

PROBLEMS ASSOCIATED WITH COLLABORATIVE PRACTICE

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I was asked to write an article in this journal outlining some problems associated with the practice of Collaborative Law, and I do so as a supporter of this new concept and framework of practice, and as one who was amongst the first group of Irish family law practitioners to have trained in this area in 2004.

We legal practitioners and others invariably assess cases and judge success by reference to the result. For example:

- He did very well because she only got 32.5% of the total, and she has to transfer her shareholding in the family business to him; and
- She did very well because she ended up with more than was offered outside Court.

A common criticism of the way we deal with cases is that legal practitioners (and judges) are insensitive to, and have no appreciation of, the damage that can be caused to individuals and personal relationships by the legal process. Collaborative practice is a response to such criticism, and it undoubtedly provides a framework which allows couples to resolve disputes in a manner which is more human and sensitive, and in particular more conducive to each party overcoming and resolving the hugely important personal aspects of any family law dispute.

It must be emphasised that all that collaborative practice sets out to achieve can also be achieved by adopting and suitably adapting the more traditional approach to settlement negotiations. There is a perception that all cases which proceed in the traditional way either end up in court, or are managed and settled in a hostile framework. While this is so with many cases, it is not so with many other cases which do settle amicably at an early stage – though far too few do so.

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A big problem with collaborative practice is that it is only available or appropriate in a minority of cases. Because of the absolute prohibition against litigation, all cases are excluded where proceedings have been issued, or where they are likely to be issued. Furthermore, collaborative practice is in effect excluded if one party merely wants to reserve his or her right to litigate at a later stage. There 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. Collaborative practice again would not be available in such cases.

While 600 or so Solicitors have now undertaken training in collaborative practice, there are very many solicitors practising and indeed specialising in family law who have not received any training in collaborative practice. Consequently there will be situations when collaborative practice will not be available, because one or both solicitors might not be in a position to offer such a service. At present it is considered inappropriate to adopt collaborative practice unless both solicitors have undertaken appropriate training.

There are very many family law cases when it is appropriate for solicitors to instruct counsel. Since very few barristers to date have undertaken training in collaborative practice, instructing counsel is likely to make collaborative practice unavailable or inappropriate.

With collaborative practice there is a built-in vested interest for solicitors to settle, because if a case does not settle and one or both parties want to litigate, both solicitors have to withdraw from the case, and both parties have to instruct two new solicitors. This may put undue pressure on one side to settle a case on unreasonable terms.

Another problem with collaborative practice which is likely to arise is when a client reveals information which is relevant and material to the negotiated outcome of the dispute, but the client instructs his solicitor not to divulge it to the other side. For instance, a solicitor might express concern to his client about the client's willingness to accept a postponement of a sale of the family home for several years, as to do so could leave the client unduly vulnerable. The client might respond to his solicitor by

informing him that he is in a new relationship with another person, and that he intends after some time to move into her home. For obvious reasons, the client might not want his wife to know about such plans – however, given that one of the fundamental rules of collaborative practice is to engage in open communication and information sharing in an honest manner, it is likely that not to reveal such information would be considered to be in fundamental breach of collaborative practice and the participation agreement signed by the parties.

Because the collaborative practice approach is very much based on trust and openness, there is more scope for it to be easily abused by one party than there is with the more traditional approach. Without appearing to be un-cooperative or un-collaborative one party could easily drag matters out so as to enhance his or her negotiating position. If, eventually, the other party realises that the collaborative practice is being abused and that his or her negotiating position has been weakened significantly he or she, nonetheless, is likely to be reluctant to call off the process, sack his or her solicitor, and start all over again in a more traditional manner with a new solicitor.

A central feature and rule of collaborative practice is that all communications and negotiations must be carried out in the context of four-way meetings (*i.e.* the two parties and their respective solicitors). Consequently, geographical factors and problems can make collaborative practice time-consuming, and so costly as to render it quite impractical and inappropriate in some instances. These problems and factors must be taken into consideration even when all four parties are located in the same county or city.

It seems to me 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 a traditional approach to negotiations. In the few collaborative practice cases which I have had to date, I am quite sure that such cases could have been resolved quicker and cheaper by “cutting to the chase” in the context of a traditional approach. It has to be remembered that any collaborative practice case operates on a highly structured and rigid manner, whereas the traditional approach can be adapted in a very flexible manner to suit the individuals’ needs

and the particular circumstances of the case. In addition to all communications and negotiations taking place in the context of four-way meetings, it is a requirement of collaborative practice that the solicitors will meet one another in advance of such meetings, and that each solicitor will also meet his or her client both in advance of and after each such meeting. Minutes of each four-way meeting are drafted by one solicitor and sent in draft form to the other solicitor for his or her approval, in advance of the next meeting.

If a collaborative practice case runs smoothly and settles quickly, there are likely to be a very minimum of three four-way meetings, along with three meetings between both solicitors, and several meetings between each solicitor and his or her client. The highly-structured and rigid manner of any collaborative practice case has to be measured against those cases which settle quickly and amicably in the context of a traditional approach, where a substantial amount of constructive work can be carried out between solicitors on the phone or in correspondence with one another and in similar communications with their respective clients. Collaborative practice cases are likely to be far more expensive and far more time consuming (and also less profitable for solicitors) than those cases which can be settled amicably and at an early stage in the context of a traditional approach.

There does seem to be a lack of appreciation amongst some practitioners who have been converted to collaborative practice that family law cases can be settled quickly and amicably and reasonably in the context of traditional negotiations. Collaborative law practitioners however would say that if cases are settled in a non-collaborative manner there would be less transparency, and much less likelihood of personal healing for each individual and for all the personal relationships involved.

Undoubtedly there is less transparency and less involvement of the parties with a traditional approach. Undoubtedly too a successful collaborative practice case is likely to create an atmosphere which is more conducive to personal healing for each individual and for their personal relationships. However such healing, important as it is, can be achieved for the estranged parties and their family in other ways, such as personal counselling, family therapy, or parenting counselling. One must

wonder whether it is possible to have a legal process which is designed to facilitate negotiations and settlements about legal and financial issues and which at the same time is designed to provide a form of therapy for the parties and for their relationships, both with one another and with other members of the family.

Over the last number of years the Legal Aid Board has invested a very substantial amount of money and time training most of its solicitors in collaborative practice. However, to date there has only been a very small handful of legal aid cases which have concluded successfully in the context of collaborative practice. Collaborative practice has not taken off for Legal Aid cases, for the same reasons it has not taken off for cases in private practice – too many cases are excluded because of the prohibition against litigation. In many other cases it would simply not be cost-effective to have them managed in the context of collaborative practice. While it could be said that the Legal Aid Board's significant investment in collaborative practice has not paid off, it should be emphasised that the Board has made a very valuable and significant contribution to changing the mindset of family law practitioners, by encouraging practitioners to seek ways of resolving contentious issues in a manner which is conducive to each party's wellbeing and a future relationship with one another.

All practitioners in every family law case should set out to achieve reasonable terms of settlement, by resolving matters in an amicable manner, and in a manner which avoids or minimises further personal damage to each individual involved. Collaborative practice certainly provides a framework for achieving such objectives. Such objectives can also be achieved by practitioners co-operating and collaborating with one another in the context of a traditional approach and in the interests of their clients. Traditional practice has much to learn from collaborative practice, and if the philosophy and spirit of collaborative practice could be enshrined in traditional practice many more cases would settle at an early stage – and with far less trauma and damage for individuals and their relationships.