BEYOND JUDICIAL INTERVENTION: COLLABORATIVE LAW AS A NOVEL APPROACH TO CONFLICT RESOLUTION

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Abstract

This paper analyzes the main characteristics of the collaborative approach to conflict resolution. It traces its history and development across the continents. The comments of the participants from the research conducted by the International Academy of Collaborative Practitioners (IACP) are reviewed and the success rate is presented. The author posits that collaborative law, a non-adversarial approach to resolving conflict, has been successful in the area of family disputes and should be used worldwide in other types of disputes allowing the court systems to only manage the truly adversarial cases with the litigants disinterested in win-win solutions.

Keywords: Collaborative law, conflict, family disputes, conflict resolution

Introduction

The purpose of this article is to outline the history of the collaborative law movement and to present the unique aspects of the collaborative process. It will also discuss the results of the survey undertaken by the IACP on the impact of various factors on termination and difficulty of cases and their success rate. Finally, the author will argue that the results of the research conducted by the IACP; in particular, the client satisfaction rate should further support the application of this model of dispute resolution to other types of legal disputes. **A brief history of collaborative law**

The concept originates in the United States of America, in the city of Minneapolis, Minnesota where a family lawyer, Stuart G. Webb, was battling one of the worst litigation cases of his career in 1989. It involved all of the elements of the litigation process that make it so challenging and unattractive to many practising lawyers: never ending court hearings, lying, nasty tricks, failing to disclose assets and so on. In traditional litigation model each spouse is represented by his and her lawyer who labours to draft lengthy affidavits outlining the client's stories, conducts depositions and

examinations with expensive transcripts, files detailed briefs, prepares witnesses and eventually proceeds to trial. By the time the trial is concluded there may be no money left for the spouses (and their children) involved in the dispute. So in the middle of his nasty divorce case, Stuart Webb came up with an idea during one of his hearings in the case that, "There should be settlement only specialists available for divorcing couples, specialists who work with the couple outside the court system, and who would turn the case over to trial lawyers if and only if the settlement process failed. That, in a nutshell, was the birth of Collaborative Law." (Webb & Ousky, 2006).

This was a novel approach to resolution of family disputes in early 1990s. The model became better known in the United States in the 1990s and Stuart Webb and his law partner Ronald Ousky wrote a book entitled "The Collaborative Way to Divorce: The Revolutionary Method That Results in Less Stress, Lower Costs, and Happier Kids – Without Going to Court". Stuart Webb's book was followed by Pauline Tesler's "Collaborative Law: Achieving Effective Resolution in Divorce without Litigation" and by "Collaborative Divorce: Helping Families Without Going to Court", written by another prominent California lawyer, Forrest S. Mosten and published in 2009. The common underlying thread for the above authors and many other lawyers who chose to be trained in the process is the deep concern for the wellbeing of the children (research is unequivocal that parental conflict harms the children) and respect for the participants and human dignity, the qualities that appear to be scarce in the litigation processes in many courtrooms of the world. Collaborative attorneys are mindful of the importance of the need to preserve family relationships in the future as spouses cease to be wives and husbands but continue to be the parents to their children for the rest of their lives.

The American Bar Association in its 2007 Ethical Opinion (American Bar Association, 2007) about collaborative law defined it as follows:

"Collaborative Law or Collaborative Practice is an out-of-court settlement process where parties and their lawyers try to reach an agreement satisfying the needs of all parties and any children involved. The parties agree to provide all relevant information. If the parties engage in contested litigation, their Collaborative lawyers cannot represent them in court. The process typically involves "four-way meetings" with the parties and lawyers and possibly other professionals such as neutral financial specialists, communications coaches, child specialists, or appraisers."

What is unique in the collaborative law approach to dispute resolution is the requirement for the lawyers to withdraw from representation of their clients in court if the process turns out to be unsuccessful. This was a much debated requirement that has generated a lot of discussion in legal

circles. It was perceived as limiting the lawyer's right of representation but, the holders of the opposite view, claimed that it was motivating to have more in depth settlement discussions with careful consideration of all options presented by the parties which ultimately led to more satisfactory solutions.

The other requirement for engagement in the collaborative process is voluntary disclosure of documents. In a typical court case the litigants, if reluctant to share the documents, can be ordered to provide them sometimes necessitating several court applications which increase the overall costs of the proceedings. In collaborative process, on the other hand, the clients commit in their Participation Agreement to the timely provision of all necessary financial disclosure to enable meaningful settlement discussions. The process, like mediation, remains confidential and voluntary. The participants are committed to negotiation of a mutually acceptable resolution while maintaining open and respectful communication. At the conclusion of the four-way meetings the parties instruct the lawyers to draft a legal contract reflecting their negotiated agreement.

The only other country to follow the collaborative process in the 20th century was Canada where the collaborative practice began in 1999. In 2001 IACP, the International Academy of Collaborative Professionals was founded, the international organization which currently has of over 5,000 members from all around the world and holds yearly networking forums usually in the month of October. The United States of America has 3,558 members and Canada has 550. In the first five years of the 21st century some European countries joined in 2003 (England, Ireland and Scotland), Switzerland in 2004 and from all the way down under, Australia in 2005. Between 2006 and 2010 Austria, Bermuda, France, Czech Republic, Germany, Israel, Netherlands and Italy also began to practice in the collaborative model. In the last five years New Zealand, Hong Kong, Spain and Brazil have also started developing their collaborative practice. In terms of the membership, as of 2014, in the International Academy of Collaborative Practitioners, after the Americans (3,558) and Canadians (550), there are 192 Dutch members, 122 Australians, 118 Italians, 104 Scots and 98 French. The table below details the entire membership in such distant geographic locations as Bermuda, Israel and New Zealand (IACP, 2014).

Country	When Collaborative Practice Began	# of IACP Members	# of IACP Practice Groups
United States of America	1992	3,558	239
Canada	1999	550	35
England	2003	47	11
Ireland	2003	11	6
Scotland	2003	104	2
Switzerland	2004	7	2
Australia	2005	122	14

Austria	2006	3	2
Bermuda	2006	8	1
France	2006	98	2
Czech Republic	2007	3	1
Germany	2008	3	2
Israel	2008	29	3
Netherlands	2008	192	1
Italy	2009	118	2
New Zealand	2012	2	1
Hong Kong	2013	5	1
Spain	2013	2	1

In addition to the paradigm shift from adversarial to interest based approach to the resolution of family conflicts, collaborative practice has adopted an interdisciplinary approach. The IACP in its "Principles of Collaborative Practice" stresses the inclusion of other professionals as follows:

"Collaborative Practice is a new way for a divorcing couple to work as a team, with trained professionals to resolve disputes respectfully without going to court. The term encompasses all of the models that have been developed since Minnesota lawyer Stu Webb created the Collaborative Law model in 1990. This model is at the heart of all of Collaborative Practice. Each client has the support, protection and guidance of his or her own lawyer. The lawyers and the clients together comprise the Collaborative Law component of Collaborative Practice.

While Collaborative lawyers are always a part of collaboration, some models provide child specialists, financial specialists and divorce coaches as part of the clients' divorce team. In these models the clients have the option of starting their divorce with the professional with whom they feel most comfortable and with whom they have initial contact. The clients benefit throughout collaboration from the assistance and support of all of their chosen professionals." (Mosten, 2009).

Other professionals have become increasingly more involved in the practice. With difficult child custody disputes, clients can rely on child specialists (psychologists), where there are financial and tax issues to be decided clients are assisted by financial neutrals and the emotional problems of the clients get under control with the involvement of the divorce coaches. The IACP Professional Practice Survey, conducted between 2006 and 2010 provided first data indicating that almost half of all collaborative cases used some type of interdisciplinary process. Clients generally express satisfaction with the collaborative practitioners and the process itself. The process was mostly used by middle and upper middle class educated divorcing parents with children. The settlement rate was 86% with the majority of cases resolved within eight months or less. The factors that we identified as "top

difficulty factors" included lack of trust, extreme lack of empathy, unrealistic outcome expectations, little value perceived in the contribution of the other, power imbalance, one or both clients acting unilaterally and unrealistic process expectations. With these factors being identified as most challenging it is easy to appreciate how the involvement of other professionals, in particular divorce coaches and child specialists, is beneficial to the process. A lot of cases fall apart because of poor communication skills of the clients (and the lawyers do not remain immune from them) and a lot of challenges with meaningful discussions revolve around the emotions of the clients, especially when the focus of the discussion is the custody of their children. It is not surprising then that the presence of an interdisciplinary team resulted in greater client satisfaction with individual professionals.

Having regard to the growth of the collaborative family practice across the world in the last fifteen years the climate appears ripe for collaborative practice to emerge as a prevalent dispute resolution process in other types of disputes such as insurance claims, estate contests and business cases. The fundamental principles will still apply for the parties to commit by signing the Participation Agreement, to respectful settlement discussion with voluntary disclosure of material and relevant documentation and purposeful exclusion of the court process. Hopefully more and more individuals involved in conflict will prefer to choose this confidential and voluntary process to deal with their dispute instead of lengthier, more stressful and more costly litigation. By choosing collaborative approach empowering them to openly discuss their goals and interests, the parties will craft together an agreement that meets their needs. The process will result in a win-win solution for the parties involved unlike the litigation process which inevitably leads to a win-lose outcome.

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