COLLABORATIVE PRACTICE: AN OVERVIEW

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INTRODUCTION

Collaborative practice is a new way for separating couples to work as a team with trained professionals to resolve disputes respectfully without going to court. The term encompasses all of the models that have been developed since Stu Webb first created the collaborative law model in 1990. Each client has the support, protection and guidance of his or her own lawyer. The lawyers and the clients together comprise the collaborative law component of collaborative practice.

While collaborative lawyers are always a part of collaboration, some models provide child specialists, financial specialists and divorce coaches as part of the clients' divorce team. In these models the clients have the option of starting their divorce with the professional with whom they feel most comfortable, and with whom they have initial contact. Clients then choose the other professionals as they need them. The clients benefit throughout the collaboration from the assistance and support of all of their chosen professionals.

Although collaborative practice comes in several models, it is distinguished from traditional litigation by its inviolable core elements. These elements are set out in the contractual commitment or participation agreement and are as follows:

- A commitment to the withdrawal of the professionals if either client goes to court.
- A commitment to engage in open communication and information sharing which involves parties in an honest, voluntary and good faith exchange of all relevant information.

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- A commitment to negotiate and reach an acceptable settlement, by creating shared solutions that take into account the highest priorities of both clients and the interests of all of the family members.

Lawyers who are new to this model frequently comment that they have been working in this way for many years and settle almost all cases, so why should they disqualify themselves? The answer to this can be set out in the following points:

- Traditional family law litigators view family law litigation as just another dispute resolution option, and not as a potentially irreversible family disaster where the negative affects of the litigation can survive into the future and can cause permanent damage to the interpersonal relationships and family structures.
- The investment of the collaborative lawyer in the process is significant, since if the negotiation breaks down the lawyer loses his or her client. Without this disqualification, the pace at which, in the face of an apparent impasse, the lawyers bolt from the negotiation table to the court, potentially increases. It is not possible to threaten court, and the disqualification liberates the parties to do what this system allows them to do best: problem-solve in a safe, clean environment, where the success is measured in terms of finding the solution.
- There are different roles and skills for the clients and professional team. The competent collaborative lawyer firstly detaches from the outcome as a measure of success. The collaborative lawyer becomes a specialist in managing conflict and guiding negotiations, and works to preserve what he or she can out of the relationship, so that the transformed family unit can function on its best possible level, and can (for example) go to the family weddings, christenings and the like. The process of guiding the parties through the delicate negotiations does not come easily to lawyers. We have had to re-learn our skills and in particular, we have had to cede control over

the substance to the clients while remaining custodians of the process.

The process operates in a highly structured co-ordinated and choreographed manner. There is almost no correspondence between the parties. Clearly there are no interim applications to the court. Communication takes place in a four-way manner, so that all four parties to the process are recipients of any documentation which is to be exchanged, together with the minutes of each meeting and the agenda. The meetings operate from an agreed agenda, which sets out the only matters which will be discussed at the meeting. Each party has an opportunity to prepare for the meeting with his/her lawyer, and discuss any issues which cause concern. Prior to a four-way meeting, the lawyers will also meet to discuss any issues that may arise during the course of the four-way meeting. At the four-way meeting, the visiting lawyer takes the minutes of the meeting (the meetings are rotated from office to office), and each has an opportunity to speak to both clients during the four-way meetings. The meeting proceeds on the basis of the agenda, and it is an option for any of the participants in the room to seek an opportunity to converse privately with his/her client, to take a break, to speak to the other lawyer, or the like. When the meeting has come to an end, each solicitor will debrief with his/her own client, and have a discussion as to how the meeting went, and any concerns that arose. I should also say that before the meeting ends, the agenda for the next meeting is prepared and agreed and at the outset of each meeting, the minutes of the previous meeting are also approved. Finally, both lawyers together have an opportunity to debrief.

In the interdisciplinary model, the choreography is extended to include any other professionals which are in the case, and will include the interaction between the lawyers, the mental health professionals and/or the financial expert, as well as the clients themselves. Clients may ask why they should pay for all these professionals. They may worry about the cost of the service. On the face of it, that appears to be a very reasonable question. It has been our experience, over very many years doing family law, that clients have found themselves unable to reach a place

where they can make good decisions, and have relied heavily on their lawyers to counsel them and to deal with the emotional fall-out of the separation, in circumstances where the lawyer has no expertise whatsoever in this regard. It is our view that early intervention by a mental health professional is more cost-effective for the client, and has the potential to put the client in a place where he or she is actually able to make good positive decisions about the future. Rather than costing more money, it has potential to save money for the client; it should reduce the time spent with the lawyer. Similarly the financial expert, who is neutral, comes to the table with invaluable expertise to offer to assist in the resolution of the issues.

Instead of being a lawyer-centred negotiation, the negotiation becomes client-centred. The aim is to reach higher, deeper resolution, and not just reach a settlement where the parties are worn out, and the next step both sides have to take is into the court. The creation of a safe environment is a huge benefit, and certainly promotes the type of environment which allows a concentration of intellectual energy solely on problem solving.

Collaboration sits side by side with a number of other options on the alternative dispute resolution continuum. Collaborative practice is different from mediation in the following ways:

- In collaborative practice, it is possible to adopt a team model which does not exist in mediation.
- In mediation no legal advice is given, and the mediator facilitates the parties reaching their own decisions. One of the key elements of collaborative practice is that the lawyers are there to help clients problem-solve, but also advise the clients and to let them know their legal position.
- Mediation keeps the consulting lawyers outside the heart of the negotiations, and they become drafters of agreements. In the collaborative model, the lawyers are at the heart of the process, both in terms of guiding the process and advising the client, but also in terms of drafting the ultimate agreement.

- Collaborative lawyers share the risk of failure, which is not shared by the lawyers in the mediation.

There are however striking similarities on two levels between mediation and collaboration. The skill set required is the same for both, and it is arguably impossible to conduct a case collaboratively without being really well-versed in the skill set required for mediation and principled negotiation. Secondly, collaborative lawyers can make good consulting lawyers in mediation, and similarly mediators can work within a collaborative case with children, new partners or extended families.

It has been argued that, at times in mediation, there can be a disparity between the parties in terms of their negotiating powers, which results in there being an inequality – or to put it another way, an absence of a level playing field. Any such deficit that exists in collaborative practice can be made up by the assistance of the lawyer. There has been traditional sibling rivalry between mediation and collaboration. These disciplines however are emphatically not mutually exclusive, and can interact easily and readily with each other and complement each other.

Interest-based negotiation is at the heart of principled negotiation. Interests are what inform positions. The basic problem in negotiation is not in conflicting positions, but rather in the conflict between each sides' needs, desires, concerns and fears. These are interests. Interests motivate people, and they are the silent movers or the informers of the hubbub of positions. People assume that because their positions are opposite, the interest must also be opposite – whereas frequently they can have many shared interests, and frequently opposing interests can promote very good solutions.

The difficulty however is to identify what the interests are. The position is likely to be concrete and explicit, but an interest is often intangible, maybe inconsistent and unexpressed, so in interest-based bargaining it is important to figure out what one's own interest is as well as the interest of the other side. The most powerful positions are based on human needs, and they include security, economic wellbeing, sense of longing, recognition,

control of one's life. These are frequently overlooked, and are at the core of the problem or dispute.

Lawyers in the dominant paradigm or the traditional adversarial approach control communication, and the parties themselves do not communicate directly with each other. The new paradigm provides for the negotiating work to be done almost entirely in four-way meetings attended by both lawyers and both clients, thus maximizing creativity, transparency and accountability, and minimizing control, which is the cornerstone of the dominant or conventional paradigm. This is referred to in collaborative practice as "the Paradigm Shift". So what does "the Paradigm Shift" actually mean for lawyers? Quite simply, it means moving from the debate to dialogue. It means moving away from a negotiating style which saw lawyers debate issues with one another, set out their clients' position and seek to obtain for their client the largest amount of the available "pie". The movement or shift which takes place brings the debate to dialogue, where the parties share information, and then explore options so as to find a solution, which instead of being a win-lose type situation becomes a win-win orientation. The client becomes the centre of this team-centred approach as well as being a member of the problem-solving team. Decision-making is shared with the clients and with other members of the team. There is a movement from a rights-based approach to a problem-solving approach. Open communication is at the heart of the process, rather than traditional confidentiality. The input of the mental health professional promotes open communication within the team. The mental health professional also supports communication and problem-solving skills. This helps the team to focus on the needs and interests of the family system, rather than focusing on individual therapeutic interventions. For financial professionals, the paradigm shift focuses on team work rather than individual outcome. Most importantly, the financial specialist is neutral, and facilitates the parties in reaching their financial agreement.

Collaborative law was fashioned by Stu Webb in 1990, when he had reached the point in his career that he simply did not want to go to court anymore, and he felt that there had to be a better way to resolve disputes. The word very soon spread

throughout the North American Continent, and there are now over 3,000 members of the International Academy of Collaborative Professionals. This Association was formed in 1999. We first became aware of collaborative practice in Ireland around 2004, when Muriel Wall of McCann Fitzgerald Solicitors had the foresight to bring a trainer to Ireland to start the initial training in Dublin. The following year, the first training took place in Cork. And arising out of that training, six disciples of this model (including the writer) were so enthusiastic about its potential that it was decided to form a group to take the necessary steps to make collaborative practice a meaningful option in Cork and subsequently throughout the country. This led to the birth of the Irish Association, which is the ACP or Association of Collaborative Practitioners in Ireland. This is now a national body with delegates from North, South, East and West, and is an All-Ireland association.

Similarly, this movement has taken hold in the UK and throughout mainland Europe. Collaborative practice is now practiced on four continents and approximately thirty countries throughout the world. We have 600 trained practitioners in Ireland. The Legal Aid Board has also been instrumental in promoting the growth of this movement in Ireland. In September, the first meeting of European leaders took place in Munich, where eleven nations including Northern and Southern Ireland met to discuss common issues in the growth of collaborative practice. In May of this year Cork hosted the Second European Collaborative Practice Conference, which was opened by the President, Mary McAleese, and addressed by the Attorney General and Minister for Justice. Four Continents and eighteen nations were represented at the conference.

It is clear that collaborative practice will not be for everybody. There are cases which simply cannot be dealt with in this manner, and will need to proceed to litigation. There will always be a necessity to have available to clients the very fine court system, in order to have the dispute adjudicated. The purpose of collaboration is to try and minimize the harmful impact of litigation on the parties themselves, their families and their extended families. The aim is to create a system which is transparent, where the parties become the authors of their own

destiny, and take control of the pace and substance of the process and create their own outcomes. We believe that substantial financial and emotional costs are incurred up to the run-up to the litigation settlement, where messages become garbled as they pass through the chain of independent perceptions from one client through his team, through the opposing team to the other client. We see collaborative practice as a viable option for those people it suits, much in the same way as mediation. We are striving to have legislative recognition, and to offer collaborative practice as an "either/or" with mediation in the relevant family law legislation. We have received strong backing from the last Minister for Justice, the Law Society and the Legal Aid Board.

Collaborative practice has wide applicability not only in the area of family law, but also in the areas of civil, commercial and employment law. Or to put it another way, it has applicability in any area where there is a dispute between two or more parties. Civil collaborative practice is not as widely developed, however, although it is advancing at pace in North America. We believe that there will be strong growth in this field in the coming years.

Finally, collaborative practice takes its place on the Dispute Resolution Continuum. It does so in a climate more and more open to the growth of methods of dispute resolution which are better value for money, more cost effective, more transparent, more user friendly and more client centred. It will never usurp the role of the mediators, the courts or the arbitrators. It will however give the public a further option in the quest for deep and lasting resolution, which benefits not only the parties, but their families and arguably also provides a wider societal benefit.