes; how these processes are related to each other and the formal legal system; and what the incentives and disincentives are for their use. Processes options range across a broad spectrum, ranging from direct negotiation, to third-party facilitation, mediation or arbitration, and court adjudication.

*Existing systems for using mediation to resolve cross-border family disputes were detailed in a June 30, 2016 process proposed by the EU Commission: “As early as possible during the proceedings, the court shall examine whether the parties are willing to engage in*

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<sup>14</sup> Hans van Loon, *The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the role of mediation in resolving international child abduction cases*, 12(2) WORLD ARB. & MEDIATION REV 1-19 (2018).

*mediation to find, in the best interests of the child, an agreed solution, provided that this does not unduly delay the proceeding.”<sup>15</sup> This use of mediation involves finding a qualified mediator;<sup>16</sup> navigating long distances, cultural and language barriers, and Convention time lines; cooperating with the courts; and complying with national rules of jurisdiction, choice of law, and enforceability. These steps may improve communication between the parents so that normal contact may ensue.<sup>17</sup> Any ODR system will need to operate in the context of these existing structures and processes.*

#### E. Resources

Resources are a critical element to consider in terms of what financial, human, data, and technological resources are needed and available to support a system.

*In the case of cross-border family cases, public education and design of a platform that is accessible (i.e., understandable across languages) will require a significant investment of resources. An optimal structure would be flexible and well-funded, i.e., can pay for the parents’ travel, or the mediators’ time. If resources aren’t sufficient for the system’s requirements, choices among priorities will need to be made, which may affect user perception and experience of fairness and justice. Some EU nations offer free, State-funded cross-border mediation by mediators who specialize in cross-border cases. Perhaps other jurisdictions can be persuaded to provide similar resources once the effectiveness of the system is demonstrated.<sup>18</sup>*

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<sup>15</sup> See *Proposal for a Council Regulation on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (Recast)*, at Art. 23(2), COM (2016) 411 final (June 30, 2016), <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF>.

<sup>16</sup> In addition to competence, a big issue in cross-border mediation is having a mediator who matches the culture of a parent, but co-mediation would be required to offer parity. Having a mediator who lacks knowledge of either parent’s culture offers impartiality, but risks having a neutral who isn’t trained or certified to the specifics of the case. A related issue is whether law students, with a qualified mediator professor, should be mediating these cases, as they do for the U.S. Department of State.

<sup>17</sup> Hans van Loon, *supra* note 14.

<sup>18</sup> Germany and the UK also have systems similar to The Netherlands. France has a government office in its Foreign Ministry that has employed mediators

#### *F. Accountability*

Last, a system's accountability and success will depend on the degree of transparency around its operation and whether the system includes monitoring, learning, and evaluation components. Evaluation is critical in order to ascertain whether (a) the system is functioning effectively in terms of participation, cost-benefit, quality neutrals, and user satisfaction; (b) the system is improving over time; and (c) the users understand how the system operates. Transparency increases credibility, and thus, participation.<sup>19</sup>

*Any ODR system for cross-border family disputes will need to collect data around these priorities so as to ensure transparency, accountability, and effectiveness. Satisfaction data from parents and children will need to be combined with data on adherence to agreements achieved, the frequency of changes and revisions, and how many cases eventually end up going in front of a judge due to non-compliance.*

Table 1 examines each of these DSD elements for three different system designs: (1) the Hague Convention, (2) in-person mediation, and (3) an ODR-based process.

**Table 1**

	Hague Convention	Mediation	ODR
Goals	<ul style="list-style-type: none"> <li>• Prompt return of the child</li> <li>• Prevent abduction</li> <li>• Help parents agree</li> </ul>	<ul style="list-style-type: none"> <li>• Prevent abduction</li> <li>• Voluntary return of the child-appropriate measures/amicable resolutions</li> <li>• Help parents agree</li> </ul>	<ul style="list-style-type: none"> <li>• Help parents agree from a distance based on communication technologies</li> </ul>

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for Hague abduction cases. Japan was visiting this issue by coordinating with five bar associations and organizations to handle mediations. Countries in Europe have less obstacles – more funding, shorter distances to travel within the EU, to handle these cases. A complication is that when asked to participate in mediation, parents have felt pressured to do so, but have felt stressed to mediate in another country where they lack a lawyer's advice, with a mediator who isn't really neutral.

<sup>19</sup> LISA BLOMGREN AMSLER, JANET MARTINEZ & STEPHANIE E. SMITH, *Chapter 5: Accountability: Evaluating Dispute System Design*, in DISPUTE SYSTEM DESIGN (Stanford University Press forthcoming 2020).

Stakeholders	<ul style="list-style-type: none"> <li>• Central Authorities</li> <li>• Judges</li> <li>• Parties in conflict</li> </ul>	<ul style="list-style-type: none"> <li>• Central Authorities (Central Contact Point)</li> <li>• Mediators</li> <li>• Parties in conflict</li> </ul>	<ul style="list-style-type: none"> <li>• Platform creators/administrators</li> <li>• Mediators</li> <li>• Parties in conflict</li> </ul>
Context & Culture	<ul style="list-style-type: none"> <li>• Judicial approach</li> <li>• Different locations</li> <li>• Different languages</li> <li>• Different legal systems</li> </ul>	<ul style="list-style-type: none"> <li>• Amicable approach</li> <li>• Different locations</li> <li>• Different languages</li> <li>• Different legal systems</li> </ul>	<ul style="list-style-type: none"> <li>• Communication technologies accessible</li> <li>• Different locations</li> <li>• Different languages</li> <li>• Different legal systems</li> </ul>
Process	<ul style="list-style-type: none"> <li>• Cooperation with the courts and Central Authorities.</li> <li>• Compliance with national rules of jurisdiction, choice of law, and enforceability</li> </ul>	<ul style="list-style-type: none"> <li>• Face-to-face mediation</li> <li>• Recognition and Enforceability of voluntary agreements</li> </ul>	<ul style="list-style-type: none"> <li>• Online dispute resolution –long distance mediation</li> <li>• Recognition and Enforceability of voluntary agreements</li> </ul>
Resources	<ul style="list-style-type: none"> <li>• Guide of good practice in mediation.</li> <li>• Data base – INCADAT-</li> </ul>	<ul style="list-style-type: none"> <li>• International family mediators</li> </ul>	<ul style="list-style-type: none"> <li>• Platform</li> <li>• International family mediators</li> </ul>
Accountability	<ul style="list-style-type: none"> <li>• No accountability mechanism available</li> <li>• INCSTAT show case statistics—return and access applications</li> </ul>	<ul style="list-style-type: none"> <li>• Depending on the mediator, there may be satisfaction surveys</li> </ul>	<ul style="list-style-type: none"> <li>• Intrinsically available evaluation components to monitor performance and continuing improvement</li> </ul>

An overarching issue is that of the ethics of systems and online dispute resolution, in particular. Ethical principles encompass an array of criteria: accessibility, accountability, competence, confidentiality, fairness, impartiality, informed consent, and transparency. To design a system that will function in practice,

the goals of the system would align with these ethical principles and be translated into measurable standards.<sup>20</sup>

#### IV. ENVISIONING ODR FOR CROSS-BORDER FAMILY DISPUTES: TYLER'S MODRIA PLATFORM FOR PARENTING PLANS

A starting point for the design of our cross-border family ODR process should look at the existing family ODR systems currently in operation. One such example is Tyler's Modria platform for creating child custody parenting plans. This platform is currently in use in Clark County, Nevada, which is the county that houses the City of Las Vegas. By examining the design of this system and applying the DSD framework, we can identify additional capabilities that might be required to address cross-border cases.<sup>21</sup>

Clark County is the 12th largest county in the United States by population, and it supports twenty family courts and thirty-two civil and criminal courts, with more than 600 court employees. Clark County employs eleven full-time mediators on its staff with approximately 4000 parenting plan mediations conducted annually. In early 2018, Tyler launched a pilot platform for three family courts in Clark County to assist in the creation of parenting agreements as part of the divorce and separation process. Judges in Clark County make mediation mandatory in all cases in which parents do not agree about custody, and the Tyler platform is provided as an option to the parents to assist them in reaching agreements in several key areas of co-parenting.<sup>22</sup>

In Clark County, the process is initiated when the court sends an invitation email to participate in the online process to the plaintiff/petitioner. The plaintiff begins the ODR process by clicking on the link in the invitation e-mail. They can do this any time of day or night, seven days a week. When they accept the invitation, they arrive at a webpage that shows them an overview of the components of the parenting agreement, including legal custody, vacation, transportation, holidays, parenting time, and

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<sup>20</sup> Leah Wing, *Ethical Principles for Online Dispute Resolution: A GPS for the Field*, 3 INT'L J. ONLINE DISP. RESOL. 12 (2016).

<sup>21</sup> Colin Rule, *Webinar Presentation to the Self Represented Legal Network* (Nov. 9, 2018), <https://attendee.gotowebinar.com/recording/3179560423317657350>.

<sup>22</sup> *Id.*

school breaks (Figure 1). One by one, the platform walks the petitioner through each area and informs about the choices that need to be made. This process could be adapted for cross-border cases, subject to court(s) authority and jurisdiction.<sup>23</sup>

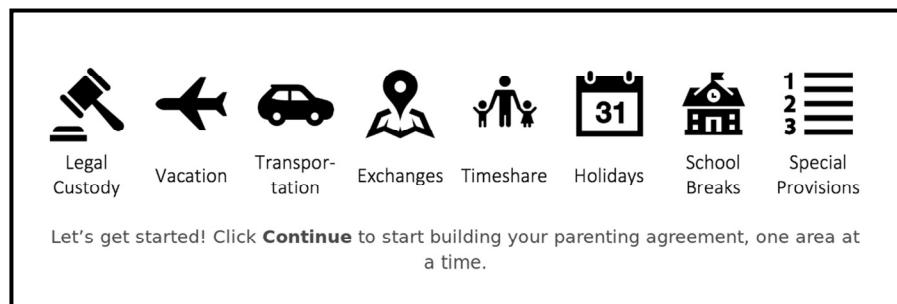


Figure 1: Overview of the Modria Parenting Plan Agreement Components

Different options are presented along with a description of what each option entails. For instance, in Nevada under the “legal custody” link, the options are: joint legal custody, where both parents share the legal responsibility to make major decisions about their children’s health, education, religious upbringing, and welfare; or sole legal custody, where one parent has a legal responsibility to make those choices.<sup>24</sup> The platform indicates that joint legal custody is presumed to be in the best interest of the children, but if the petitioner disagrees the petitioner can suggest that one parent have sole legal custody (Figure 2).<sup>25</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> The presumption of joint custody may vary by the legal standards of the jurisdiction.



**Legal Custody**

The parent with legal custody is responsible to make major decisions regarding the child(ren), including the child(ren)'s health, education, and religious upbringing.

The first area we will address is Legal Custody. Parents must agree to certain communications and access to information about their child(ren).

Click **Continue** to learn more about the available options.

Figure 2: Explanation of the “Legal Custody” Component

The petitioner can then indicate which arrangement the petitioner believes is in the best interest of the children: joint legal custody, sole legal custody with the petitioner, or sole legal custody with the other parent (Figure 3).<sup>26</sup>



**Legal Custody**

The parent with legal custody is responsible to make major decisions regarding the child(ren), including the child(ren)'s health, education, and religious upbringing.

No matter who has legal custody, you both must tell each other about the child(ren)'s contact information for anyone who provides services for the child(ren) such as daycare providers or therapists, school events, medical appointments, medical emergencies, or other activities and events involving the child(ren).

**Joint Legal Custody**

Both parents share the legal responsibility to make major decisions about the child(ren)'s health, education, religious upbringing, and welfare.

**Sole Legal Custody**

One parent has the legal responsibility to make major decisions about the child(ren)'s health, education, religious upbringing, and welfare.

Joint legal custody is presumed to be in the best interests of the child(ren). However, if joint legal custody is not in the best interests of the child(ren), the court can order that one parent have sole legal custody of the child(ren).

Which arrangement for custody do you believe is in the best interests of the child(ren)? \*

- Joint Legal Custody
- Sally has Sole Legal Custody
- Billy has Sole Legal Custody

Figure 3: Option Selection for the Legal Custody Component

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<sup>26</sup> Rule, *supra* note 21.

Once the petitioner has made a selection, the party is asked to confirm the use of this option or to specify a different arrangement. Once the petitioner confirms, the process moves to the next aspect of the agreement. In this manner, the petitioner steps through each of the components of the parenting agreement, and the platform registers the petitioner's preference. Parents also have the ability to save their progress at any time so that they can later return and pick up where they left off (Figure 4).<sup>27</sup>

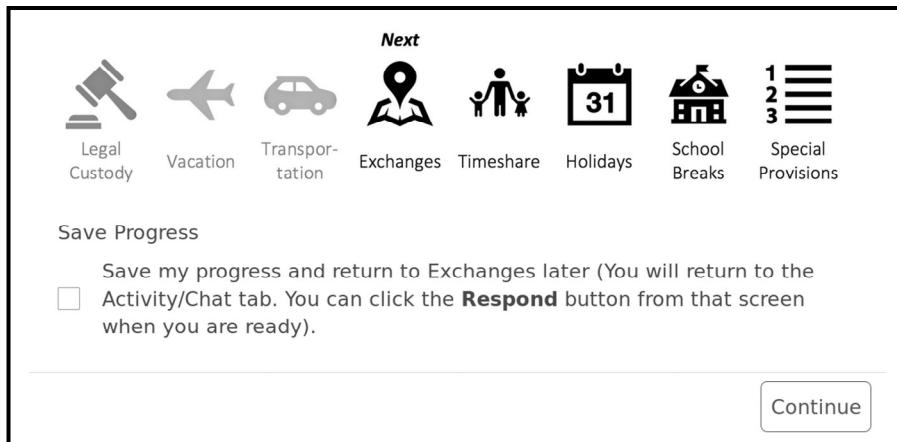


Figure 4: Progress Indication through the Agreement Components

Once the petitioner has completed the selections, he is thanked for his participation and informed that the respondent will now be invited to participate as well. Once the respondent receives the invitation e-mail, the respondent can also click on a link and enter the online workspace for the parenting agreement. Like the petitioner, the defendant can use the system at any time, 24/7.

The respondent also steps through all of the components of the parenting agreement in sequence, but the respondent sees the proposals that were advanced by the other party in each step and is asked how he would like to proceed, by either accepting the co-parent's proposal or by proposing a different arrangement (Figure 5).<sup>28</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

 <p><b>Legal Custody</b></p> <p>The parent with legal custody is responsible to make major decisions regarding the child(ren), including the child(ren)'s health, education, and religious upbringing.</p>
<p><b>Co-Parent's Proposal</b></p> <p><b>Joint legal custody of the child(ren).</b></p> <p>How would you like to proceed? *</p> <p><input type="radio"/> Accept Co-Parent's Proposal  <input type="radio"/> Propose a different legal custody arrangement</p>

Figure 5: Respondent Selection of Options

Once the respondent has completed all of the components in the parenting agreement, he is presented with a graphic representation that indicates how many of the components have achieved mutual resolution. Each of these areas is highlighted with a green check mark indicating that the petitioner and respondent selected the same option (Figure 6).<sup>29</sup>

<b>Summary</b>							
<p>The proposed parenting agreements from each parent are shown below. Please review the proposals and then select an option below.</p>							
 Legal Custody	 Vacation	 Transportation	 Exchanges	 Timeshare	 Holidays	 School Breaks	 Special Provisions

Figure 6: Check Marks Indicate Which Components Have Achieved Mutual Agreement

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<sup>29</sup> *Id.*

The mediator then joins the case. The mediator can see which areas the parties have been able to agree upon and which areas remain unresolved. The mediator can also review the proposals entered by each party. The mediator also has the ability to communicate with the parties in a joint discussion, as well as the option to communicate with each party individually in a private caucus space. In this manner, the mediator can collaborate with the parties to try to reach an agreement on any of the remaining unresolved areas. All of these communications are text-based and asynchronous. The system structures the negotiation by calling out each individual area of agreement and enables the parties to memorialize their agreements to build momentum towards a complete solution (Figure 7).<sup>30</sup>

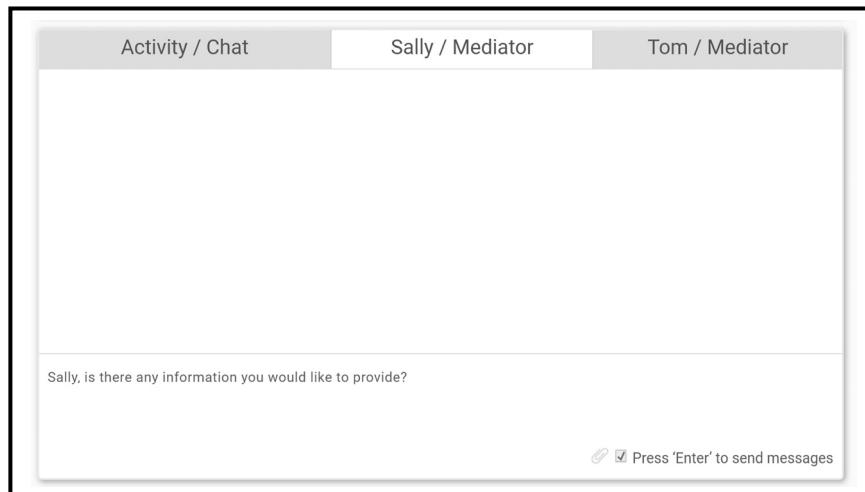


Figure 7: Communications Interface with  
Three Concurrent Discussions

The Clark County platform generates outcome agreements based on the selections made by the parties. These outcome agreements may be full agreements if the parties were able to resolve every component in the parenting plan, partial agreements if the parties were able to reach consensus in only a few of the areas, or non-settlements if the parties were not able to reach agreement in any areas. The platform then enables the parties to each sign the generated agreement, which is then shared back with

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<sup>30</sup> *Id.*

the court as the settlement agreement is e-filed directly into the court case management system. However, the direct communication between the parties in creating the agreement is not shared with the court, and it is deleted once the case is closed.<sup>31</sup>

#### A. *Using the DSD Framework to Apply ODR Tools to Cross-Border Cases*

Working from the existing design of the Tyler Modria parenting plan ODR process, we can use the DSD framework to examine what additional features and options may need to be added to address cross-border custody issues.<sup>32</sup> First, we examine the process related criteria:

1. Multiple Process Options (Including Rights-based and Interest-based) for Parties with the Flexibility to Move between Them

The cross-border family ODR process must not lock users into a single set of options for resolving their dispute. The system can present the eight areas for agreement present in the Tyler Modria design, but it will also need to offer additional options relevant to cross-border cases, such as international exchange arrangements and international travel. Also, while the Clark County process is initiated by the court, cross-border cases should be initiated outside the court because of jurisdictional complexities. The disputants need to be able to move between the areas of agreement as they see fit, but also be able to log back into the platform to make adjustments as are appropriate over the life of the agreement (for instance, as the children age). Video conferencing may also be a valuable option for cross-border mediations where face-to-face interaction is difficult or impossible.

#### 2. Substantial Stakeholder Involvement

The cross-border family ODR system must focus entirely on the parties, and the users must feel complete control in navigating

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<sup>31</sup> *Id.*

<sup>32</sup> Recall that a “system” is two or more processes to resolve a specified set of disputes. In the case of cross-border family disputes, there is an existing system of offline processes. In this paper, we are proposing to add an optional online process option.

the system and freedom in selecting the option they believe best meets their needs and the needs of the children. Since the system is driven entirely by the parties prior to mediator engagement, it should ensure substantial stakeholder involvement (including possible roles for private lawyers and government officials).

### 3. Education and Training of Stakeholders on Use of Available Process Options

Each area of agreement must include a clear description of (a) the issues involved, (b) possible areas of concern or misunderstanding, (c) challenges introduced by different legal jurisdictions, and (d) what each option entails. If the parties have additional questions, they should be able to consult help able to provide even more clarity. The cross-border ODR system should be more in-depth than the Clark County system because of the additional complexity involved in cross-border disputes. Questions need to be framed carefully to elicit the best information from the parents, because questions will be read through a cultural lens, and that could give “false positives” or wrong answers that were unintended. No party should feel that they are being asked to make a decision with inadequate information.<sup>33</sup>

### 4. Participation That Is Voluntary, Confidential, and Assisted by Impartial Third-Party Neutrals

Parties must have clear opportunities to opt-out of the online process at any point and to default back to a more traditional, face-to-face mediation or court-based process. If the parties request the assistance of a mediator, those mediators should be thoroughly trained in the system and able to assist the negotiation without bias or favoritism toward one party or the other. A clear “agreement to mediate” should be completed by participants at the outset to manage party expectations. The system must also utilize the latest technology to ensure all information submitted is encrypted and protected from unauthorized access.

### 5. System Transparency and Accountability

Any agreements achieved in the system must be documented and officially memorialized (preferably with a binding e-signature

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<sup>33</sup> Questions need to be framed more carefully to elicit the best information from the parents, because questions will be read through a cultural lens.

from the parties) to ensure transparency and to hold parties accountable for the agreements they make. The system should share mediator biographies and experience to reassure users that the mediators harbor no bias or partiality. High-level, anonymized statistics around case outcomes should be regularly compiled and provided to external auditors to ensure the system is delivering fair outcomes and it is not systematically disadvantaging any particular class of users.

We should also apply six additional effectiveness elements to our cross-border family ODR design:

*i. Goals*

The goal of the ODR process option will be to help parents craft workable parenting plans that (a) account for all of the key potential points of disagreement or conflict; (b) prevent abduction; (c) provide a return remedy, should one be needed; and (d) help parents come to an amicable resolution of their differences. Our objectives must be to help as many parents as possible in crafting viable, comprehensive agreements, and to ensure that those agreements are adhered to and are enforceable.

*ii. Stakeholders*

The stakeholders for this cross-border family ODR process are primarily the children, children's siblings, parents, parents' counsels, and the courts. If the process is working well, judges, court staff, and government officials would get involved in fewer cases than they are currently, and nonprofit social services, schools, and religious organizations would be able to devote more of their time and resources to the small number of cases that have a dire need of intervention and support. The ODR process should put control in the hands of the parents, who have the most context, and minimize the need for involvement by government and judicial officials.

*iii. Context and culture*

The ODR software in and of itself is unlikely to provide much cultural context to these issues. It probably will not offer different agreement areas and options based on the home countries of the users. It will be up to the parties themselves and the mediators to raise these types of questions and to ensure that the outcomes

achieved are durable and sustainable in the various cultural environments within which the agreed upon solutions will play out. The parties, for example, may want to craft custom agreements with more flexibility to ensure acceptance from friends and family members in different countries.

*iv. Structures and processes*

The design of the cross-border family ODR process will be programmed into software code, providing a clear structure and linear process moving the parties toward agreement and resolution. The intake from the initiating party, the stepwise movement through the agreement areas, and then the intake from the responding parent ensure that every key area is touched upon. Once the mediator is engaged, the mediator has more flexibility in determining which topic is discussed and in what sequence the topic is discussed. But the final agreement, and the availability of the court to resolve remaining areas of disagreement, ensures that no important issues will be overlooked.

*v. Resources*

The creation and maintenance of an ODR system such as this one is not inexpensive. Fortunately, because the Tyler Modria system has already been created, cloning it and making the required adjustment should not consume many resources. Courts, such as those in The Netherlands, will likely see the expenditure of resources required to create a system like this as a wise investment, because the cost per case resolution in a system like that is probably far lower than the cost of a case handled in-person in front of a judge.<sup>34</sup> Once the system is created, it should be sustainable for the long haul, because the vast majority of costs arise during the initial programming and deployment. Perhaps small case filing fees can cover the ongoing cost of administration once the system is up and running, but there will still be resources required to fund the ongoing work of the mediators.

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<sup>34</sup> HIIL TREND REPORT IV, ODR AND THE COURTS: THE PROMISE OF 100% ACCESS TO JUSTICE? (Online Dispute Resolution 2016), <http://www.onlineresolution.com/hiil.pdf> (last visited Feb. 9, 2019).

*vi. Accountability*

The Tyler Modria system already collects extensive data on the performance of the system. For example, case closure data shows that the settlement rate for parenting plan cases entered into the system is 74%. Also, the average time to resolution in the system is six days (with more than 90% of agreements finalized outside of court operating hours, meaning the parties reached resolution at a time when the court was not open to assist them face-to-face).<sup>35</sup> The cross-border family ODR system should continue to track these statistics, as well as additional statistics relevant to cross-border matters, such as data on adherence to agreements achieved, the frequency of changes and revisions, and how many cases eventually end up going in front of a judge due to non-compliance. This data should be closely monitored to determine system effectiveness, hold platform administrators and neutrals accountable, and to identify potential areas of improvement.

## V. CONCLUSION

ODR is certainly not a panacea for family disputes, and this is certainly the case for cross-border parenting disputes. People are just as complicated on either side of a computer-based interaction as they are face-to-face. There is nothing magical about the use of technology that suddenly makes all disputes easily resolvable and makes parties more reasonable, less angry, and less emotional.

However, research to date indicates that technology does have great promise in helping to expand access to justice, build sustainable agreements, and avoid escalation of family disputes. These benefits should be even more pronounced in cross-border family disputes where geography is such a complicating factor.

By building on existing ODR platforms and leveraging DSD frameworks to address all the categories of design criteria, we can envision ODR enhancing the existing system to address cross-border family case volumes more effectively and efficiently. We can identify which disputes, and at what point in each dispute, technology may be most helpful in assisting the parties to reach agreement. Mediators, provider organizations, and courts can

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<sup>35</sup> Rule, *supra* note 21.

also learn about the advantages and challenges in using ODR for cross-border family disputes so they can best decide when to use and when not to use technology with their parties.

Many experienced family mediators may feel a sense of encroaching skepticism while reading this article. They may ask themselves, *why is it necessary that we re-invent face-to-face processes that are currently effective and that we have worked to refine over the past few decades? Plus, there is so much we do not know about the effectiveness of these new techniques. What is the sense in fixing something that is not broken?* But using the same techniques while society is changing radically due to technology is likely to reduce the effectiveness and utilization of dispute resolution services over time. If the dispute resolution field is to stay relevant and useful to the younger generation—who will eventually become the older generation—it is important to engage with these changes and to learn when and how to leverage technology.

Online dispute resolution is destined to become more commonplace in family disputes, particularly those that cross borders, over the next decade. Since the law surrounding these kinds of disputes is less settled than the law governing more transactional matters, and because family disputes are so complicated and emotional, it will take time for the field of dispute resolution to codify best practices and ethical standards in this area. In part because of this uncertainty, the dispute resolution field must proactively engage these challenges and questions to keep ADR and ODR services relevant and to ensure they can be maximally effective in assisting parents in moving into the future.

