

**COLLABORATIVE LAW: COMMENT**

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It is widely accepted – in theory at least – that family law disputes do not benefit from an adversarial approach, and that the resolution of such disputes through mediation or other forms of alternative dispute resolution (ADR) is almost universally to be desired. Recourse to the courts is frequently denigrated.

In recent years there has been an increase in the general use of various methods of alternative dispute resolution, notably in commercial disputes and in the context of industrial relations difficulties. A consultation paper surveying the different systems of ADR and their particular contexts was published in July 2008 by the Law Reform Commission,<sup>1</sup> and a final report on the subject will be published in the near future. It is notable that there has been a very high level of public demand for the Consultation Paper, and this has been reflected in an unprecedented number of submissions on the subject to the Commission since its publication.

The general stance of approval and encouragement of alternative forms of resolution in family law disputes is reflected in the statutory provisions contained in both the Judicial Separation and Family Law Reform Act, 1989, and the Family Law (Divorce) Act, 1996. Sections 5 and 6 of the 1989 Act and sections 6 and 7 of the 1996 Act provide that a solicitor, before issuing proceedings, is to draw a client's attention to the options of counselling and mediation; must give information concerning these options; and must provide to the court a certificate to establish that these requirements have been satisfied. All this, however, as stated by Dr. Carol Coulter in her Report to the Board of the Courts Service following the *Family Law Reporting*

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\* President of the Law Reform Commission of Ireland, and former Justice of the Supreme Court. This comment is written in a personal capacity, and does not represent the views of the Commission.

<sup>1</sup> See Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution* (LRC CP 50 - 2008).

*Pilot Project*, “appears to have little bearing on the use of mediation by those whose relationships have broken down and some judges express scepticism as to whether the option of mediation is seriously discussed by many solicitors with their clients”.<sup>2</sup>

Thus the general approval and support of mediation and other forms of ADR seems as yet to be somewhat more aspirational than effective. Over the years there has been a dearth of statistics and other data for research in the family law area in this country. This has no doubt largely been caused by the operation of the *in camera* rule. The *Family Law Reporting Pilot Project* and the resulting Report by Dr. Coulter to the Board of the Courts Service does, however, provide some relevant information. It is not particularly encouraging. It appears from the figures given by Dr. Coulter that in the year 2006 only some 3% of the total seeking a resolution of their family disputes used the Family Mediation Service.<sup>3</sup> Other couples may, of course, have used private mediation services, but it is unlikely, given cost factors, that the number is very high. It may be that the quoted scepticism of the judges is justified but, given that Dr. Coulter found that in the region of 90% of family law cases in the Circuit Court are settled without a court hearing, it would seem that the reasons for the infrequent use of ADR are more complex than a reluctance by solicitors to point their clients in that direction rather than towards a courtroom battle.<sup>4</sup>

I would have to say that in my personal experience both as a barrister and as family law judge I found that the vast majority of experienced family law solicitors and counsel were strongly committed to assisting their clients to reach an agreed solution to

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<sup>2</sup> Coulter, *Family Law Reporting Pilot Project: Report to the Board of the Courts Service* (Dublin: Courts Service, 2007), p. 40

<sup>3</sup> Coulter (previous note).

<sup>4</sup> Details on settlement rates can be found in the journal *Family Law Matters*, published by the Courts Service. In particular see Coulter (2007) 1(1) *Family Law Matters* 22; (2007) 1(2) *Family Law Matters* 34; and (2007) 1(3) *Family Law Matters* 46. The 90% figure is quoted by Coulter in “Inside the Family Courts”, *Irish Times*, 7 March 2009.

their difficulties. This approach is well reflected in solicitor Kevin Liston's important book *Family Law Negotiations*.<sup>5</sup>

In this family law context, where ADR has been seen as desirable in theory, but is relatively infrequently used in practice, there has been a recent growth among solicitors in a number of areas of the country in the method of practice known as collaborative law. The number of solicitors who have received training in collaborative law methods has sharply increased; notably the Legal Aid Board has provided collaborative law training for all its solicitors. In the past few months I have personally taken part in three launches of collaborative law groups – in East Wicklow, Kildare and West Wicklow, and Galway. It is therefore timely to have some consideration of the possible strengths and weaknesses of what Kevin Liston has described as this form of “enhancement of legal negotiations”. The articles on which I have been asked to comment are therefore welcome.

Patricia Mallon's article gives a detailed description of the principles and practice of collaborative law, and there is no need for me to repeat what she has set out with admirable clarity.

Ms. Mallon stresses the core elements in collaborative practice, including the initial contract which provides for completely open communication and information-sharing between both the parties and their solicitors, together with a commitment to the withdrawal of the professionals if either client goes to court. The parties must then instruct not only new solicitors but, it appears, a new team of expert advisers/witnesses. Ms. Mallon believes that failure to reach agreement is more unlikely than in traditional inter-lawyer negotiations because, as she says, “[t]he investment of the collaborative lawyer in the process is significant, since if the negotiation breaks down the lawyer loses his or her client”.<sup>6</sup> The alternative of the lawyers “bolting” from the negotiation table to the court is no longer available.

Presumably the imminent threat to the clients that failure to reach agreement will mean at least a doubling of costs, coupled

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<sup>5</sup> (Dublin: Thomson Roundhall, 2005).

<sup>6</sup> Mallon (this issue), 4.

with the weary task of instructing a new firm of solicitors from the beginning, will ensure that the client also has a heavy “investment in the process”. While I absolutely accept the sincerity of the advocates of collaborative practice, and I consider that there is a great deal to be said for the development of a form of ADR coupled with legal advice and support, I wonder if, from the client’s point of view, this pressure to settle is so very different from that traditionally exerted by the imminent onset of court proceedings? Both in collaborative practice and in traditional negotiations a great deal will depend on the approach, attitude and ability of the lawyer, whether solicitor or counsel, and, even more importantly, on the motivation and honesty of the parties. As is pointed out, a very high degree of trust is needed both between the parties and between their lawyers.

The process, with its series of four-way meetings, with careful preparation beforehand and exact minuting after each meeting, also demands a high level of time commitment by the solicitors involved. (This is an aspect referred to by Eugene Davy in some detail in his article.) Undoubtedly, however, the aims of the process – to avoid the harmful impact of litigation; to allow the parties to take control of the pace and substance of the process; and to create their own desired outcomes – are well worth striving for.

While I found Ms. Mallon’s article both clear and helpful, I thought that the article by Rita S. Pollak, an American attorney, was somewhat disappointing. The author purports to provide a discussion of disadvantages of collaborative law, but in fact what she actually does is to set up a series of carefully chosen targets simply, it appears, for the purpose of shooting them down. She meets criticisms of the process by making sweeping statements such as that “there is little anecdotal evidence that abuse of process actually happens” without referring to any source for such a conclusion. While collaborative practice is relatively new in Ireland it has been sufficiently long-established in the United States to allow assertions to be based on something more cogent than unreferenced “anecdotal evidence”. Again Ms. Pollak states categorically that breakdown of negotiations and transfer of the case to new solicitors happens only in approximately 2% of cases, but we are given no reference

to actual research that would back up this assertion. Nor are we told whether the figure refers to Ireland, to the United States as a whole, or to any individual state or states.

Ms. Pollak is on much stronger ground when she comes to discuss the need for an effective screening process when deciding which are the right clients to refer to the collaborative law route. Here she, like Ms. Mallon in her description of the process, relies on having a mental health professional as part of the collaborative team. This individual is to be involved both in the screening process and in assisting the parties to reach their optimal outcome. Both writers advocate an interdisciplinary approach during the period of the collaborative four-way meetings, assistance being given by jointly-appointed financial and other experts, as well as by the proposed mental health professional. Many conventional family lawyers will be aware of the value of involving financial and other relevant advisers – either jointly appointed or taking part in joint discussions – in settlement negotiations, but these are normally invoked only in cases where large assets are in issue. However desirable, the inclusion of interdisciplinary experts is an expensive exercise; experts charge high fees for their specialised knowledge, especially in a legal context.

Eugene Davy explains at the outset of his article that although he was asked to write an article outlining some problems associated with the practice of collaborative law, he does so as a supporter of this new framework of practice; he has himself trained in this area. His article is in fact very measured in its approach, as one would expect from one of Ireland's most experienced family law solicitors. He expresses the view that the collaborative law approach is available or appropriate in only a small number of cases, as all cases in which proceedings have been issued or are likely to be issued must be excluded. He points out that "[t]here are very many family law cases where proceedings are issued – appropriately or otherwise – and when after a bit of litigation jostling the climate settles down and becomes conducive to constructive negotiations"<sup>7</sup>. Collaborative law would not be available in these cases.

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<sup>7</sup> Davey (this issue), 15.

As I have also suggested above in reference to Ms. Mallon's article, Mr. Davy draws attention to the built-in vested interest of the solicitor in settling the case lest the client is lost; this may, he suggests put undue pressure on one side to settle a case on unreasonable terms. He also draws attention to the scope for abuse by one party of the openness and trust which is required by the collaborative process.

It seems to me, however, that the most telling point made by Mr. Davy in his article is his view that if a family law case is conducive to being resolved by collaborative practice, such a case should also be capable of being resolved by adopting and adapting a traditional approach to negotiations. He believes that, in the few collaborative practice cases which he has had to date, such cases could have been resolved more quickly and cheaply by "cutting to the chase" in the context of a traditional approach. He also effectively analyses the reasons why he believes that collaborative practice cases are likely to be far more expensive and time-consuming than those cases which can be settled amicably and at an early stage by traditional means.

Mr. Davy comments interestingly on the rather less than wholly successful promotion of collaborative methods by the Legal Aid Board, and provides a valuable analysis of this. While Mr. Davy acknowledges that collaborative law methods have been used successfully in only a small number of Legal Aid cases, he emphasises that the Board has made a valuable and significant contribution to changing the mindset of family lawyers, by encouraging them to seek solutions to contentious issues in a manner conducive to each party's wellbeing and future relationship with one another. This, I consider, is a tribute that can with justification be paid to the practitioners of collaborative law in general, both inside and outside the Legal Aid Board.

Having read these three articles, I would accept that the method of collaborative law has a useful part to play in Irish family law practice. It is not, I think, quite so extensive a part as envisaged by its more enthusiastic advocates, if only because of the high cost implications. Some of these advocates, whom Ms. Mallon herself describes as "disciples", bring an almost missionary quality to their advocacy, which may have the unfortunate effect of repelling the unconverted.

I would further draw attention to the fact that, at least as yet, there appears to be no place envisaged for the bar in the worldview of the collaborative law solicitors, perhaps because the idea of collaborative law originated in the United States. This, of course, has the unfortunate, if natural, effect of creating a degree of hostility to the whole methodology among many family law barristers. At the risk of being told that I have a vested interest in the matter, I think that the present groupings of collaborative solicitors should give further consideration to this aspect. As regards the Legal Aid Board, for instance, my experience (and that of others whose opinion I value) is that over the years much reliance has been placed on the advices of counsel by those solicitors who have rather less experience, both in Legal Aid Board cases and in general practice. It is notable that Mr. Davy, himself a very experienced solicitor, in his article states that there are many family law cases when it is appropriate for solicitors to instruct counsel. An adherence to collaborative law ideology should not mean that clients, whose interests are paramount, should be deprived of this resource.

In the conclusion of her article, Ms. Mallon provides an admirable and well-expressed summary of the place of collaborative law on what she describes as the Dispute Resolution Continuum. Time will tell how wide a role this method of practice will play in Irish family law. I very much hope that in the coming years there will be recording and research as to its development, and that it will, as Ms Mallon hopes, give parties a further option in the quest for a deep and lasting resolution of their unhappy differences.