

Let's work together

Resolution ADR committee member Suzanne Kingston reveals the history and core processes of this increasingly popular alternative to divorcing through the court system



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Collaborative family law, where separating spouses work together with assistance and advice from their respective legal advisers to reach a dignified and fair settlement without recourse to the courts, is becoming a real alternative to the traditional court-based divorce. Often this process will involve four-way meetings, with each separating spouse and their lawyers present.

It is useful to remember how the collaborative model started here. One of the people who inspired its development was James Pirrie, a member of the board of the International Academy of Collaborative Professionals. As he explains:

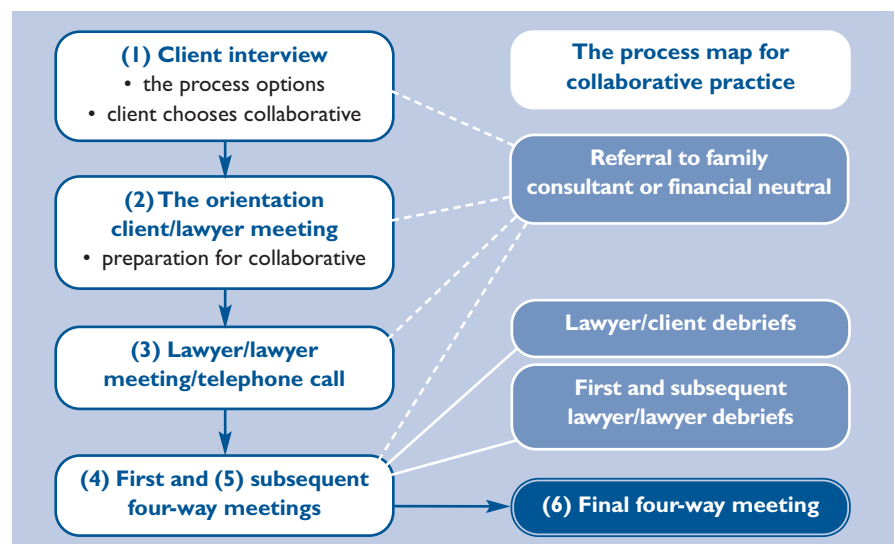
The 'light switch' moment for me was the idea of a contract: not just a bargain at the end of the negotiations but a deal creating the ground rules for how we would get there. What is more, it would be in standard form. We would all become familiar with it. Until that point, negotiation had seemed to be whatever anyone could get away with. But this clearly wasn't what we wanted to do and it didn't work. The ground rules chosen were interest-based

bargaining and an ethical code. The latter was very much 'business as usual' as it was more or less Resolution's code of conduct in another form. From that start, we have evolved to recognise more fully the skills we must harness if we are to offer our clients the full potential of their opportunity to be free from court norms and court process. Now the limits are simply our own ability to visualise what can help our clients through to better futures.

Gradually the collaborative idea has spread and Resolution now has 816 trained collaborative lawyers, with a further 350 people waiting to be trained. So, from very small beginnings, it is clear that the word is spreading and in fact, in some areas it is fair to say that the 'tipping point' has been achieved in favour of collaborative law.

The collaborative process doesn't only rely on lawyers being involved – it may also make use of practitioners from other disciplines, such as family consultants and financial neutrals (eg an accountant or a financial adviser brought in to assist both parties). Consequently, professionals

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from these other disciplines are now training and joining the collaborative movement in increasing numbers.

International models

The extent to which the process is dependent on how lawyers and other professionals can work together and

trust each other is demonstrated by the international experience. In particular, the model that is utilised in most states in the US and in Canada is the interdisciplinary model. By this I mean that, in those countries, collaborative law has evolved to become collaborative practice to include family consultants; eg thera-

pists, counsellors, child specialists and independent financial advisers (who, it should be noted, are not involved in the implementation of a deal).

Interdisciplinary approach

It is fair to say that although in England and Wales there is a commitment to

Stages for collaborative practice – the process map explained

(1) At the initial meeting with the client

- Build the foundation with the client: establish a rapport.
- Explain the options available to the client.
- Identify priorities and what really matters most to the client.
- Evaluate the options in line with the client's objectives.
- Consider the suitability for the collaborative process.

(2) Preparation meeting with client for collaborative process (can be combined with (1) above)

- Discuss with the client their goals and objectives in choosing the collaborative process.
- Lay the foundations for good faith, interest-based bargaining.
- Consider the different levels of separation/divorce.
- Discuss what professional support is needed/introduce the team.
- Talk through the process for collaborative divorce.
- Identify with the client's concerns and prepare them for any uncertainties.

(3) First pre four-way meeting between lawyers

(NB parallel or further interdisciplinary work may also be taking place in which case management also needs dealing with.)

- Build the foundation with the collaborative lawyer for the other party and establish a rapport.
- Consider the skills that are required.
- Ascertain/confirm expectations about process, to include:
 - agenda management;
 - conflict management;
 - good faith bargaining/negotiation;
 - transparency of information;
 - interest-based approach;
 - when (and when not) to give advice;
 - withdrawal or termination for bad faith.
- Identify the client's priorities but don't negotiate.
- Share any client concerns appropriately but avoid point-scoring.
- Work out the agenda and plan for the first four-way meeting.
- Establish practicalities, to include the location of the meeting, the anticipated duration, who will prepare the participation agreement and what should be covered.

(4) First four-way meeting

- Articulate and affirm collectively the foundation and understanding about the collaborative process, especially:
 - integrative interest-based negotiation;
 - constructive and respectful approach;
 - pacing and timing;
 - agenda management to accomplish the tasks;
 - full disclosure;
 - team support if required and, if so, team management.
- Invite the clients' sharing of their objectives in choosing collaborative process.
- Ensure that the clients' voices are heard.
- Orientate the clients to the stages in the collaborative process and divorce/financial/other legal processes.
- Review and sign the four-way participation agreement.

- Plan and confirm the agenda for the second four-way meeting.
- Discuss how financial information should be shared and the timing.
- Assign 'homework' for the next four-way meeting.
- Schedule future four-way meetings (best to do this well ahead now).
- Practicalities – agree the location and who will prepare the post four-way minutes.
- Recap: review and highlight successes.

(5) Intermediate four-way meetings

- Begin by confirming the agenda with the clients and check whether any new issues have arisen.
- Discuss clients' priorities and concerns.
- Discuss any holding strategies required to meet immediate or short-term needs.
- Seek to uncover the key 'what matters most' issues.
- Collaborative paperwork: information gathering and exchange – clients encouraged to take the lead in sharing information.
- Are other team members needed? Consider the involvement of family consultants or financial neutrals.
- The process of accomplishing a successful collaborative outcome should include:
 - full disclosure;
 - brainstorming options;
 - identifying clients' preferred solutions;
 - preparing final documents;
 - signing and concluding meeting.
- Where impasse strategies and problem solving are required, consider the following:
 - think creatively, brainstorm ideas, develop options and consider the reasons why the clients may be stuck;
 - use strong, trust-based relationships to leverage problem solving;
 - reflect candidly on whether the lawyers have contributed to the problem;
 - consider the use of a mediator;
 - consider whether an apology is appropriate; expressing regret, a reason and a remedy;
 - remember to learn from the experience and make the lessons explicit.

(6) Final four-way meeting

- Ensure documents (eg divorce petition, statement of arrangements, minutes of agreement, heads of agreement etc) are ready for signing and preferably approved by the clients.
- Review and sign the documents.
- Discuss any possible future pitfalls and confirm the agreement about procedures for handling them.
- Review the history of the collaborative work, acknowledging and highlighting accomplishments.
- Explain when and how the legal divorce and financial court order etc will be finalised.
- Draw the collaborative process to a respectful and appropriate conclusion: remember, this is a major life event for the clients.

Boxed text and process map (p18) source: Resolution

follow this model, many practitioners have found that clients are reluctant to involve other professionals for a number of reasons, including a desire to keep costs down. However, our American cousins are of the view that in utilising the inter-disciplinary approach, the collaborative model really comes into its own and works well.

It has been fascinating to see and gain from the experience of our international colleagues. There is a real wish to share information and exchange ideas about collaborative practice.

Top tips for practitioners

In considering this article, I thought it might be helpful to have a practical overview and so I've talked to many of my collaborative colleagues in order to highlight what we have encountered. I hope these 'top tips' are of assistance. In no particular order:

- (a) In our experience it is imperative to spend time at the beginning of a collaborative case obtaining 'buy-in' from the client. They must be fully apprised of their options and actively elect to pursue this process. We have also found that it is imperative for the clients to draft a good mission statement at the beginning. If the process becomes 'rocky' we can then refer them back to it and encourage them to remember why they chose this process and what it is they want to achieve.
- (b) Don't be too over-zealous to make each case a collaborative case. If you are offering choices in your practice,

let it be the client's choice, not yours. On that basis, each collaborative case you do is more likely to be successful.

- (c) Stick with the timetable you have agreed with the clients – don't let your workload prevent you adhering to it. This requires a degree of organisation and commitment to the process but it is vital.
- (d) What's open and what's not open? When we first started doing this work, we took the view that all financial disclosure was open, although as matters have progressed, we have come to the conclusion that future aspirational budgets should be without prejudice. Generally, discussions and minutes of meetings and agreements reached are without prejudice until the agreement is finalised and made open.
- (e) Big-money cases – initially it was felt that perhaps collaborative law would be utilised mainly in smaller cases but, as we have seen, there have been a number of large cases dealt with in this forum. It appears that the biggest so far has been a £35m deal.
- (f) A number of practitioners have used the collaborative process to deal with pre-nuptials, pre-registration or co-habitation agreements. It has been suggested that since the couples in these circumstances are starting out in their relationships, it is preferable to deal with things in a less oppositional and antagonistic way, and the collaborative process is thus the ideal forum.
- (g) It is possible to do a collaborative case even if there is a jurisdictional element. Obviously, it is absolutely imperative that the clients are fully informed about what this means. For conflicts involving Brussels II jurisdictions there is probably no alternative but to have traditional process involved to determine jurisdiction. However, once done, the parties may still have an opportunity to engage collaboratively, particularly now that the movement is beginning to take off in mainland Europe. In other cases it may help to take advice from a lawyer in the relevant jurisdiction, and even for the clients to share it. If

Collaborative lawyers

- The lawyer's role covers:
- agenda management;
 - conflict management;
 - ensuring good faith, interest-based integrative negotiation;
 - highlighting accomplishments;
 - dealing with full disclosure;
 - organising/auditing assets and preparing agreed schedules of assets/liabilities and income/outgoings;
 - using 'joint' experts, referral to the team where necessary;
 - giving advice on 'rights' if necessary (often in four-way meetings);
 - remaining sensitive and empathic;
 - planning sequence of agenda to maximise accomplishment of tasks;
 - reality testing;
 - keeping on track to ensure progress;
 - preparing post four-way minutes; and
 - preparing (consensual) court documentation.

not, it is sensible for the clients to understand fully the need to ascertain what their situation would be in a different jurisdiction prior to entering the collaborative process and deciding that it is the right way for them. Further, it may be worthwhile having a discussion with the client and ascertaining whether or not they both would be prepared not to issue in another jurisdiction, pending discussion of the collaborative law process and the best way forward.

- (h) It is also possible to take counsel's advice jointly in a collaborative case and a number of barristers have signed up to help in this regard.
- (i) Many lawyers do give legal advice in collaborative meetings – their view of the applicability of the law may differ and they can explain to the clients in a meeting that this mirrors the court process and, indeed, that is why a number of cases come to trial.

Conclusion

My view remains the same as when I trained: collaborative law is an option to consider with clients but traditional litigation continues to have its place. By considering collaborative law as an alternative we won't obviate the need to go to court, but we may reduce the number of litigious cases we have. That is vital for family lawyers to remember. ■

Who to contact

There are a number of people behind the scenes helping the collaborative process move forward. Sarah Lloyd of Resolution is the focal point of all things collaborative:

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The ADR marketing group is keen to hear from you – how can we help you develop your collaborative practice? We have devised a questionnaire and if you are interested in completing it please e-mail me at: s.kingston@dawsons-legal.com.