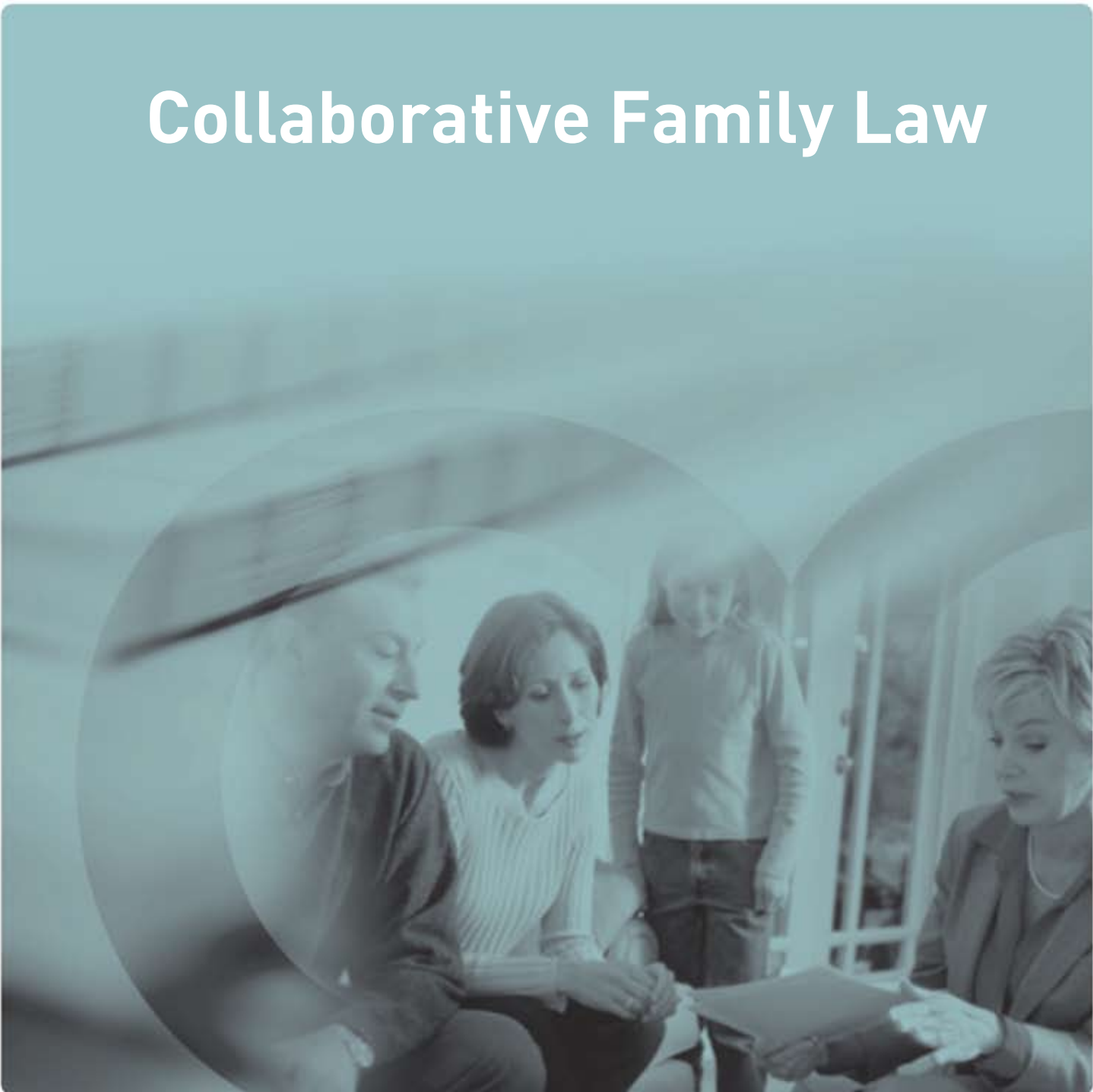


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Collaborative Family Law



COLLABORATIVE FAMILY LAW

Family Law Without Court, With Less Stress And With More Satisfaction

INTRODUCTION

There are many methods of dispute resolution. In the beginning, the first method tried was murder. When Cain fell out with God because his offering wasn't acceptable and his brother Abel's was, Cain took the logical way out by beating up on his brother. In fact he murdered him.

This method of dispute resolution was popular, leading to wars, feuds between families and, in some well known jurisdictions, people still insist on carrying handguns for their mutual "protection".

Nevertheless civilisation has developed, sometimes for the better. Murder is frowned on. Theft is not acceptable. Many of the 10 Commandments have been legislated for. Law courts have been created to resolve disputes both between individuals and even between countries (International Court of Justice). They embody what we call the "rule of law". Not only are the rules published and known but they are enforced by police, prosecutors and courts.

The very first parentage dispute in recorded history went before a wise family law judge. He had no technology to back him up. He was presented with the story of two young boys, one of whom had died in what sounds like a cot death. The two women insisted that the survivor was theirs. King Solomon decreed that he would resolve the problem by cutting the survivor in half and giving each supplicant half. Of course one mother was horrified and immediately offered to give the whole child to the other woman. Solomon metaphorically said "aha!" and wisely decided that that woman must be the true mother.

Today if we have a dispute with a spouse or a domestic partner as the Victorian legislation calls it, we are not allowed to hit the other person over the head with a club like cavemen once did. We also don't cut children in half. Instead, we go to Court and give a stranger the responsibility of deciding impartially and with complete (supposed) objectivity what the right result should be.

Now, it should be noted here that the litigation process was refined through the Age of Enlightenment in the 18th century and subsequently up to this day. It was

an article of legislative and scientific faith that if all the facts were objectively put before a decision maker then a wise and correct decision would be made. The decision maker would be objective and impartial and would in no way be influenced by their (usually) male gender, stratospherically high social status and general lack of experience of the lives of ordinary people.

In recent decades philosophers and others increasingly point to the inadequacy of this model. Post modern thinking emphasises that reasoning processes are inevitably influenced by the perspective of the decision maker. Historians can't write history without it being prejudiced by their own perspective. Scientists can't report experiments without consideration of factors which may affect their decisions from their own background and judges can be notably and unwittingly biased.

Of course, the practical problems of cost, delay and lack of control of the court process can be of even more problematic than esoteric philosophic considerations.

However, it should be said that the client often has a much simpler perspective on the Family Law legal process. It goes like this.

The client comes into the lawyer with a basket full of information, documentation, evidence, opinions and prejudices which they believe are important and relevant in their case.

- The lawyer hears part of the story.
- The lawyer decides that a lesser amount is relevant.
- The lawyer prepares a lesser amount of papers, affidavits etc for court setting out what is relevant and admissible.
- The Judge hears and reads evidence and takes in a lesser amount.
- The Judge gives a judgment which analyses the facts and relies on even less of the client's story.

To use some imagery which is both mathematical and historical, regardless of the outcome of the Family Law litigation process, the client usually feels hung, drawn and quartered. And the lawyers often get blamed.

OUR CURRENT SYSTEM

In Australia, the *Family Law Act 1975* was introduced to establish a more enlightened approach and machinery through which Family Law matters could be resolved. Its revolutionary element was compulsory counselling, designed to endeavour to settle all children's matters by negotiation. Later on this was de-funded.

Then mediation was developed to endeavour to settle all Family Law matters (and of course mediation extends to other areas of dispute resolution as well). This had the significant shortfall of not working when there was a significant power imbalance between the clients. There were also problems because the mediator was not giving legal advice. Quite commonly after settling a mediation, the parties would go their lawyers to finalise the settlement only to find that their settlement was way outside what was reasonable and it fell apart.

Arbitration was invented, a system of private judging through the means of renting a judge. In Family Law this is only permissible in financial cases and unfortunately few people use this process. Often one party in a Family Law matter has a vested interest in not settling before they have to (they are living in the unencumbered family home for example and their financial situation will only get more difficult when a settlement occurs and they have to pay the other party some money).

A number of years ago the Attorney-General decided that the above processes should be called "primary dispute resolution" rather than the more commonly used "alternative dispute resolution". This name change didn't actually have a great deal of impact!

The next historical step occurred in 2006 when Family Relationship Centres started to be opened and 65 were ultimately opened by 2008 around the country. This is a privatised model which copies and expands on the original Family Court concept of compulsory counselling/mediation/dispute resolution prior to commencing Court proceedings. Unfortunately the free element of the Family Relationship Centres is limited to three hours of "dispute resolution". After that the parties have to pay.

All the approaches above retain the "big stick" (of the court system) hanging over the parties. In other words, if something fails you can still take the matter to court

(your appeal rights from an arbitration may be limited, but not so the other avenues).

With all the above models, more than 50% of all Family Law matters settle by agreement without commencing legal proceedings. This is partly because of the number of primary dispute resolution options available but it has a great deal to do also with the goodwill and high skills of Family Law lawyers. I say that all good Family Lawyers work hard to negotiate settlements without going to Court. Having said that, we all know that in some cases Court is inevitable. Negotiations are often very difficult when there are issues such as mental illness involved or a high level history of domestic violence.

The traditional negotiation of Family Law matters is imperfect and continues to cause much angst for clients. Some of the reasons are as follows:

1. Lawyers being untrained in negotiation skills and inflaming matters by their words, correspondence or legal actions.
2. Lawyers not having the skills to recognise, normalise and at least to some extent reduce some of the passions of their clients.
3. Delay. Lawyers may be slow in responding to correspondence. Clients may have their head in the sand or wilfully wish to delay.
4. Round Table Conferences (a popular process) are highly reliant on the personal skills of the lawyers which may or may not have been picked up on the job.
5. The Court process always hangs like a sort of Damocles over the parties. The financially stronger party (usually) can threaten to use it when he/she does not get their way. The sheepish other party is metaphorically bludgeoned into submission.
6. Much of the negotiation process is not seen by the clients. Numerous telephone calls between solicitors may occur. Some letters may not be shown to clients because they are just too inflammatory – although the recipient solicitor is in an invidious position when having to make a decision not to show a letter to their client.

7. In Round Table Conferences or lawyer-based mediations the protocol is for the lawyers to do most of the talking. They often do all the talking. The clients may enjoy seeing their lawyer perform but in no way is their relationship with their ex improved. In no way do they learn communication skills which will be essential for them coping with their ex into the future when there are children.
8. Many matters settle during the Court process and often the sheer cost of the process is the major reason for settlement. This will often encourage unsatisfactory settlements.

Obviously this is not an exhaustive list of the potential problems with negotiated settlements.

COLLABORATIVE FAMILY LAW

In this context and against this history Collaborative Law was invented. Collaborative Family Law was invented by a lawyer called Stu Webb from Minneapolis in the USA in 1990. From there it has spread through America, Canada, England and to Germany, Austria and other parts of Europe. In recent years, it has moved into most of the States of Australia and the Australian Capital Territory. In 2007 the Attorney-General assisted by the Chief Justice of the Family Court launched the Collaborative Law websites for all the participating States and Territories which is at www.collaborativelaw.asn.au.

The websites both explain what Collaborative Law is and give some details of the process. They list all practitioners in each State who are trained in Collaborative Law by surname, firm name and location/suburb/town. In other words, Collaborative Law is now on the map.

The distinctive features of Collaborative Law are:

1. Each party is represented by a lawyer and the two parties and the two lawyers sign a contract agreeing to endeavour to negotiate a settlement of all issues and agreeing not to take the matter to Court. Technically, if the negotiation falls down or is incomplete the parties can choose to take the matter to Court but the lawyers are obliged to cease to act. The parties are obviously obliged to get new lawyers from new firms. All evidence given in

the collaboration process is inadmissible in the later Court process and all experts who have assisted with the collaboration (psychologists, accountants, valuers and the like) are disqualified from giving evidence.

2. Negotiations are “interest based” rather than positional in nature. Interests are what motivate people. They are the silent movers behind positions. There are usually several possible positions which could satisfy an interest. For example, rather than saying “I must have the house” (a position), clients are encouraged to say something like “I need security for myself and the children”. Rather than a Dad saying “I must have 50% of the kids”, the statement should be re-routed as “I don’t just want to be a weekend Dad and I want to make sure I have a substantial, ongoing relationship with my kids”.
3. All negotiations take place in four-way meetings between the lawyers and the clients. (In some cases there may be extra people there such as a psychologist or accountant which might make it a five-way meeting). The clients see what work their lawyer is doing. You don’t put in three months of negotiating and send a four figure account to have your client then say “but I only saw you once and you only sent a few letters!” The client owns the negotiation process because they see it happening.
4. The lawyers are trained to be “negotiation coaches”. This is new and quite a departure. In other words, the clients are encouraged to speak. It is their negotiation after all. Meetings are carefully agendaed and clients are carefully prepared before the meeting so that they know precisely what issues will be discussed. This helps to prevent maverick issues coming out and upsetting the meeting.
5. The parties and their lawyers sign a contract and they also agree to adhere to protocols of conduct which give even more detail about the behaviour of the lawyers and the clients during the process. A copy of the contract is attached to help illustrate the process.
6. The parties and the lawyers are obliged not to take advantage of any mistake and must rectify a perceived mistake.
7. The parties must be respectful.

8. The lawyers are not “opposing solicitors” but they are “co-counsel” or “counterpart solicitors”. The lawyers in fact work as a team in getting to a solution. The emotional needs of the clients which can easily de-rail a negotiation have to be attended to carefully by the lawyers and the lawyers have to be trained accordingly.
9. Full and uninhibited disclosure of all relevant documents and financial records must occur.
10. The time taken for a successful collaboration will usually be quicker than most other alternative processes. It is common and desirable to set two appointment dates at once, for example, two weeks apart. This makes sure that diaries do not get full and unduly delay subsequent meetings. This keeps the process moving. It is common to have four or perhaps five collaboration meetings over two or three months and have all issues settled. In less complex matters it may be shorter. In more complex matters it may be longer.
11. What are the lawyers’ costs? Because it is a labour intensive process the lawyers’ costs may be a little higher than the costs of an average negotiated settlement. In this process, however, that there is usually substantially higher client satisfaction and substantially more chance of the clients having all their “interests” attended to than by the strict legal model. The legal costs will usually be much less than the costs of taking the matter to Court.
12. Across the world, the success of rate of collaborations is 95%. In parts of America collaboration is dominating the Family Law practice at the relevant bar.
13. Anecdotal evidence suggests that more people reconcile after going through a collaboration!

THE CHOREOGRAPHY OF THE COLLABORATION PROCESS

I shall now give a little more detail about the Collaborative Law process.

Screening

It is obviously important to screen for suitability for the collaborative process.

Matters to look out for are:

- Mental illness/personality disorder. It may be that you do not realise there is an issue with your client and your co-counsel actually alerts you to the mental health issue.
- Drug abuse.
- Significant domestic violence.
- Completely unrealistic goals. This needs to be probed and this includes both your client's goals and their perception of the other party's goals.
- Overly dependent personalities.
- Denial.
- Refusal to make immediate support arrangements – although this can be an immediate item on the first meeting agenda.
- Reluctance to fully disclose finances and the like.
- Bully or victim mentality.
- Overly vindictive/furious client – this may be attended to by referring the client to personal counselling/therapy.

A number of the above matters may be able to be handled in collaboration. It may be that a significant amount of preparatory work needs to be done by the lawyer with the client, and additionally or alternatively, by referring the client for professional psychological/counselling assistance.

First Lawyer Meeting

When the two clients have decided on collaboration, the co-counsel meet either in person or by telephone essentially to set the agenda for the first meeting and to prioritise issues. They are ***not*** negotiating issues. They are not organising valuations or exchange of documents. They set the agenda and email or mail it to all parties.

The collaboration contract and protocols are sent to the clients for reading in preparation for signing of those documents at the first four-way meeting.

First Four-Way Meeting

The first goal is to anchor the clients in the process. It is most important at first to focus on the process even more so than the issues because the process keeps the parties focused and not digressing off the agenda.

Ideally the lawyers alternate their offices as the meeting place for the four-way meetings.

We review the agreement and protocols and verbally highlight the main points of the agreement. The parties and both lawyers sign.

The clients share their hopes for the collaborative process and identify their mutual interest in protecting the children, retaining control over the outcome and preserving relationships. We negotiate immediate issues as per the agenda (interim maintenance and child support, sole use if applicable of the family home, preservation of assets).

We discuss the exchange of information and the obtaining of valuations which are to be attended to before the next four-way meeting.

Legal costs should usually be on the agenda and arrangements will often be made for these to be paid from joint funds.

The agenda for the next meeting is set.

After the Meeting

Each lawyer and their own client de-briefs, discussing what went well, what did not go well and how “we” can improve the meeting process.

Then the two lawyers de-brief, saying “what can we do better?” and jointly discussing how to handle the matter optimally.

By agreement one lawyer drafts the minutes of the meeting which is circulated to all.

Before Next Meeting

Each lawyer and client meets for say 45 minutes to talk through the issues on the agenda, discuss options but not to set “positions”. They discuss how they think the other party might be feeling.

Further Meetings

Up to a point it depends on the number of issues as to how many meetings occur after this. The parties may be referred off to a psychologist to discuss children’s issues or a psychologist may be brought in to a four-way meeting to discuss such issues.

An accountant may be jointly briefed and report to the lawyers for the purposes of the collaboration.

Further meetings occur in a similar way with agendas being set and minutes being written each time. All paperwork is simultaneously mailed or emailed to lawyers and clients.

When agreement is reached the formal settlement documents (Form 11, Consent Orders, BFA, Child Support Agreement etc) are drafted and circulated.

Those documents are signed off at a subsequent four-way meeting.

Negotiation Techniques

A major change which is part of the collaboration process is to train the lawyers in more sophisticated negotiation techniques. Generally lawyers receive little professional training in negotiation techniques and simply learn “on the job” about adversarial Court processes and negotiation techniques.

Collaborative lawyers have learnt and encourage clients to learn to change language so as to:

- Move from TRUTH to PERCEPTION
- Move from BLAME to JOINT RESPONSIBILITY – ask we questions
- Move from INTENTION (you can’t be sure of the other person’s intention) to IMPACT.

Lawyers use sophisticated listening skills. Above all, all parties listen carefully to each other. The toolbox of techniques includes:

- Active listening
- Reflecting
- Summarising (so did I hear you say you have three children?)
- Reframing (I am hearing you have a lot of anxiety about Remove the positional and acknowledge the emotions. Normalise the emotions: "that's a very strongly held feeling and it's common/normal". Alternatively: "it's very important for us lawyers to recognise the tension between you" – in other words call a spade a spade in a gentle way!)
- Focusing "(There are a lot of issues here that you are raising. How does that help the two of you move forward on the agenda?" Bring the discussion back to the agenda).

CONCLUSION

Collaborative Law is a breath of fresh air. The anger and posturing is often removed from the negotiations. Lawyers know the Court system is unpredictable. They know that by the time they get to the end of the Court system the clients often won't be happy, whatever the outcome, in many cases.

Let me leave you with a couple of thoughts:

- Litigation is the basic legal right which guarantees every corporation its decade in Court.
- It is easier to lead men to combat, stirring up their passions, than to restrain them and direct them toward the patient labours of peace. (Andre Gide, September 13 1938).
-whether we like it or not, every encounter that our clients have with us and with the courts operates in the service of healing or against it; little or nothing that we do with clients enduring so stressful a life passage (whether the death of a marriage, the loss of a job or career, the end of a long time personal or professional relationship) can be seen as therapeutically neutral. We can choose to ignore the scarring impact of our work as litigating lawyers, but that does not make the damage we do less real; it merely makes

us wilfully ignorant. (From a paper by Pauline Tesler, an American Collaborative Lawyer and writer).

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The Australian website for Collaborative Law is www.collaborativelaw.asn.au The website of the International Academy of Collaborative Professionals is www.collaborativepractice.com.

Attachment:

Excerpt from IACP website with client feedback quotes.

WHAT CLIENTS SAY ABOUT COLLABORATIVE PRACTICE AND ABOUT OUR COLLABORATIVE PROFESSIONALS

- " I was pleased with the process and will recommend it to anyone I know who is...thinking about separation or divorce"
- "It was very emotional but also empowering for me to negotiate the settlement that I felt was fair for both parties."
- "It was a positive process for me. I actually found the self-confidence to stand up for myself and verbalize my own needs."
- "I was pleased that we were able to negotiate what felt fair to both of us."
- "I was pleased that it actually cost less than I figured"
- "Well, we can pay people to fight for each of us, or we can fight and pay people to referee, or we can work it out and pay people to help us. I'd rather do the last one!"
- "I'm really glad we chose this process. For our family and for each other, it allows us to have sustainable amicability"
- "You listened well to me, and my upset and my needs. You handled things in an orderly, thorough and gentle manner. I feel I got every penny's worth..."
- "The collaborative process provided three significant benefits: (1) the private nature in which it is performed; (2) less contentiousness and therefore, less anxiety-ridden; and (3) the outcome seemed fair for both parties. You embodied confidence and compassion. These are two traits which were necessary to help me feel comfortable and focused through this painful situation."
- "... made me feel important, and that everything was done as your highest priority... I like the collaborative process. It is clear and when it is not clear, questioning the problem brings an answer"
- "Thank you for everything you have done for my family and me. I can finally get some sleep! "
- "... Divorce is difficult, and with the passage of time, and all of your help and support, my life is happy. Thank you, thank you, thank you."
- "It's done. I can sleep. I can laugh. I can play. All thanks to you."

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