



Précis Paper

Collaborative Law

A discussion of collaborative practice, including how it works, when it is suitable and how it differs from traditional forms of dispute resolution.

Discussion Includes

- What is collaborative practice?
- Differences between collaborative practice and other dispute resolution practices
- Fees and the collaborative process
- The collaboratively trained lawyer
- Suitable candidates for collaborative practice
- Information and training for practitioners in collaborative practice

Collaborative Law

1. In this edition of BenchTV, Jennifer Hetherington (Partner, Hetherington Family Law, Brisbane) and Shelby Timmins (Mediator, Dispute Resolution Practitioner and Collaborative Coach, Divorce Done Differently, Sydney) discuss collaborative practice including how it works, when it is suitable and how it differs from traditional forms of dispute resolution.

What is collaborative practice?

2. Collaborative practice is about aiding parties to reach a consensual resolution and to settle their matter without going to court.
3. The actual process of collaborative practice can itself differ based on the specific needs of the parties in the matter. The process always involves two lawyers who are collaboratively trained and sometimes neutral persons such as mediators, communication coaches, financial neutrals or child consultants are brought into the process.
4. Collaborative practice is for persons who are looking to reach an outcome which is respectful, open and transparent and who do not want to go through the formal court process.
5. The process can be extremely flexible dependent on client needs.
6. Throughout the process, the parties are able to ask the experts questions without having to conform to the formal rules of the court.
7. Collaborative practice also allows for more involvement for clients. When in court or in mediation, clients are faced with a linear structure and rules which govern how the matter is run. In collaborative practice, the parties can choose how the process is carried out based on their individual needs.
8. The collaborative process is private which allows parties to have an open and honest discussion about their worries, needs and thoughts in the environment of a team of professionals.

Differences between collaborative practice and other dispute resolution practices

9. It is important for practitioners and professionals to consider what it is that the client wants out of the process rather than what does tradition say to do.
10. Generally, the initial conferences in collaborative practice involves the lawyer using open ended questions, inviting clients to share information and talking through which process options are available.

11. It is important to note that not every lawyer and not every client is suitable for collaborative practice. For example, in some situations parties cannot even sit in a room together.
12. Interests based negotiation and being able to put oneself in someone else's shoes is important for successful collaborative practice, otherwise the process tends to lend itself to facilitative positional bargaining which is often how mediation is carried out.
13. Collaborative practice allows parties to communicate with each other in a supportive environment whilst staying in the legal framework.
14. A significant difference between mediation and collaborative practice is that mediation is usually scheduled for one day and often ends in agreement by exhaustion. The collaborative process on the other hand, is spread over a number of days and carried out in smaller time slots that people can better manage.
15. The current practices of court and mediation are not family friendly to parties or practitioners, especially in relation to the timing which is associated with such practices.
16. Collaborative is a way that the practice can be made more family friendly for the clients as well as practitioners.
17. Collaborative is a series of informal meetings with a structure and agenda set and depending on the professionals involved in the process, it can be quite formal or informal. The agenda can also be changed throughout the process depending on the issues that arise throughout.
18. There is a lot more flexibility in collaborative law. If a collaborative law meeting needs to be ended earlier than scheduled, it can be without any detriment, financial or otherwise.
19. This allows parties to attend to any homework that needs to be done, allows for valuations to take place if necessary, gather information or simply allows parties to have some processing time to see independent therapists or work with the communication neutral about parenting etc.
20. The collaborative process works at the pace of the slower party and allows both parties to be in a good space where they can make proper, non-emotionally charged snap decisions.
21. The goal of collaborative practice is to have a legally binding agreement at the end of it that is durable and that the parties can live with and feel that they have been treated fairly in the process of getting there
22. In mediation, many of interim issues which the parties face are dealt with by negotiation by correspondence between lawyers whilst the parties are waiting for their mediation date. This can very quickly turn into litigation by correspondence and a lot of the goodwill prior to the mediation can be eroded.

- 23. With collaborative process, urgent issues are able to be dealt with immediately and then if necessary, the dust can be left to settle and the remaining issues be dealt with after the passing of some time.
- 24. The parties are in complete control of when collaborative meetings take place, pending the availability of those involved.

Fees and the collaborative process

- 25. There is a perception in the legal profession amongst family lawyers that collaborative practice will not make money for the lawyer.
- 26. There is also the view that if they fail to reach an agreement in collaborative practice they will lose their client.
- 27. In a mediation matter, generally the lawyers will have a plan B, eg to take the matter to court. In a collaborative matter neither lawyer will have a plan B. This is because both parties are working towards helping both parties reach agreement, openly and honestly.
- 28. It is also naive to think that just because a lawyer is taking part in a non-collaborative process eg litigation that they are not potentially going to lose their client if the client is not getting the result they want.
- 29. It has also been shown that if a litigious matter has gone on for years, practitioners start writing off fees and discounting bills and therefore can often find that they are actually making less money.
- 30. There are different models in regard to fees in collaborative law. For example, lawyers may have a fixed fee or they may continue to charge what they would typically charge as an hourly rate.
- 31. In Sydney, Relationships Australia has a fee structure in place for when they run collaborative matters.
- 32. There is a push in the law generally towards fixed fee pricing and value based pricing and collaborative practice lends itself to that. Litigation does not as it is very difficult to predict at what point a matter will settle.
- 33. Collaborative law fixed fee pricing can be achieved as a per meeting cost including preparation and attendance at such meetings. This allows clients to adequately prepare and talk to their lawyer without being time billed.

The collaboratively trained lawyer

- 34. A collaboratively trained lawyer can incorporate a collaborative approach into every other of practice, including a change in communication style.
- 35. Even having one collaboratively trained professional in a meeting can often change the dynamic of other dispute resolution processes, such as mediation.

36. A collaboratively trained lawyer is often more focused on creating respectful discussions rather than berating or positioning or pushing for an outcome by the end of a session.
37. Collaborative practice has changed how people look at the needs and truly focus on what their client is wanting out of it rather than what they feel is right as a lawyer.
38. Collaborative practice is not a 'soft' option for clients, practitioners or other professionals as it is their job to aid the parties to reach an agreement that meets the needs, goals and interests of everyone in the family. The professionals involved in the collaborative process must have a wide skillset to achieve this.
39. In collaborative practice, lawyers may often raise issues which may not be beneficial for their client. This helps to escape the positioning of party against party, and means all involved come together as part of a team.
40. Part of the collaborative process is also the opportunity to debrief with the other professionals involved after every meeting.
41. It is important to note that collaborative practice is still a legal process and that lawyers still give legal advice in collaborative practice.
42. However how the information is gathered and how the legal advice is provided is fundamentally different.
43. In a collaborative matter, lawyers are able to hear both sides of the matter including each of the party's views on the roles that they played, what they believe the assets are, what they believe the contributions were and what they feel would represent the factors noted in section 75(2) of the *Family Law Act 1975* (Cth).
44. This means that in a collaborative matter, the lawyer is able to give advice on all the information available. In any other type of practice, a lawyer is only able to give advice based on the information provided by their client, which can often be a skewed version of the facts.
45. In collaborative practice, a lawyer does not need to give advice on the range of legal entitlements until they have heard from both parties and that advice is given whilst both parties are present via a conversation.
46. Lawyer-client confidentiality still applies and nothing can be disclosed to anyone in the collaborative team without a client's consent.
47. A lawyer still has paramount duty to the court and therefore anything that has to be disclosed in court, will also have to be disclosed in collaborative. If the client is unwilling to disclose such information, a lawyer will have to cease acting in accordance with section 79A of the *Family Law Act 1975* (Cth).

Suitable candidates for collaborative practice

48. People who hate the other party and cannot have any care or empathy for them, will not be suitable for collaborative practice.

- 49. If a lawyer is seeing someone freshly after a separation, they will encounter emotion, grief, pain, fear and frustration about why the relationship has not worked out.
- 50. This alone does not render somebody ineligible for collaborative process, however if a party is unable to empathise, understand, listen and have some care about the outcome for the other party, they will likely not be suitable for collaborative practice.
- 51. Often in the collaborative process, the parenting component is often side swiped out to the communication neutral or mediator, this information is then fed back to the lawyers. Then when everybody comes back together, there is an educated discussion about what the parties need. This also also saves times and money.

Information and training for practitioners in collaborative practice

- 52. The first place to obtain information would be to go to a website of one of the collaborative bodies such as The Australian Association of Collaborative Professionals.
- 53. Further, in each State and Territory there are active collaborative groups, either practice groups or state bodies who have websites containing information.
- 54. The International Academy of Collaborative Professionals is where collaborative started and there is a lot of useful information on their website.
- 55. Lawyers should approach their State or Territory organisation who will have a list of training resources.
- 56. The training involves a two day primary introductory training and a third day of masterclass training.
- 57. After a lawyer has completed their training, it is advisable that they become part of a practice group. Practice groups allow lawyers to learn who the local collaborative professionals are and have the opportunity to become a note taker, which allows them to sit in and take notes of collaborative meetings and to see how such meetings are run.
- 58. Practice groups may also have regular professional development.
- 59. They are also a form of networking and an opportunity to develop relationships with other professionals.

BIOGRAPHY

Jennifer Hetherington

Jennifer Hetherington, Partner, Hetherington Family Law – Brisbane)

Jennifer Hetherington is a multi award winning Brisbane family lawyer with over 20 years experience in the legal profession. She has been an Accredited Family Law Specialist for the last 12 years. She is frequently called on to present and chair presentations and seminars for the Queensland Law Society and has presented at numerous international conferences. She is regularly reported in the media in relation to family law issues and has featured in The Huffington Post.

Shelby Timmins

Mediator, Dispute Resolution Practitioner and Collaborative Coach, Divorce Done Differently, Sydney)

Shelby Timmins is an Accredited Family Law Specialist who holds a Masters in Law from the University of Sydney. She is Nationally Accredited Mediator, Family Dispute Resolution Practitioner and Collaborative Professional. Shelby is a member of Collaborative Professionals NSW (Inc) and President of Southern Sydney Collaborative Professionals. Shelby has over 18 years experience as a solicitor in the area of Family Law. Shelby has also presented and published works on collaborative practice and dispute resolution. Shelby is passionate about doing things differently in the family law space and is determined to get parties, their lawyers and other professionals to look at separation, divorce and breakdown of families in a more respectful and future focussed way. With this in mind, Shelby has recently stepped aside from practising law and established a boutique family dispute resolution practice which specialises in mediation and collaborative practice known as Divorce Done Differently.

BIBLIOGRAPHY

Legislation

Family Law Act 1975 (Cth)