Diffusing Family Distress: Collaborative Law in the Family Law Context

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Abstract

Collaborative law is a very recent and novel approach to the resolution of various types of legal disputes; however, it has achieved most recognition in Australia in the context of family law. This article considers its therapeutic application in helping to diffuse family distress during the resolution of familial conflicts, and claims that, despite some early teething problems, collaborative law and its evolving presence in the area of alternative dispute resolution continues to have a sustainable and worthwhile place in Australian family law practice.

Introduction

A married couple with young children, a relationship in tatters, and a cocktail of elevated emotions; this is a postulation that for many couples becomes reality. Can similarly estranged couples amicably settle their family law disputes while still respecting the importance of the other within the new family dynamics? Collaborative law may just provide the answer. Collaborative law is a therapeutic form of alternate dispute resolution (ADR) that has an increasingly worthwhile place in the Australian family law context. It is a process which has the potential for growth and longevity in an area of law, the policy and practices of which are increasingly influenced by therapeutic jurisprudence theory. The therapeutic aspirations of collaborative law make it a worthwhile method of dispute resolution in family law as a direct result of its capacity to address the legal and inter-personal issues flowing from a relationship breakdown. The process is not without its complications, however, and its growth has been marred by a number of perturbing ethical and other concerns, some of which have been mitigated by the introduction of Collaborative Practice Guidelines.[4] This article examines the relevance of collaborative law to therapeutic jurisprudence theory and considers its practical application in the context of Australian family law.

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4 Law Council of Australia, "Australian Collaborative Practice Guidelines for Lawyers" (2011).

What is Collaborative Law?

Collaborative law for both lawyers and clients involves a distinct paradigm shift from traditional adversarial practice to co-operative practice and interest-based negotiation.[5] It is a non-positional, non-adversarial process which, unlike other forms of ADR, is not mediated by a neutral adjudicator.[6] Lawyers with their clients engage in a structured series of round-table meetings with the purpose of resolving disputes as a team without recourse to the court.[7] Legal advice is provided within that framework. If required, parties may also engage the involvement of neutral external experts (such as accountants, valuers, psychologists) in a negotiation process termed 'collaborative practice'.[8] The cornerstone of the process is that both parties and their respective lawyers enter into an agreement not to litigate, where each lawyer is disqualified from representation if the parties withdraw from the negotiation process.[9] The process can be applied in any personal or commercial conflict that may lead to civil litigation, but has received the most attention for its positive and therapeutic effects in the family law context.[10]

Therapeutic Australian Family Law

Collaborative law is therapeutic jurisprudence in practice and therefore has the potential for growth and longevity in an area of law, of which the policy, practices and application are increasingly influenced by therapeutic jurisprudence theory.[11] Therapeutic jurisprudence acknowledges that:

> *[T]he operation of the law and its institutions impacts upon the wellbeing of all those affected by them.*[12]

The theory suggests that the use of knowledge and findings from the behavioural sciences can assist in crafting laws and legal processes[13] and that legal outcomes which also address wider personal wellbeing can be achieved. Therapeutic jurisprudence seeks to promote participant wellbeing and minimise anti-therapeutic consequences by directly involving clients and other professionals in dispute resolution processes, rather than relinquishing all decision-making control to lawyers or independent third parties.[14]

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5 M. Evers, "The ethics of collaborative practice" (2008) 19 *Alternative Dispute Resolution Journal* 179 at 179; Queensland Collaborative Law, *What is Collaborative Law Practice?* (23 March 2013) Queensland Collaborative Law, http://www.qldcollablaw.com.au/what_collaborative_practice.

6 P Tesler, 'Collaborative Family Law' (2008) *Pepperdine Dispute Resolution Law Journal*: Volume. 4: Issue. 3, Article 2.322.

7 D. Cooper, "The family law dispute resolution spectrum" (2007) 18 *Alternative Dispute Resolution Journal* 234 at 238.

8 A. Ardagh, "Evaluating collaborative law in Australia: A case study of family lawyers in the ACT" (2010) 21 *Alternative Dispute Resolution Journal* 204 at 204.

9 M. Scott, "Collaborative Law: A new role for lawyers" (2004) 15 *Alternative Dispute Resolution Journal* 207 at 211.

10 A. Ardagh & G. Cumes, "The legal profession post-ADR: From mediation to collaborative law" (2007) 18 *Alternative Dispute Resolution Journal* 205 at 210.

11 M.S. King, "Reflections in ADR, judging and non-adversarial justice: Parallels and future developments" (2012) 22 *Journal of Judicial Administration* 76 at 78-79.

12 M.S. King, 'The Therapeutic Dimension of Judging: The Example of Sentencing' (2006) 16 *Journal of Judicial Administration* 92 at 92.

13 M. King, "Therapeutic jurisprudence initiatives in Australia and New Zealand and the overseas experience" (2011) 21 *Journal of Judicial Administration* 19 at 19.

14 Stolle DP, Wexler DB, Winick BJ (eds), *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Carolina Academic Press, 2000) p 7.

The current aim of family law policy is to provide a more holistic and therapeutic way of managing and resolving these interpersonal legal disputes. This is most evident in the Family Court's endorsement of case management policy and adoption of pre-litigation rules that encourage the use of ADR,[15] a move that is arguably underpinned by therapeutic principles. Since the inception of the *Family Law Act*,[16] the increasing aim of the legislature has been to bring about a cultural shift in people's perceptions of family relationships and to manage the issues arising from separation in a non-adversarial forum, and within co-operative negotiations that focus on the children.[17] When the 2006 amendments to Part VII of the *Family Law Act*, contained within the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, came into force the Government clearly envisaged an environment and process within which the responsibilities and role of each parent would be regarded as integral to the promotion of the best interests of the child. At the same time as these legislative amendments were made, the Government introduced a number of Family Relationships Centres where the new form of mediation, Family Dispute Resolution (FDR), could occur. Those centres, and private Family Dispute Resolution practitioners, began to conduct the mediations which would, ideally, facilitate dispute resolution within what might be described as a therapeutic jurisprudential model and, if resolution was not possible, provide the certification that would enable litigation to be commenced. It is arguable that the application of the FDR process has, in practice, developed somewhat differently to what had been anticipated by the legislators.

As an ADR process, collaborative practice would appear more capable of delivering the aspirations of the therapeutic jurisprudence ethos, and the Family Law Act's therapeutic objectives.[18] Unlike the traditional adversarial system, collaborative practice seeks to appropriately address and manage the highly emotional aspects of disputes by removing parties from an adversarial forum that often escalates conflict and fosters environments of low trust, defensiveness and rigidity.[19] Parties instead embrace a co-operative, non-adversarial environment that promotes openness, flexibility and a willingness to resolve the dispute as amicably as possible.[20] In doing so, the nature, framework and agenda of collaborative law aims to lessen the emotional strain and anti-therapeutic consequences experienced by disputing parties in the course of litigation and other forms of ADR.[21]

Collaborative Law's Therapeutic Benefits for Clients

It is not suggested that collaborative practice offers an opportunity to 'treat' parties in a therapeutic counselling sense, but it is well accepted in family law that litigation has destructive emotional and financial consequences for parties.[22] The collaborative process requires lawyers to direct the resolution

15 S60I *Family Law Act 1975 (Cth);* King, above n 7 at 79.

16 Family Law Act 1975 (Cth).

17 J. Gutman, "Legal ethics in ADR practice: Has coercion become the norm?" (2010) 21 *Alternative Dispute Resolution Journal* 218 at 221.

18 King, above n 9 at 78-79.

19 Scott, above n 7 at 209-210.

20 C. Counsel, "What is this thing called collaborative law?" (2010) 85 *Family Matters 2010 – Australian Institute of Family Studies* 77 at 78.

21 Evers, above n 3 at 179.

22 D. Bryant CJ & J. Faulks DCJ, "The "helping court" comes full circle: The application and use of therapeutic jurisprudence in the Family Court of Australia" (2007) 17 *Journal of Judicial Administration* 93 at 95.

of disputes through a process that aims to produce just outcomes for both parties, by promoting constructive communications which focus on the interests of each party and the best interests of any children involved.[23] Collaborative law uniquely allows for the inclusion of non-legal issues in negotiations, as they are often embedded in the foundations of family law disputes.[24] Consequently, parties may feel some level of satisfaction with and control over the outcome, as opposed to dissatisfaction and disempowerment following the resolution of their dispute by a court. In an evaluative study of collaborative law in the Australian Capital Territory, practitioners were interviewed about their general perceptions of collaborative law's effects on clients. One practitioner observed that in a complicated collaborative law case, the result following the resolution of the dispute was comparable with that which would have resulted through litigation.[25] However, it was noted that because of the collaborative process, the client was in a far better position emotionally than if the matter had been litigated, and had been spared the destructive and highly stressful experience of litigation.[26] It is not difficult to see that the ongoing relationship between co-parents has the potential to be vastly different depending on the process engaged in to resolve the issues between them.

Properly managed, the collaborative law environment has the potential to diminish rather than exacerbate both the power imbalances that may exist between parties and the coercive outcomes experienced in an adversarial forum and other traditional ADR processes such as mediation.[27] Instead, parties are provided with an environment that enhances their potential access to justice and seeks to maintain trust between them by conducting negotiations in which the focus is not about winning and losing, but on negotiating a mutually acceptable agreement.[28] In doing so, collaborative law is highly beneficial to parties with children who are involved in an ongoing familial relationship. By working collaboratively, parties are able to begin developing a different but workable relationship with one another and a framework of parenting apart that still focuses on the children and preserves the concept of 'family'.[29] This is a feat not so easily accomplished in traditional ADR frameworks.

The Demand for a New ADR Framework

Collaborative law answers Australian family law's call for a new, therapeutic ADR framework that overcomes the shortcomings of existing ADR frameworks. Unlike mediation and other ADR processes, collaborative practice seeks to operate outside the shadow of the court and is performed completely within a non-litigious framework.[30] This framework sees lawyers and clients working as one settlement team that strives towards agreement, as opposed to other ADR models in which two teams of lawyer and client are pitted against one another throughout the negotiation process.[31] Unlike other ADR

23 Ardagh, above n 6 at 213.
24 Counsel, above n 20 at 78.
25 Ardagh, above n 6 at 209.
26 Ardagh, above n 6 at 209.
27 Gutman, no 17 at 220.
28 Counsel, above n 20 at 78.
29 Counsel, above n 20 at 78.
30 Evers, above n 3 at 180.
31 Ardagh, above n 6 at 204.

processes such as mediation, collaborative law evades the possibility of the process unravelling because of outside, often lawyer-related, influences by involving both lawyers in listening to and dealing with the parties at the same time.[32] With all members committed to the process and to avoiding litigation, the litigious mindset often present in other ADR processes must be reworked and avoided.[33] Similarly, parties are not compelled to participate in negotiations and then pressured to settle on a strict time frame.[34] In the collaborative process, clients set the pace for client-focused interest-based negotiations; they are responsible for setting agenda items, the frequency of meetings and the involvement of any multi-disciplinary professionals.[35]

Consequently, clients may find the collaborative process more financially beneficial than other ADR processes as it gives them the opportunity to develop cost-effective and fair resolutions that best service their criteria for resolving the particular dispute.[36] Collaborative law avoids the continuous paper warfare occurring between lawyers in litigation and other ADR processes over a lengthy period.[37] Instead, clients are present at all times during the negotiation process and are empowered to directly participate in discussions and to control the collaborative expenses, which can result in greater client ownership of outcomes.[38] Clients must pre-approve expenditure at all stages of the process and agree as to the method of payment of any professionals involved.[39] Consequently, and distinct from other ADR processes, the "needs" of parties, whether they be strictly financial or emotionally inclusive, are considered by both parties in the context of determining the best outcome for the family as a whole.[40]

Ironing Out the Kinks in Collaborative Law

However, collaborative law's introduction has not been without its complications and the growth of the practice has been challenged by a number of ethical concerns surrounding its current practice in the Australian family law context.[41] The Law Council of Australia has recently sought to mitigate some of these concerns by developing and implementing the 'Australian Collaborative Practice Guidelines for Lawyers' in 2011.[42] The Guidelines seek to address the discrepancies between the applicability of the adversarial ethical framework and the collaborative practice principles,[43] by defining the nature and scope of the professional and ethical responsibilities specific to collaborative practitioners, devising a framework for conducting the process and setting standards for lawyers training.

32 Ardagh, above n 6 at 214.
33 Ardagh, above n 6 at 215.
34 ALRC, Managing Justice: A Review of the Federal Civil Justice System, No 89 (2000) pp 76-78.
35 Counsel, above n 20 at 78.
36 Ardagh & Cumes, above n 8 at 210.
37 Ardagh, above n 6 at 213.
38 Counsel, above n 20 at 78.
39 Counsel, above n 20 at 78.
40 Counsel, above n 20 at 78.
41 Evers, above n 3 at 188.
42 Law Council of Australia, above n 2.
43 Evers, above n 3 at 181; D. Jaku-Greenfield, "Family dispute resolution: The importance of clear protocols for cooperation between family relationship service providers and family lawyers" (2012) 2 *Family Law Review* 225 at 226.

Collaborative practice developed in the United States in response to the perceived damaging effects of the adversarial system (which included no mechanism for court sanctioned ADR, as is the case in this country) and commentators have urged caution against slavishly applying the model without reflecting on the differences between the American and Australian legal culture.[44] There is merit in such a caution in light of the other ADR processes available, however, what collaborative practice offers parties is a wholly different experience to that provided for in the traditional ADR processes adopted in the course of, or on the cusp of, litigation.

It is also arguable that legal practitioners working within the team model fall foul of their obligations of 'vigorous advocacy' and more particularly the Australian Solicitors Conduct Rules, which imposes a duty on solicitors to act in the best interests of a client.[45] It is important to note that although the lawyers in the collaborative model adopt non-positional roles to assist discussions, they continue to be engaged in a representative role and remain obliged to provide timely advice to their client. In a client-centric model where clients are encouraged to be responsible for generating the various options for the resolution of the dispute, there is a balance to be found for solicitors in advising clients of, and protecting, their legal rights while allowing them to navigate their own way to a mutually agreeable resolution.

In the absence of substantive empirical research into the Australian collaborative experience, there also remains some concern surrounding the truth of the purported 'cost-effectiveness' of collaborative law. Clients are necessarily required to participate in multiple sessions when undertaking the process, with each session having the potential of costing more than other ADR sessions if the team model is adopted.[46] A number of the initial sessions are purely administrative, rather than directly substantive in terms of resolving the dispute in question, and this raises the concern that the process is a very expensive piece of decision making.[47] Notably, the 'purist' collaborative law model, which involves legal representatives only as opposed to the collaborative practice model which involves multidisciplinary teams, may well be less expensive.[48]

In the ACT study, practitioners conceded that there is a substantial cost still involved in resolving disputes through collaborative practice, but noted that practitioners, through experience, are getting better at cost management.[49] Similarly, the Collaborative Practice Guidelines stipulate that practitioners should avoid conflicts between their own personal, entrepreneurial interests with those of their client.[50] However, the Collaborative Practitioners Guidelines do not provide a mechanism for checking ethical accountability that is specific to the practice,[51] and instead relies on traditional adversarial mechanisms with possibly little understanding of the subtleties of the collaborative process.

44 A Ardagh, 'Repositioning the Legal Profession in ADR Services: The Place of Collaborative Law in the New Family Law System in Australia' (2008) 8(1) *Queensland University of Technology; Law and Justice Journal* 238.
45 See Australian Solicitors Conduct Rules 2012, Law Council of Australia Rule 4.1.1.
46 Gutman, above n 17 at 222.
47 Ardagh, above n 6 at 213.
48 Ardagh, above n 6 at 210, 212-213.
49 Ardagh, above n 6 at 213.
50 Law Council of Australia, above n 2 at 7-8.
51 Ardagh & Cumes, above n 8 at 211.

Conclusion

In an area of law advocating change in the way people perceive and think about family relationships and their dissolution, Australian family law legislators sought to embrace therapeutic justice. Collaborative law is an example of this ethos in practice. It is a process which is gradually being perfected to create a method of resolving disputes that does not destroy families but leaves parties more satisfied and the new family unit, perhaps unconventionally, intact.