Private Justice in the Domain of Family Law: The Place of Family Group Conferences Within the Range of ADR Methods

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Abstract In this contribution, the success of family mediation and collaborative practices across Europe will be briefly touched upon, but the focus will be on a less known method (or rather a decision-making model): 'family group conferences'. The concept of family group conferences originated in New Zealand in 1989; less than 15 years later the proliferation of the concept had led to the adoption of such conferences in over 30 countries worldwide. This contribution analyses how referrals to family group conferences have been organized and regulated in three of those jurisdictions, New Zealand, England and Wales and the Netherlands. Among the issues to be dealt with are: the problems that crop up in the (judicial) assessment of requests for referrals, the nature of 'a right to direct' one's own family affairs and the legal status of 'plans' concluded during a family group conference. The analysis ends with a preliminary assessment of the value added by this specific ADR variety, while further longitudinal, empirical research by the authors is in progress.

1 Mediation: The 2016 European Commission Report on Directive 2008/52/EC

Private justice—where parties directly involved in a conflict attempt to engineer a solution themselves—is often associated with ADR methods such as mediation. In the domain of family law, mediation is well established, but many more private justice varieties can be found there.

As mediation is likely the best known and most commonly used ADR method in the domain of family law, a few words need to be said first about the recently

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A. Uzelac and C. H. van Rhee (eds.), *Transformation of Civil Justice*,
Ius Gentium: Comparative Perspectives on Law and Justice 70,
https://doi.org/10.1007/978-3-319-97358-6_9

published *Report from the European Commission on the application of Directive 2008/52/EC on mediation in civil and commercial matters*.[1] This evaluation Report, published on 26 August 2016, integrates the outcomes of two earlier projects. First, a study titled 'The Mediation Directive', carried out in 2013–2014 by two consultancies, involving desktop research and small-scale consultations among stakeholders, particularly mediators (Milieu Ltd and Consulting 2014). Second, the Commission conducted a public online consultation in the fall of 2015, during which 562 responses were received, from the mediator community, but also from academics and public authorities.[2]

In its Report, the Commission concludes, among other findings, that across Europe mediation seems most successful in the domain of family law, this despite the difficulty in obtaining comprehensive statistical data on mediation.[3] Especially mentioned are divorce cases between spouses with children. According to the Commission, it is in the best interests of children that a constructive atmosphere is created to ensure fair access and maintenance arrangements, while minimizing (further) emotional trauma.

To give just one example: in the Netherlands today, approximately 20% of couples contemplating a divorce will jointly engage a single lawyer-mediator to help them make the necessary arrangements and prepare the documents that can be submitted together with the divorce petition, reducing the court's role to rubber-stamping the divorce, and everything even without the inconveniences of a hearing (Ter Voert and Klein Haarhuis 2015).[4]

The Report also summarizes a number of best practices. For instance, litigants 'should be required to state in their court applications whether mediation has been attempted'. Particularly in family law matters, '[L]itigants should be *obliged* to attend information sessions on mediation.'[5]

It is clear that the Commission thus seems to favour a cautious move into the direction of *mandatory referral* of litigants to mediation in family matters, arguably in the interest of children, although this is not specified in so many words.

One is reminded that in the 2013–2014 Study mentioned earlier data collection took place primarily among the community of private mediation providers. These respondents were overwhelmingly *in favour* of making court referrals to mediation mandatory. In the later *online consultation*, however, many government officials (including representatives from the judiciary) and academics responded, and they were largely *opposed* to making referrals mandatory.

[1]COM (2016) 542 final (Commission Report).

[2]The online consultation was open to the public from 18 September to 11 December 2015; parallel to this open consultation, national representatives within the EJN network were invited to give their views.

[3]Commission Report, p. 5: 'Family law appears to be the area where mediation is used to the greatest extent'.

[4]For completeness sake: 1 in 3 Dutch marriages ends in divorce; the single ground 'permanent disruption' is accepted without evidence.

[5]Commission Report, p. 12.

The best practices thus seem to embody a diplomatic compromise.

The Report does not specify the arguments on which the pro and con stances towards mandatory referral are based. As far as academics are concerned, one might expect this has to do with the current lack of conclusive evidence for the effectiveness of either voluntary or mandatory referral in generating friendly and enduring solutions.

This lack of evidence was also brought to the fore in a recent international study commissioned by the research unit of the Dutch Ministry of Justice (WODC) into the effectiveness of mandatory mediation in fiercely contested divorces, the so-called diWARce cases, or in Dutch *vechtscheidingen* (Geurts and Sportel 2015).

The effectiveness—with regard to the well-being of children particularly—can only be ascertained through sophisticated research designs, such as randomized, controlled trials (RCT), but such robust experimental studies are not available as yet. Empirical studies with less robust designs can provide indications at the most, but even then the emerging picture is still unclear. Hence, the researchers had to abstain from advising the Ministry to introduce mandatory mediation.

2 Collaborative Practice: An Increasingly Familiar Mediation Variety

Possibly due to the success of mediators 'taking over the business' of family lawyers, a practice has developed, first in the United States, for each of the spouses contemplating a divorce to engage their own lawyer, but under the proviso that litigation should be avoided (Tesler 2001). For such a collaborative approach, a so-called Participation Agreement is concluded at the outset, wherein it is stipulated that the parties will disclose all relevant information. Moreover, the Agreement provides that the parties will make good faith efforts to reach a mutually acceptable settlement and that the lawyers' roles will terminate in the event and as soon as negotiations fail and contested court proceedings are resorted to.

3 From State Abstention to State Intervention in Family Life

In view of the widespread use of mediation and similar collaborative practices in family disputes, the imposition of divorce arrangements by a court may be perceived as an intrusion into private family life, albeit an intrusion that logically follows the inability of parents to come to an agreement themselves.

A different situation arises where families with children are found to be in such deep trouble that the public authorities are authorized to step in. This is expressly so in cases of neglect or abuse, where a child may even be separated from his/her

parent(s) in order to safeguard the child's well-being and security in the light of the parents' inability to raise their child in a safe and responsible manner. Child protection authorities and/or professional guardians are usually the designated agents that request the family courts to endorse such measures. Therefore, courts may issue 'supervision' or 'care and protection' or 'placement' orders, as they are most commonly referred to, although the exact name may differ as per jurisdiction. Such orders roughly extend to the (continued) appointment of a guardian to supervise the parents, to the removal of a child from its parents to a foster parent family, or even to a special-purpose facility run by psychologists and other professional social care workers. Parents will regard such court-endorsed measures as by far the most intrusive (and unwanted) interference with their family life. Most supervision or placement order cases therefore epitomize fierce disputes, this time between the parents and the public authority, such as the child protection authority that requested the court order. A typical characteristic of such disputes is, moreover, that the parents tend to lack the (mental) capacity or (socio-economic) means to such an extent that this makes them unfit to raise their child properly themselves.

It was for such situations that the concept of the 'family group conference' (FGC) was initially developed and introduced in New Zealand.

4 The FGC in New Zealand

The idea of the family group conference originated in New Zealand in response to an over-representation of Maori children in the state care system. The indigenous Maori pride themselves on their strong sense of community and close-knit social texture. They requested an opportunity to utilize the human resources in their own community—notably extended family networks—to care for children identified as suffering from neglect or abuse by their own parent(s), rather than having 'alien' state agencies take over.

The Maori request was honoured through adoption of the 1989 Children, Young Persons, and Their Families Act, which granted not only to the Maori but also to every family in New Zealand the right to a 'family group conference'. This right to a family group conference is essentially a decision-making process, where the child involved and the members of the wider family network come together to make a plan regarding the safety and welfare of the child. In this way, intervention by the State (*casu quo* the Department of Social Work) can be avoided.

A typical family group conference will unfold in four stages.

- Stage 1: a coordinator, who speaks the language of the family/community, and who is independent from the public authorities, will help the family prepare for the meeting, e.g. by locating more remote family members (or others in the community) who may assist in looking after the child.
- Stage 2: the conference itself gets started and professionals (social workers, guardians) may clarify their concerns about the upbringing of the child.

- Stage 3: the professionals leave and the family is left alone to discuss these concerns amongst themselves, and make a plan to address them. The plan may have to conform to bottom-line stipulations provided by the professionals.
- Stage 4: finally, the professionals are called in again and the plan is presented and (possibly after some refinements) approved.

These four stages are known as the preparatory, information-sharing, private family time and presentation stage, respectively.

Section 13 of the Children, Young Persons, and Their Families Act provides that every court and every social worker *must* be guided by the principle that children have to be protected from harm, as well as by the principle that the primary role in caring for and protecting a child lies with the child's (extended) family. The referral to a family group conference is mandatory for the Department of Social Work (DSW), as Section 18 of the Act provides that a family group conference must be convened if the DSW believes a child is in need of care. Section 34 of the Act further provides that a family plan as the outcome of a successful family group conference is basically binding, as DSW shall give effect to such plans, unless this would be unreasonable. It appears then that a clinical margin of appreciation is built into the system, both on the 'entry' (referral) side and on the 'exit' (plan) side.

A leading scholar in the field has observed that in the course of a decade the statutory right to a family group conference resulted in a 60% decline in court supervision orders (Doolan 2007).

From the perspective of the United Nations Human Rights Committee, a supervision or placement order does not constitute a violation of one's right to family life if the avenue of a family group conference has been offered.[6]

The family group conference has developed as a device to give 'voice' to the wider family (or community) and to mobilize support among its members to the benefit of the child.

Many commentators and scholars hailed the 1989 Act as an outstanding piece of 'responsive regulation', enabling 'problem solving' and 'therapeutic jurisprudence' (Levine 2000).

[6]View of the Human Rights Committee under the UN Covenant for Civil and Political Rights: Communication No. 858/1999 *Margaret Buckle v New Zealand.* The Committee found no violation of Arts. 17 and 23 of the Covenant, as an FGC had been convened. No cases have yet been published under the 1989 UN Convention on the Rights of the Child. Article 9 of the Convention provides that *all interested parties* shall be given an opportunity to participate in removal and placement proceedings.

5 Reception of the FGC in Europe—General Observations

In Europe, the concept of the family group conference as a fundamental right was well received in a number of countries, among them the UK and the Netherlands, the two countries to which we will confine ourselves here. Unlike in mediation, professionals in the field who were critical of the top-down, 'system-based' way of operating established private organizations such as the Family Rights Group in the UK and the *Eigen Kracht Centr*ale in the Netherlands. Their goal was to promote the FGC philosophy and to train independent coordinators in techniques to stimulate initiative and resourcefulness among family members, while at the same time respecting their autonomy.

The family group conference has strong potential to actively engage families that might otherwise remain 'passive consumers' of welfare. *It is the family* that decides how they are going to *take action*, to address the professional concerns, rather than being the *recipients* of imposed professional decision-making. This aspect in particular appeared to fit in well with the desire for more direct participation of citizens, the new buzzwords being 'empowerment', 'right to challenge' and 'the Big Society' (Taylor 2012). One is reminded of David Cameron's maxim: 'Society is not a spectator sport'. As observed in a comprehensive evaluation of the Big Society ideal, however, the idealistic motive of 'empowerment' went hand in hand with the somewhat more cynical motive of 'austerity' (Civil Exchange 2015). These same dual forces have also shaped the development of mediation.

In view of these strong parallels, the question presents itself whether the European agencies have laid down a similar regulatory framework for family group conferences as for mediation. The answer is no, although indirectly the steadily expanding case law of the European Court of Human Rights (ECtHR) on Article 8 of the European Convention on Human Rights (ECHR), bringing 'the mutual enjoyment by parent and child of each other's company' within the ambit of the right to family life, definitely provides support to the idea.[7]

6 Reception in the UK: The FGC as a Judicial Case Management Tool?

In the UK, Smith and Hennessey conducted an early family group conference experiment in Essex (Smith and Hennessey 1998). They found that family plans prevented 32% of children from entering local authority care and 47% of cases from proceeding to court. Cost savings were thus generated in respect of publicly funded care professionals as well as the publicly funded court system.

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[7]ECtHR, 12 July 2001 *K and T v Finland,* held that Article 8 ECHR encompasses a positive duty to facilitate family reunification whenever a (justified) external placement order is renewed.

These outcomes were undoubtedly instrumental in the Ministry of Justice recommending the use of family group conferences to social workers and courts in its guidance that accompanied the introduction of the so-called Public Law Outline (PLO) in 2008 (Evans 2011).

The PLO is not a statute, but essentially a case management tool that specifies the steps to be taken by the local authorities whenever they intend to seek care and protection—and placement—orders from the family court. The aim is to ensure timely care proceedings (to be completed within 26 weeks), compelling the authorities to do their preparatory work well, demanding specified reports and care plans to be submitted during the 'pre-proceedings stage'.

During this stage, it is also peremptory that the professional social workers discuss their concerns with the family: the children and their immediate and wider family should be involved in addressing the concerns or in identifying alternative kinship care. The objective should be to keep the children with their (wider) families whenever possible in view of their safety and well-being.

Care proceedings were reformed following a 2011 review. Since then they provide an even stronger impetus to use the pre-proceedings process. However, there is a real danger that work during this stage becomes entirely focused on *preparing for court*, rather than *supporting families to avoid court*.

The main practical problem that has emerged is the very tight schedule within which a family group conference has to be organized: if a family plan is to be presented at the first court hearing, there is only a two-week window available as from the moment the 'letter before proceedings' (the document that starts the procedure) is issued.

This is a problem, because the preparatory work for a family group conference tends to be time-consuming. Family members not only have to be traced and child carers identified, but time is also needed for a face-to-face meeting of all the family members, and for all to get accustomed to the idea that they have to assume responsibility for making important decisions.

Several authors have wondered whether the very principles underlying FGCs are not compromised by this paramount need to avoid delays (Connolly and Masson 2014).

Meanwhile, the Court of Appeal of England and Wales in a 2013 landmark case laid down the principles to be observed by local authorities.[8] The court will expect the local authority to consider the pros and cons of all realistic options for the child in their care proposals, and explain why the preferred option is a proportionate intervention in the family life. It thus has become all the more important that all actions are reasoned and that options for alternative care in the family are fully explored.

Therefore, unlike in New Zealand, in the UK family group conferences have not become a statutory right, but are merely recommended in various guidance notes within the PLO. The courts have laid down specific standards by which they will

[8]Re B-S (Children) [2013] EWCA Civ 1146.

critically assess the reasons purported by the local authority to pass over the family network. Yet the time pressure, which was simultaneously introduced in the PLO, puts the very concept of the FGC in jeopardy.

7 Reception in the Netherlands: The FGC as Camouflage for Self-help Duties?

In the Netherlands, the concept of the FGC, heralding private family autonomy, has become even further squeezed between countervailing pressures. There, the Dutch provider Eigen Kracht Centrale (EKC), in a larger variety of areas than just child protection cases, has engineered the family group conference approach since 2000.

Early studies indicated that solutions thought out by families actively engaged were overall as viable as professional interventions, but came at a considerably lower cost (de Roo and Jagtenberg 2012).

In 2011, a Member of Parliament took up the concept when a new youth protection bill was discussed in the Dutch parliament. The MP, Mr. Voordewind, viewed a new statutory right to a family group conference essential in order to counterbalance the expanded powers that the bill granted to public authorities.[9] Therefore, in the Netherlands, as in New Zealand, the family group conference would constitute an emancipatory alternative to government intervention.

This bill was withdrawn, however, to make room for a more fundamental reconstruction of the entire care system. This included both youth protection (with public authorities in a supervisory role) as well as publicly funded support by professionals, which is often *hoped for* by families in need of professional support. Underlying this fundamental reconstruction was the consideration that the entire (youth) care system had become over-compartmentalized and supply-driven.

High profile care dramas, where, for example, twenty different care professionals had worked without any coordination on a single case, fuelled the idea that the care system should be anchored locally, in neighbourhoods, with *one generalist* as a designated contact person. This contact person was to decide about the care needed, but only after having inquired into the capacity of the family network to provide assistance in the first place. The expectation was, and remains, that this approach will generate cost savings as well.

To underscore the desired transformation of former passive ‘care consumers’ into ‘co-producers of care’, the new youth bill replaced the pre-existing statutory *right* to designated subsidized care that had accrued to parents and their children with a (allegedly non-enforceable) general *duty* of local authorities to help out. However, this duty was made *conditional* on families demonstrating their *inability* to help themselves.[10]

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[9]Kamerstukken (Dutch parliamentary papers) II 2010/11, 32 015 nr. 23.

[10]Article 2.3 Jeugdwet 2015.

It is in this particular context that MP Voordewind, in 2013, again proposed to introduce a right to a family plan, this time in the comprehensive youth bill. At that time, the underlying idea seems to have been where a family is under an *obligation* to try to help itself, it should also have the *right* to help itself, as a corollary.[11]

MP Voordewinds's proposals were adopted. The new 2015 Youth Act, to be clear, covers *all* areas of youth care, which is the domain of youth protection including the array of interventions that may be imposed, such as supervision and placement orders, *and* the domain of publicly funded professional support applied for by families.

With regard to the *first* domain, the family group conference could be said to still function as an *emancipatory alternative* to authoritative intervention, but as for the *second* domain the family group conference serves as a *tool* to manage (i.e. to *reduce*) care *support applications*. One could argue that in the Netherlands as well as in the UK the idea underlying the FGC concept is compromised, but in different ways: in the UK due to the time pressure in pre-proceedings, in the Netherlands due to the considerably wider application of the family group conference well beyond the mere domain of youth protection.

8 The FGC and the Dutch Courts: Are Professionals Made the Gatekeepers for Family Autonomy?

It is fascinating to see how the Dutch courts have dealt with the right to a family group conference (or the duty to family self-help) in both domains, youth protection and hoped for professional care support. In the first domain, the family divisions within the regular courts have jurisdiction. In most of the published cases, the parents invoke the right to make a family plan in order to fend off requests for removal/placement orders. It is noteworthy that Dutch family courts (unlike UK family courts) have hardly formulated any specific guidelines. The pattern one can discern in the judgments on the merits is that the courts mostly rely on the professional's (guardian's) assessment, which a reliable family network that could offer alternative care is lacking.

Occasionally, courts use the argument that parents should have invoked their right the very first time that a supervision or placement order was sought.[12] If parents let one year pass by, they are denied a legal interest to vindicate this right. This finding infringes the case law of the ECtHR.

In the second domain, the *administrative courts* have jurisdiction, as publicly funded professional care support is now the responsibility of municipal governments (i.e. the mayor and his/her aldermen). In these courts, parents have precisely *sought* that professional support be provided by the local authorities. Here one

[11]Kamerstukken II 2012/2013, 33 684 nr. 57.

[12]ECLI:NL:RBNHO:2017:988.

comes across cases where municipalities use the duty to organize self-help first (or put differently, the duty to invoke one's right to a family group conference first) *against* citizens who have applied for support.

A recent landmark case by the Dutch Central Court of Appeals addressed the decision of a local authority *to discontinue* professional support to a daughter with mental retardation: in the opinion of the authority, *her mother* could take over.[13]

The Central Court of Appeals laid down a three-step model that is likely to *reverse* the roles of the family and the (publicly funded) expert professional.

According to the court, first, the request for care and support should be carefully analysed; second, a professional expert should specify the nature of the (mental) problems and indicate what exact care would be needed; third (*and only third*), the authority should ascertain whether the care needed (according to the expert) can indeed be provided by the family network itself.

The fascinating picture that emerges is that in both domains—that is, (1) the domain of child protection where family group conferences present an alternative to government intervention, and (2) the domain of hoped for professional support where family group conferences and family autonomy are used to curb the volume of applications for assistance—the Dutch courts thus far have strongly mitigated the envisaged role of family autonomy while giving the publicly funded care professional pride of place (again). The professional is thus bound to become the gatekeeper of family party autonomy.

9 FGCs and 'Regular' Modes of ADR: A Provisional Assessment

The problems and disputes for which family group conferences were designed are of a special nature: these are essentially disputes between a nuclear family (often a single parent trying to raise one or more children) on one side and an authority on the other. This authority can be a body of professional care workers (in the child protection domain) or it can be the municipal government (which is to decide about granting professional support that the family applied for). In both scenarios, there is apparently a serious problem with one of the parties in the dispute, i.e. the parent(s) who lack the capacity or means to perform their role as a parent properly. The idea underlying the original New Zealand FGC (where conferences are only used in the child protection domain to avert government intervention) was to replace the ill-performing parent(s) as a party with a caretaker, i.e. the wider family network. In this way, the greatly desired family (or rather, community) autonomy could (often) be preserved.

In *regular* ADR, such a 'subrogation' of one of the disputing parties is hardly conceivable, as it is exactly the disputants themselves who are expected to solve

[13]CRvB 1 May 2017 (*Steenwijkerland*) ECLI:NL:CRVB:2017:1477.

their problem. The option of 'extending' a party with problems might deserve further study though, particularly as the 'private life' notion in Article 8 ECHR has gradually been expanded in European case law.

At the same time, such an 'extension' or 'subrogation' of one of the parties in a dispute does raise a potential complication: a first prerequisite is that there *actually is* a (family) network trusted by the disputant (the parent); and a second prerequisite is that the network members themselves are *willing* to cooperate in providing a care solution vis-à-vis the child. Here, it does not take just two, but many more participants to tango.

This takes us to the other party in the dispute. In child protection cases, this is the party (child protection board, family guardian) with a statutory duty to protect the child from neglect and abuse. Always the interest of the child is (or should be) paramount. This means that if a family network is willing and able to conceive of a plan to take care of the child, the other party, the child or the protection agent must screen that plan. This is not different from regular ADR, with one exception: the screening is aimed at the interests of a third party, i.e. the child, and a risk assessment of what may happen if control over the further raising of the child is relinquished to the family. If things go wrong, could the child protection agent be held liable then, in view of his/her statutory duties?

Then again, can an unwilling adversary just preclude a family from exercising its right to a family group conference? The statutory rules in New Zealand and the Netherlands and the judicial criteria in the UK suggest the (wider) family is not to be lightly put aside, although some discretionary margin remains for the child protection authority.

The right to a family group conference could be regarded as a right not to be subjected to top-down professional interventions. However, there are other rights involved here: the neglected or abused child's right to adequate protection, and the statutory duty resting upon the child protection authority to provide this protection.

All the same, the right to a family group conference opens up the possibility for more reasoned decisions by the authority whether or not such protection could alternatively be afforded by the child's own family network. A form of 'collaborative governance' between professional and lay members of the family may be required here. Such a cooperative approach might even generate cost savings.

This cost aspect brings us finally to the standards for assessing the right to a family group conference, and indeed for assessing ADR/private justice generally. Two very different standards of evaluation that are familiar from the ADR debate were also encountered in the recent history of family group conferences:

(1) the potential to reduce costs (in this case not only in court administration, but even more so in state-funded youth care); and
(2) the potential to devise solutions oneself—the potential to empower people.

However, if there is the threat of child neglect or abuse, or a mental disorder complication that has also affected the child, is that a problem that *can* be solved by the extended family? How much can a layperson reasonably be expected to 'solve'?

What—in other words—is the therapeutic effectiveness of autonomous help or (alternatively) a professional intervention? Should that *also* be a standard for evaluation?

This creates a formidable obstacle by itself in making 'the right to direct one's own family' a reality. Owing to the judgment of the Central Court of Appeals of 1 May 2017 that we discussed earlier, the Dutch courts at any rate will seriously check how professionals think about the family's therapeutic potential.

There is in these cases a major power imbalance between the parties (professional authority versus lay family members) anyway, if only because families may not even be aware of the existence of this fairly novel right to make their own plan. Do professionals bring it to their attention? And to round off with a rhetorical question: following the Central Court of Appeals 2017 criteria, would a Dutch care professional, who is remunerated for his/her expertise, likely inform a court that the care problem at hand does not require his/her expertise as a care professional?

In the end, there will always be a host of diverging interests to reckon with. The main thing for researchers in this area is, in our view, not to overlook any of them. That, at least, is a lesson to remember from interest-based approaches in ADR such as mediation.

Acknowledgements This longitudinal, socio-legal empirical research project (2015–2019) is subsidized by the Netherlands Organization for Scientific Research NWO, together with the city of Rotterdam, under the aegis of the national *Smart Governance* programme.

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