

THINKING OUTSIDE THE BOX: COLLABORATIVE PRACTICE IN FAMILY LAW

By Shelby Timmins



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Is it time to think outside the box when it comes to family law? Do practitioners need to change the way they look at resolving clients' disputes?

With long delays in the Family Court (sometimes more than three years, not including delays in decisions being handed down and appeals), increasingly high legal bills, and clients unable to move on with their lives while they await resolution, perhaps it's time to embrace collaborative practice.

Collaborative practice – a new way of working

Around 1990, the same time as the American boy bands like New Kids on the Block and the Backstreet Boys were being heavily promoted in Australia, an American by the name of Stu Webb decided that there had to be a better way to resolve family law disputes compared with the traditional litigious path.

He decided that he could assist parties to resolve their family law matters through negotiation. If the matter didn't settle and one or both of the parties decided to travel the dreaded court path, he would withdraw from the case. This became known as collaborative practice.

Collaborative practice is about the parties controlling the process through cooperation, respect, conflict minimisation and dispute resolution, without going to court. It involves confidential and transparent negotiations that take an interest-based 'team approach'. It's a leap away from the win/lose adversarial mentality, to a process where parties and practitioners are committed to a win/win, future-focused outcome for those involved, without involving the court.

Key features

- Everyone involved in the process – the parties, lawyers and other team members, such as financial advisors, valuers and counsellors – all sign an agreement opting to stay out of court. During the process parties will not litigate or threaten to do so.

Snapshot

- Increasing delays in the Family Court and high legal costs have led practitioners and clients to consider an alternate way of resolving family law disputes.
- 'Collaborative practice' allows parties to control the process through cooperation, respect, conflict minimisation and dispute resolution, without going to court. It involves confidential and transparent negotiations that take an interest-based 'team approach'.
- When collaborative practice is appropriate for the particular dispute, it can result in many benefits to the parties.
- The participants commit to keeping the process honest, respectful and productive on both sides. The 'duty to give full and frank disclosure' remains paramount.
- If the collaboration breaks down, the agreement not to litigate is terminated and the parties will find themselves searching for new legal representation.

How does it work?

Most of the work is done in a series of round table (four- or five-way) meetings and correspondence is kept to a minimum. Four-way meetings consist of the parties and their lawyers. Five-way meetings involve a 'coach' whose role is to be the keeper of the process, to guide and facilitate the collaboration.

During these meetings, the parties identify the issues that are important to them and these are put up for discussion. One of the benefits of collaborative practice is that, unlike

traditional negotiations, it can provide a forum to discuss non-legal issues.

Minutes of the meetings are taken and circulated and may include a 'to-do-list' of tasks to be completed, or documents exchanged, before the next get together. Once an agreement is reached, the lawyers draft any settlement documents and, like traditional methods, these can be submitted to the court for approval.

A team approach

The beauty of the collaborative process is that lawyers get to work as part of an interdisciplinary team – working with financial planners, accountants, valuers, coaches, family dispute resolution practitioners, family counsellors and psychologists. The focus for all is on finding a mutually acceptable agreement for the family as a whole.

Confidentiality

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

Benefits of collaborative process (over the adversarial process)

- possible resolution within three – six months;
- clients are in control of the process – they set their own agendas, timeframes and are present at all times;
- the cost is generally cheaper if the parties act in good faith;
- encourages open communication and information sharing – same disclosure obligations; however there are no Rules of Court ensuring access to information and documents;
- interdisciplinary team approach where all must be collaboratively trained;
- lawyers openly discuss options in the presence of all parties;
- preservation of the parties' relationship and assistance with future communications;
- round table discussions with litigation removed from the equation;

- resolutions that may fall 'outside the box' – far reaching, flexible and jointly beneficial outcomes;
- confidential process (with the mandatory reporting exceptions);
- if no resolution – a new legal team will be required for court. Collaborative practitioners (unless they are also FDRP trained), cannot currently issue a section 60I(8) certificate under the *Family Law Act 1975*.

Is it a soft option?

Collaborative practice is not a soft option for lawyers or their clients. It can involve robust and colourful conversations, complex negotiations where lawyers are expected to provide their clients with comprehensive legal advice and the preparation, exchange and inquiry into all relevant issues. It embraces interest-based negotiation, keeping the focus on the wellbeing of the family and all its members. It allows parties to reach their own outcomes with solutions which are not traditionally considered within the court domain.

Parties and their team of professionals must be sufficiently motivated to invest in the process, knowing that if it all

falls apart, there may be significant costs involved in obtaining new representation. As a lawyer, it's a pleasant and satisfying way to work, in what has become the challenging sphere of family law.

Is collaborative practice the golden ticket?

Whilst it is theoretically open to all it's not necessarily suitable for everyone. You may need to carefully consider whether collaborative law is suitable in cases where there is a clear power imbalance or family violence and/or mental health issues are involved.

The cost

The cost is generally less than the conventional adversarial path. Professional fees are set at an hourly rate which is discussed and agreed prior to the process beginning. Each party is generally responsible for their own collaborative lawyer. The cost of the coach and any other expert who is engaged is generally shared. As costs are generally determined by the parties' readiness to settle, this can be a powerful incentive to negotiate in good faith and without delay

Education and training

Lawyers must undergo collaborative training before they can hold themselves out to be a collaborative practitioner. Below is a list of some of the training providers in NSW:

- Collaborative Professionals NSW Inc (CPNSW) (www.collaborativeprofessionalsnsw.org.au)
- Central Sydney Collaborative Forum (www.sydneycollablaw.com.au)
- Greater Sydney Collaborative Family Lawyers (www.divorcewithoutcourts.com.au)
- AIRS (www.airs.com.au)
- Relationships Australia NSW, Interdisciplinary Collaborative Practice (www.nsw.relationships.com.au)

Think outside the box

Collaborative practice is not confined to family law. This method of resolving disputes can reach far and wide where there is a dispute that requires resolution and parties and professionals are committed to finding a solution that works for all. **LSJ**