

Articles

DIVORCE WITH DIGNITY

ELISSA J DA COSTA Barrister, Arlington Chambers

Wearing my different hats as counsel in the case or as family law lecturer, I meet many family practitioners who voice a desire to do something other than the soul destroying task of dealing with warring parties fighting over the residence of their children as well as the contents of the family coffers. The fact is that vast numbers of family practitioners feel that they are simply going through the motions of encouraging settlements and that such settlements only deal with part of the wide spectrum of issues which rise to the surface during a divorce. It is also disheartening to realise that however we, as lawyers, tinker with the court process to make it more user friendly, we just need to recognise that the courts are probably the worst places to provide divorcing couples with 'closure'. That view is continually endorsed by the number of roles that a single client often expects their lawyer to be able to play. How many of us have complained that we are required to be the lawyer, the counsellor, the accountant, the therapist and the psychiatrist? How many Clients emerge from court with a consent order and feel that nothing has really changed? Indeed, how many consider that their lives just got worse?

Some of us not only practice family law but have sadly done the divorce practical ourselves. Indeed, of those lawyers in that category to whom I have spoken, without exception theirs was a poor experience and the animosity and hostility between them and their former partner is still as fresh, many years later, as on the day of the final order. Those who experience the trauma of divorce on both a professional and personal level will realise immediately what a poor arena the courts are for dealing with it and will recognise what vast improvements collaborative law has to offer.

ANOTHER WAY?

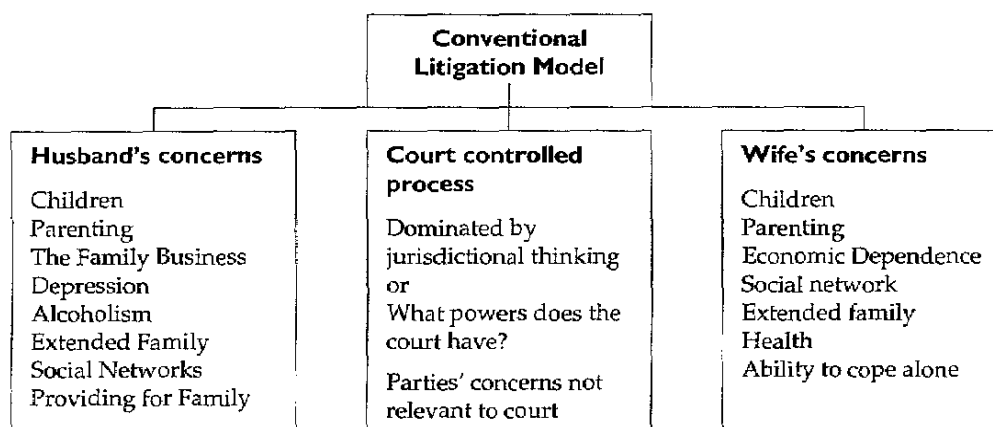
One of the reasons that many people choose a career in the law is the idea that they believe they can be creative and make a difference to the lives of those whom they serve. For family practitioners, it is important to feel that you have done the best job you could in a case and that you have helped your client to move on and continue their life in a positive way, albeit differently. No doubt there are sceptics who would say that such high ideals are not the province of the lawyer and that we should stick to the law. However, family relationships, their dissolution and the far reaching effects of that are not the sole preserve of the law – why then should the solutions be solely law based?

Collaborative law offers a method which is so far reaching, it enthuses those who might otherwise leave the profession because of poor job satisfaction while at the same time it fuels the fires of the sceptics who do not believe it will work. What then is collaborative law (CL)?

COLLABORATIVE LAW

CL is essentially a holistic approach to divorce or what might be called divorce with dignity. It is a method whereby the parties and their lawyers sign up to an agreement in which everyone uses their best endeavours to reach agreement on all issues of concern to the respective parties, without going to court. In other words, if a deal can be struck between the parties, the objective has been achieved, and if there is no deal, part of the agreement provides that if the parties have to go to court to resolve matters, then they are not permitted to retain their collaborative lawyers. Thus both clients and lawyers participating in the process 'buy into' a successful negotiated outcome.

Diagram 1: The Conventional Litigation Model



Unlike current practice whereby we engage in parallel planning in which we prepare for the litigation while at the same time trying to negotiate a settlement, the collaborative process is not constrained by the usual thinking: if this does not work, what could the court order? There is no posturing at the negotiating table or threats to walk out – going to court is no longer an option if the collaborative process is to work. There is no court-controlled process or timetable – the approach is amazingly liberating for those who have tried it.

A very useful metaphor employed by collaborative practitioners is to 'think outside the box'. The conventional litigation model only permits solutions 'inside the box' and as can be seen from the illustration above, deals only with those solutions that the court has power to order and enforce. The many concerns that fall outside the box need resolution if divorcing couples are to experience a civilised and mentally healthy divorce.

As can be seen from diagram 1, above, the lay client is concerned about a number of issues arising from the new family circumstances, whereas the court is concerned only with what it can do that is enforceable. The court process regards as irrelevant many of those matters about which the lay client will lose sleep. Surely if we as lawyers, in conjunction with other professionals, can allay some of those fears and concerns as part of the collaborative process, then our clients will be more amenable and able to deal with the

post-divorce parenting and financial issues.

The collaborative approach looks at the 'whole' divorce, hence the holistic approach. It does not view the children in isolation from the finances. It does not tell clients that certain of their very real personal concerns are 'irrelevant', merely because these are matters upon which the court has no power to make orders. Instead, a collaborative law approach offers a humanistic view of divorce, taking into account that parties are being asked to make decisions about their futures when they are probably least equipped to do so and considering what other agencies may be used to assist with better equipping the parties, not only for their decision making but for life after divorce.

It is one of the guidelines of Resolution that lawyers should:

'advise, negotiate and conduct matters as to help the family members settle their differences as quickly as possible and reach agreement, while allowing them time to reflect, consider and come to terms with their new situation.'

The collaborative approach does just this by only going as fast as the slowest person. It enables consultants to be brought in to deal with those issues or concerns which the lawyer cannot and should not deal with such as parties' anxiety, depression, and parenting the children through the divorce and after.

Table 1: Different negotiating techniques

Soft	Hard
Participants are friends	Participants are adversaries
Goal is agreement	Goal is victory
Make concessions to cultivate relationship	Demand concessions as a condition of the relationship
Be soft on the people and the people	Be hard on the problem and the problem
Trust others	Do not trust anybody
Change your position easily	Dig into your position
Make offers	Make threats
Disclose your bottom line	Mislead as to your bottom line
Accept one-sided losses to reach agreement	Demand one-sided gains as the price of agreement
Search for the single answer: the one they will accept	Search for the single answer: the one you will accept
Insist on agreement	Insist on your position

THE ORIGINS OF THE COLLABORATIVE APPROACH

This approach clearly has its origins in negotiation and mediation, although it is different from both. Those who have engaged in mediation training may well have had the benefit of reading R Fisher and W Ury, *Getting to Yes* (Random House Business Books, 1992), which examined the problems that ensue when people adopt different negotiating techniques, being either competitive or hard as against cooperative and soft, and illustrated them as illustrated in table 1, above.

Fisher and Ury stereotyped the 'hard' and 'soft' negotiators to highlight their third way, that of principled negotiation which separates the people from the problem and enables the lawyers and their clients to regard the process as an opportunity to be courteous to one another while at the same time creating solutions beyond that which the divorce court can offer. In the same way, Collaborative law thus enables all participants to adopt a highly principled approach to achieving what the lay clients themselves want, freed from the constraints of the law.

THE PROCESS

The collaborative process is simple. Each party instructs a collaborative lawyer. First, the parties will have discussions with their own legal representatives as to whether this is an option that is likely to be useful to them. The approach taken with one's own client is to recognise the reality of divorce as a major life-changing event, in the sense that clients will have good days and bad days. The lay client will not always be in a position to make decisions or feel 'principled'. The role of the collaborative lawyer is to recognise this and deal with it, perhaps by delaying a round table meeting with their collaborative partner and the other spouse until the client is better able to deal with matters. However, since the lay client signs up to the principled approach, the opportunities for delay as a tactic should be rare. Indeed, this is not an approach that lends itself to tactics, scheming or deviousness – on the contrary, it is an approach in which principles, courtesy and honesty prevail. Until there is agreed full disclosure, negotiations do not take place. The two collaborative lawyers will meet, before the 'four-way' meetings and without their clients, to discuss the characters of their respective clients so that each is sensitive to the other spouse's specific

concerns and does not seek to minimise them in any way or to say or do anything to inflame. From this it will be clear that the collaborators need to be able to work well together in order to give maximum benefit to their respective clients.

At an agreed time, there will be the first four-way meeting between the parties and their lawyers in order to deal with the process itself and set the tone for future meetings. The formal participation agreements are signed, good faith reiterated and future meetings scheduled. The number of future meetings, the issues and concerns to be dealt with and the speed with which the process is completed will vary from case to case. The beauty of the process is the freedom to express non-legal concerns, brainstorm non-legal solutions and bring in consultants to assist in the non-legal problems.

OUTCOMES

Where collaborative law is successful, it provides the parties with what they want rather than necessarily what the law allows them to have, thus giving credence to the speech, so often heard in court when the parties achieve agreement, that it is far better for the parties to reach their own solution rather than to have one imposed upon them.

For the sceptics who may argue that an agreement that does not sit wholly within the straightjacket of the law is not enforceable, it is submitted that where the method achieves the desired ends of the parties, the law should attempt to keep up with that, rather than the other way around. Surely the fact that intelligent people are content to come to their own arrangements with the assistance of their lawyers must indicate that divorce law and procedure is wanting in some way and it is that that needs to change. To that end, the judiciary

needs to be supportive of any method of dispute resolution in the area of family law which retains the dignity of the parties and enables them to maintain a relationship of civility for many years after the divorce simply because of the manner in which they dealt with it.

An example of a supportive judiciary is the HHJ Donna J Hitchens, presiding family law judge of the San Francisco Superior Court. This judge declared her courtroom to be the Collaborative Law Department of the Superior Court (see P Tesler 'Donna J Hitchens: Family Law Judge for the Twenty-First Century' (2000) 2(2) *Collaborative Quarterly* 1). Her idea was that having a department devoted to collaborative law would enable the lawyers and clients to have somewhere to which they could bring any difficulties they experienced with the collaborative process. Judge Hitchens has said:

'with the establishment of this department, collaborative law cases would be put on a special track once they were filed, where they could be nurtured, and where the collaborative law agreement would be enforced, so that participants could not undermine it and could not avoid following the procedures specified by the collaborative law agreements they had signed ... there haven't yet been any enforcement problems at all for me to deal with.'

This is a fine example of judicial support, and one which it is hoped our English judiciary will follow. Finally, for those who are enthused by the suggestion that there is a better way for divorcing couples to deal with the mechanics of the process, contact Resolution for details of the 2-day training course provided by Pauline Tesler.

concerns and does not seek to minimise them in any way or to say or do anything to inflame. From this it will be clear that the collaborators need to be able to work well together in order to give maximum benefit to their respective clients.

At an agreed time, there will be the first four-way meeting between the parties and their lawyers in order to deal with the process itself and set the tone for future meetings. The formal participation agreements are signed, good faith reiterated and future meetings scheduled. The number of future meetings, the issues and concerns to be dealt with and the speed with which the process is completed will vary from case to case. The beauty of the process is the freedom to express non-legal concerns, brainstorm non-legal solutions and bring in consultants to assist in the non-legal problems.

OUTCOMES

Where collaborative law is successful, it provides the parties with what they want rather than necessarily what the law allows them to have, thus giving credence to the speech, so often heard in court when the parties achieve agreement, that it is far better for the parties to reach their own solution rather than to have one imposed upon them.

For the sceptics who may argue that an agreement that does not sit wholly within the straightjacket of the law is not enforceable, it is submitted that where the method achieves the desired ends of the parties, the law should attempt to keep up with that, rather than the other way around. Surely the fact that intelligent people are content to come to their own arrangements with the assistance of their lawyers must indicate that divorce law and procedure is wanting in some way and it is that that needs to change. To that end, the judiciary

needs to be supportive of any method of dispute resolution in the area of family law which retains the dignity of the parties and enables them to maintain a relationship of civility for many years after the divorce simply because of the manner in which they dealt with it.

An example of a supportive judiciary is the HHJ Donna J Hitchens, presiding family law judge of the San Francisco Superior Court. This judge declared her courtroom to be the Collaborative Law Department of the Superior Court (see P Tesler 'Donna J Hitchens: Family Law Judge for the Twenty-First Century' (2000) 2(2) *Collaborative Quarterly* 1). Her idea was that having a department devoted to collaborative law would enable the lawyers and clients to have somewhere to which they could bring any difficulties they experienced with the collaborative process. Judge Hitchens has said:

'with the establishment of this department, collaborative law cases would be put on a special track once they were filed, where they could be nurtured, and where the collaborative law agreement would be enforced, so that participants could not undermine it and could not avoid following the procedures specified by the collaborative law agreements they had signed ... there haven't yet been any enforcement problems at all for me to deal with.'

This is a fine example of judicial support, and one which it is hoped our English judiciary will follow. Finally, for those who are enthused by the suggestion that there is a better way for divorcing couples to deal with the mechanics of the process, contact Resolution for details of the 2-day training course provided by Pauline Tesler.