

COLLABORATIVE PRACTICE – WHY I CHOSE TO STOP LITIGATING AND EMBRACED DIVORCE DONE DIFFERENTLY

Written by Shelby Timmins



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Shelby is a member of Collaborative Professionals (NSW) Inc, and the President of Southern Sydney Collaborative Professionals.

Shelby has stepped outside the box of litigious family law practice and set up the collaboration and mediation dispute resolution practice of “Divorce Done Differently”.

A relationship breakdown is undeniably difficult. It has been described by some as ‘the most emotionally and financially challenging time of their lives’ or ‘like walking around with no end in sight, no hope’.

After 18 years as a family lawyer, where much of my time was spent strategising about how to get one over my opponent, locking horns with colleagues who were similarly attempting to get one over me and only to be told as I stepped inside the Family or Federal Circuit Court, by an overworked Judge, ‘*Sorry Mrs Timmins I have 20 matters in the list today. I don’t think we are going to get to your matter. I suggest you step outside and try to have some sensible discussions with the other side*’. I had a light bulb moment. I realised that there had to be a better way to resolve family law disputes.

Now don’t get me wrong. I was always open to having settlement discussions, conscious of looking for ways to resolve a matter and willing to negotiate. However, I realised that by the time parties were at the door steps of the court, having sent a flurry of correspondence to the other party which at times included demands and affidavits which aired everyone’s dirty laundry, it was often too late. Parties had become so entrenched in their views it was an almighty task to persuade them to take a rational and neutral approach to their family law issues.

So I took a few moments and had a good look around. I thought a lot about why I had entered the family law space in the first place and realised I needed to make a change to the way family law issues were being resolved. And so I embraced collaborative practice. Fast forward to today... I have stepped away from practising as a family lawyer and established a boutique family law dispute resolution practice that focuses on Collaborative Practice, mediation and separation and divorce support.

SO I HEAR YOU ASK, ‘WHAT EXACTLY IS COLLABORATIVE PRACTICE?’

Essentially, there are four fundamental elements to Collaborative Practice:

- The process is voluntary and there is an open exchange of all relevant information.
- Parties promise not to litigate. Yes, you don’t go to court and if you do threaten to commence proceedings, it becomes mandatory that the legal team and any other collaborative professional who may be involved, withdraws from the matter.
- All involved, commit to using their best endeavours to support interest based negotiations in achieving an agreement.
- The process remains respectful and focussed on resolving the matter in the best way for parties and their family.

COLLABORATIVE PRACTICE – WHERE DID IT ALL BEGIN?

Much like me, but about 27 years earlier, an American, Stu Webb, now known as the ‘Godfather of Collaborative Practice’, became so disgruntled with how litigious family law matters were being dealt with, that he realised there had to be a better way to resolve family law disputes.

Webb decided it wasn’t rocket science and that you could resolve family law issues in an open, respectful and future focussed way. Parties didn’t need to become even more polarised than perhaps they already were, especially when children were involved. People and their legal teams needed to think differently.

Webb took it one step further, and this is the part where some of us in the legal profession may cringe and run for cover. He decided, that in the unfortunate event that parties weren't able to settle their dispute via the collaborative process and declared 'i'm going to court', he would walk away from the case.

For those of you who are a little perplexed with the concept of having to walk away from your client if they decide to go to court, I urge you to take a deep breath and to look at this from another perspective. Those practising in this area, despite initially being a little concerned themselves, have found that when parties and their interdisciplinary team commit to the collaborative process, they give it everything they have and are truly invested in coming up with outcomes that are workable and in everyone's best interests. They shift their focus from a win/lose mentality to a mindset of win/win for all involved. They think outside the box.

COLLABORATIVE PRACTICE 101

Put simply, parties meet with their legal advisors in a series of four or five-way meetings – yes, you can celebrate by saving money on storage fees knowing correspondence is kept to a minimum. The five-way meeting will include a 'coach'. Now this may sound like we're talking about the American baseball league, but the role of the coach is to be the keeper of the process and to guide and facilitate the collaborative process.

The parties control the process. They identify the issues they are hoping to discuss (both legal and non-legal), they agree on an agenda and they are present during all discussions. Everyone signs a 'Participation Agreement' which sets out how parties and the professionals will behave and importantly, outlines that in the event that legal proceedings are threatened and/or commenced, the lawyers will step aside.

One of the lawyers is usually delegated the task of being the 'note taker' during each meeting and the minutes of the meeting are circulated between the parties and the professionals involved. The minutes may include a list of tasks that are to be completed or documents exchanged prior to the next meeting.

Parties still have a duty to make full and frank disclosure and if you become aware, as a collaborative lawyer, that your client is keeping something hidden up his or her sleeve, you must also withdraw from the matter.

When a deal is struck and the parties have reached an agreement, with the assistance of the lawyers, settlement documents are prepared and if required, made into court orders by consent.

The process is confidential with the exception of any of the experts involved having mandatory reporting requirements.

Each party pays the costs of their own lawyers and generally share the costs of the coach and any other jointly appointed professional. Costs are generally cheaper and matters are resolved in a more timely manner when compared to traditional litigation, but this is heavily dependent on the parties willingness to be open, honest and focussed on their family and their future.

IT'S ALL ABOUT TEAM WORK

When families break down I came to realise it's not as simple as dialling 1300 'family lawyer'. Sometimes a team approach is needed! It may be difficult to accept, but as family lawyers, we don't know everything about what families require when they fall apart.

Practising in a collaborative way allows you as the lawyer, to bring other professionals who are experts in their respective fields, to join the process and assist the parties as and when they are required. This means you have the opportunity to call on, for example, a mental health professional, a child expert or financial advisor, who are also collaboratively trained and have a similar ethos to you in relation to the resolution of family law issues, to work together with the parties to create future-focused outcomes, which are best for their family. The use of other experts in the process is subject to the issues in each matter.

DIFFERENCES BETWEEN THE COLLABORATIVE AND THE ADVERSARIAL PROCESS

COLLABORATIVE PROCESS	COURT PATH
Possible resolution within months (3-6).	3+ year wait (currently) for a court determination, that's without delays in decisions being handed down and appeals being filed.
The parties are in control of the process - they set their own agendas, timeframes and are present at all times.	Under resourced, overworked and controls the process.

COLLABORATIVE PROCESS	COURT PATH
The cost is generally cheaper if parties act in good faith.	Like looking into a bottomless pit without a torch
Encourages open communication and information sharing – same disclosure obligations. However there are no Rules of Court ensuring access to information and documents.	A duty to make full and frank disclosure.
Interdisciplinary team approach where all professionals must be collaboratively trained.	Does not require collaborative training.
Lawyers openly discuss options in the presence of all parties.	Strategic/behind closed door discussions.
Parties pledge to be mutually respectful and open. Preservation of the parties' relationship and can assist with ongoing relationships/communication.	Possible destruction of any ongoing relationship.
Round table discussions, litigation is removed from the equation.	The court room bar table, if negotiations fail.
Resolutions that may fall 'outside the box' – far reaching and flexible outcomes which are jointly beneficial. Win/Win.	Conventional family law outcomes where there is little opportunity to shape the form of the settlement.
Confidential process (with the mandatory exceptions).	Section 121 and the rules of court apply.
No resolution – new legal team for court. Collaborative practitioners (unless they are also FDRP trained), cannot currently issue a section 60I(8) certificate under the Family Law Act.	No resolution – legal team remains.

THE WAVE OF COLLABORATIVE PRACTICE

Having started with humble beginnings in America, Collaborative Practice is now established in over 26 countries including the USA, Canada, the United Kingdom, France and Germany, as well as having a strong presence in Australia. Collaborative Practice kicked off in Australia in 2005 and you will now find a large number of trained collaborative professionals and local practice groups in most States and Territories.

HOW DO YOU BECOME A COLLABORATIVE PROFESSIONAL?

Before you hang your shingle on your office door and amend your email signature to include '*Collaborative lawyer – no court divorce*', you need to sign yourself up for a few days' training to learn all about practising collaboratively. Fundamentally, the biggest task will be shifting your mindset from that of an adversarial to embracing interest based negotiations.

To avoid you looking too far, below are a list of some of the collaborative organisations/practice groups in each State. Unfortunately, there is yet to be a system for the accreditation of collaborative professionals in Australia, but that may be the next step.

NSW	Collaborative Professionals NSW Inc www.collaborativeprofessionalsnsw.org aucollaborativeprofessionalsnsw.org.au
QLD	Queensland Collaborative Law www.qcl.org.au
VIC	Victorian Association of Collaborative Professionals www.viccollab.com.au
WA	Collaborative Professionals Western Australia www.collaborativeprofessionalswa.com.au
SA	The Law Society of South Australia www.lawsocietysa.asn.au/LSSA/Community/Collaborative_Practice.aspx
NT	Collaborative Family Lawyers (NT) www.collaborativefamilylaw.com.au/nt-cfl.html
TAS	The Law Society of Tasmania www.taslawsociety.asn.au

The International Academy of Collaborative Professionals (IACP)
www.collaborativepractice.com

IS THERE ANY REAL TRACTION FOR COLLABORATIVE PRACTICE IN AUSTRALIA?

In December 2006, the Family Law Council in a report to the Attorney-General on Collaborative Practice in Family Law, referred to Collaborative Practice as a *“unique method of dispute resolution which has the potential to deliver ongoing benefits to the general public and Australian professionals working in the family law area”*.

The Family Law Council went on to outline the benefits of the collaborative process and noted it:

- provides a formal structure in which positive child-focused communications are modelled by the advisers;
- provides legal advocacy support during collaboration;
- removes the immediate threat of litigation;
- encourages parties to develop a trusting alliance for their future parenting;
- directly involves the parties in negotiations based on interests and not positions;
- aims to achieve results that meet the needs of each of the parties and their children;
- minimises the time that lawyers must spend in correspondence with each other, and
- utilises the expertise of independent experts including child specialists and financial advisers outside of the adversarial system.

THE FUTURE OF COLLABORATIVE PRACTICE IN AUSTRALIA

In March 2017, the Board of the Australian Association of Collaborative Professionals (“AACP”) met in Adelaide which resulted in the preparation of a draft strategic plan. The Board identified that the major strategic goal was that *“By 2021, 33% of all post-separation family disputes will use Interdisciplinary Collaborative Practice as the primary means to resolve those disputes.”*

The AACP are hoping to become incorporated by the end of March 2017 which may have already

occurred at the time this article is published. One of the enormous benefits is that the AACP will be committed to resourcing local practice groups, training and standards, and having accredited courses.

The AACP have received enormous support from the Chief Justice of the Family Court, the Hon Diana Bryant.

Collaborative Practice has and continues to deliver enormous benefits to parties and the other professionals involved.

Collaborative Practice is not however, the answer to everything. We all recognise that some matters simply require judicial determination. But in the main, particularly in family law where the ongoing destruction of relationships has long lasting and detrimental effects, especially on children, I believe Collaborative Practice provides us with an opportunity to think different, be different and do different for our clients.