

COLLABORATIVE PRACTICE

BRINGING LAWYERS, FINANCIAL SPECIALISTS, AND COUNSELLORS TOGETHER TO HELP SOME SEPARATING FAMILIES SETTLE DISPUTES OUTSIDE THE JUDICIAL SYSTEM

BY VIVIANE WINGERAK, RCC, AND CAROLYN OIEN, LAWYER

Under the new Family Law Act, the use of collaborative practice in assisting separating families has increased. Here's an overview of how it works and why it is proving helpful for some families.

Those of us who serve separating families are aware that resolving conflict through the court system does not usually address family issues. The

justice system is based on an adversarial process, where the law is applied to the evidence presented, and a judge renders a decision. The parties to the litigation are adversaries and the lawyers who represent them are obligated to put their best case before the judge by providing evidence that is favourable to their client and unfavourable to the other side.

Unfortunately, this leads to situations where parents of the same children become even more polarized and are incapable of working together for the

best interests of the children. Typically, multiple applications are still made to the court to resolve even the simplest of issues following a "final" decision.

While their parents fight over them, the children may feel left behind in this conflict; thus, different means of settling disputes outside the judicial system were developed.

THE FAMILY LAW ACT

With the coming into force of the Family Law Act (FLA) on March 18, 2013, a demand for counsellors' expertise and collaboration in the separation and divorce processes seems to be on the rise. This makes sense, as the FLA requires the focus to be "the best interests of the child." These words have been commonly used over the years but



often mean different things to different people, and the lack of a consistent determination of what is in the best interests of each child has fuelled litigation.

In high-conflict separations, it may be left to judges to decide what is best for children, but legal professionals often lack specialized training regarding the best outcomes for children or the unique skills required to interview children, particularly the younger ones. A counsellor with specialized training is invaluable in assisting parties to determine and act truly in the best interests of the children.

Child therapists, on the other hand, may be well versed in family violence screening, child-development theories, and child-interviewing skills; however,

they may lack clarity of the FLA and their professional obligations under the FLA within the separation and divorce process. Counsellors are often contacted during a separation to provide services to a child, while there are other unclear agendas such as parental desire for a child to make a disclosure against the other parent or for the counsellor to make a determination that one parent or home is superior to the other. This can cause a large number of professional complications for the counsellor, and the goals of therapy may not be clearly defined nor achieved.

Clarifying the role of the counsellor and the goals of services also helps to define who the client actually is: the child, a parent, the family, a parenting coordinator, or even the court. This has

an impact on how informed consent is obtained and what counsellors share about limits of confidentiality, note taking, record keeping, and how progress is tracked.

In addition to counselling support for children or families undergoing separation or divorce, counsellors can take on a number of relatively new roles in alternative dispute resolution processes (ADR), such as completing "Hear the Child" and "Views of the Child" reports, or even acting as a parenting coordinator, a very specialized role. These roles still fall within a more polarized and adversarial process, which is, unfortunately, the more common legal process for separating and divorcing couples.

Taking on these alternative jobs

requires that counsellors practise within the scope of more specialized knowledge, training, and experience. There are associations, such as the BC Parenting Coordinators' Roster Society and the BC Hear the Child Society, where counsellors can ensure they have met the competency requirements for the roles they are accepting in the ADR process. Such roles deserve careful attention and should be studied in depth by counsellors serving children and families through separation and divorce.

COLLABORATIVE FAMILY PRACTICE

Another option to settle family matters outside the judicial system is collaborative family practice. Unlike other options, collaborative family practice involves a team of professionals who, together, work with families to settle all issues of parenting, support, and asset division.

The parties each retain a family law lawyer who is trained in collaborative

practice to provide them with guidance and legal advice. The role of the collaborative practice lawyer is not adversarial; instead, the two lawyers work together to develop a settlement plan and finalize terms. The parties and their respective lawyers agree — and, in fact, sign a contract — that if the process is terminated and the parties are heading off to court, the team of professionals involved will not represent the parties nor be called to court to give evidence. The entire process is intended to be confidential, and anything said or done while engaging in the process cannot be brought up in subsequent court proceedings. The only exceptions to this rule are if there were child protection issues or criminal law issues.

The collaborative law team is completed, as the need arises, by a divorce coach/child specialist when parenting or emotional issues prevent a settlement, and/or a financial specialist, when financial issues, including support

and division of assets and debts, may lead to a gridlock. This multidisciplinary team is invited by the lawyers to assist parents in resolving the issues of their separation and becomes party to the same contract mentioned above.

THE COLLABORATIVE COUNSELLOR'S ROLE

Counsellors can typically take on the roles of a parenting coach or a child specialist. Parenting coaches specialize in supporting parents through adjustment, conflict, emotional struggles, and triggers that interfere with their ability to move forward towards the reconstruction of the family unit.

Child specialists are also instrumental members of the group, calling the process's attention toward the changing needs of children through the separation process. Child specialists may or may not meet with children directly, and when they do, there is clarity that meetings are

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The Most Common Complaint

Counsellors who choose to work with high-conflict separating and divorcing families know — or certainly should expect — that someone is always going to be unhappy.

In fact, 30 per cent of all complaints against counsellors received by the BCACC over the past five years are in the high-conflict family realm.

"It is always a challenge to work with high-conflict families — it's not for the faint of heart," says Angela Burns, the BCACC Registrar. "But it's really important work. The bottom line for these professionals is always going to be the best interests of the children."

However, she adds, "We don't want to deter people from entering into this

area of practice just because it tends to draw complaints."

These cases attract complaints because the stakes are so high.

"Being in receipt of a complaint doesn't necessarily mean that you've done anything wrong," says Burns.

When a complaint is received, a BCACC investigator seeks to substantiate the allegations against the counsellor — for example, alienating someone or writing biased reports. The investigator gathers evidence and summarizes where the evidence substantiates the allegations and where it doesn't, and they may also identify allegations that cannot be substantiated. An independent expert may be asked to



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meant to inform the collaborative team, so that parents and professionals can make decisions that fit best with the individual needs of the children. Child specialists help the process to move past stagnant conflict towards a mutual focus on the security, routine, stability, and well-being of children. The goals include maximizing a sense of family collaboration and minimizing conflict or overall adversity to which the children are exposed. It is important

that children are aware that they cannot expect the confidentiality of a traditional therapeutic relationship.

In both of these roles, the counsellor works as a neutral party and as part of a team that shares common non-adversarial goals for the benefit of the children involved and, consequently, their parents and families. Contrary to the traditional adversarial approach, it should be theoretically easier for the counsellor to maintain neutrality as a

member of a collaborative law team, because goals are discussed openly with both parties present, including their respective lawyers and, often, financial professionals.

Transparency is at the core of the collaborative process, and it may greatly decrease the chances of misconceptions from any member of the working group. There may also be significant benefits in preventing professionals from the well-known systemic phenomenon of being

weigh in on the complaint materials. The inquiry committee then reviews the case with an eye to negotiating corrective actions, where warranted.

"We've actually dismissed cases just from having an expert review them," says Burns.

It is important to note that the inquiry process is a non-punitive review.

"It can result in someone having to take a course, get clinical supervision, or write a reflective letter about what they've learned as a result of receiving a complaint," says Burns. "The inquiry process is much less formal than a discipline hearing."

That said, because high-conflict family cases are so sensitive to complaints, there are some common pitfalls — and most are a result of working in isolation.



"If you're not part of a peer group who is doing this work, and you're not linked to good legal backing and a good clinical supervisor, these would be areas for consideration," says Burns. "At least, start by getting a clinical supervisor when you're starting with a family and consider having a colleague read your report before you release it."

Making sure you have adequate training before taking on this kind of case is another key consideration, and, again, a clinical supervisor and a peer support group can help guide that training.

Having peer and supervisory support behind you also helps to prevent another common pitfall: burnout.

"This is a high-stress area to

work in, and the general rule of burnout is that the person burning out is the last to know," says Burns. "An advantage of working with a peer group is that your own peers may tell you when it's time to add some other types of work into your practice so you're not doing only this. Or they may tell you to pull back a little bit, because you just worked on a tough case and you need to give yourself some rest."

Burns emphasizes that we want to support and encourage counsellors working in this challenging area.

"And we really want to applaud these professionals who are doing this kind of work," she adds. "It's necessary work. It's tough work. And, with a few exceptions, they're doing a great job."



“caught in the middle,” often mimicking what happens for children of divorce and their communities of support being split into separate adversarial sides.

With the counsellor being able to act as a neutral party under a clear agreement in a multidisciplinary group, the hope can rise that goals are more likely to be met, and that counsellors face significantly decreased ethical and legal issues from being “caught in the middle” of high-conflict litigious process.

While there is clarity regarding the end of services for collaborative lawyers, should a family later decide to litigate, counsellors may have a more complicated ethical decision to make when he or she has provided services to a child, which may require continuation.

CHILD SPECIALISTS HELP THE PROCESS TO MOVE PAST STAGNANT CONFLICT TOWARDS A MUTUAL FOCUS ON THE SECURITY, ROUTINE, STABILITY, AND WELL-BEING OF CHILDREN.

HOW TO DETERMINE IF COLLABORATION IS APPROPRIATE

In determining if the collaborative process is appropriate for a separating family, the professionals involved must screen for family or intimate partner violence. Although the presence of a significant power imbalance in a family does not preclude the use of the process, the screening does assist the practitioners to plan how the negotiations will be conducted.

It is important to consider the risks of the process to the family members in the case of violence, as well as the appropriateness of a collaborative

process when a significant power imbalance or mental health issues do not allow parties to resolve conflict without the intervention of an authority figure, such as a judge.

When concerns arise but the family can still be safely served outside the courts, the involvement of two parenting coaches will likely be necessary, so each party has a safe space and counsellor to confide in. The counsellors' roles will be difficult, balancing support to each party and collaboration with the other professionals involved to move the parties towards an amicable settlement.

Counsellors who are not comfortable with this dichotomy should avoid these types of cases. In cases where multiple counsellors are needed to create safety and balance within the process, counsellors must work together to avoid parties trying to cast them in the role of advocate for their side, while maintaining focus on the best interests of the child and the needs of the family and its vulnerable members. The topic of family or intimate partner violence in ADR, including its screening and management, warrants its own in-depth discussion, best facilitated through the voices of anti-violence experts.

TRAINING REQUIREMENTS

Counsellors who wish to be members of a collaborative practice team are strongly urged to seek direction in determining the specialized training requirements. The BC Collaborative Roster Society has created a set of requirements that can guide professional development in this area. In addition, the International Academy of Collaborative Professionals has issued a code of ethics that can be used and further developed by local professional groups.

While the learning curve towards professional competency in collaborative law may seem like a daunting and never-ending process, there is a great deal of hope that we can offer a service that will better address the needs of children of separating families in a much more effective, cohesive, and systemic way.

Counsellors may also face a decreased number of professional complaints arising from their participation in adversarial processes. Through education and professional collaboration, counsellors may be better able to define their roles and to explain

to clients when the services offered by a clinical counsellor do not actually constitute traditional counselling.

As collaborative law grows, we should see the benefits of this process in the form of positive outcomes for separated families. Its real strength truly lies in all three professional groups working together with the family and applying their specialized skills as a cohesive team. The process flows as counsellors work with the families to address emotional, psychological,



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and family dynamic issues; the financial specialists assist the family to reasonably allocate resources and divide assets and debts considering tax issues; and the lawyers help to develop a plan that complies with the requirements of the statutes involved and to write up agreements that are understandable and enforceable. The parties who use this process should, as a result, be better able to make the transition from an intact family to a separated family in the healthiest way and to learn ways of communicating with one another that avoid multiple trips to court. ■

Carolyn Oien was called to the B.C. bar in 1990 and has practised family law for 28 years. She is one of the founding members and an active co-chair of the Kamloops Collaborative Family Law Association.

Viviane Wingerak, RCC, has practised as a clinical counsellor since 2003. She is one of the owners of Synergy Counselling Associates and a founding member of the Kamloops Collaborative Family Law Association.

RESOURCES

<http://www.bcparentingcoordinators.com/>

<http://hearthechild.ca/>

Free ebook for distribution: <https://collaborativefamilylaw.ca/free-ebook-pathways-amicable-divorce/>

RESOURCE FOR PROFESSIONALS AND PARENTS

<http://www.afccnet.org/>

<https://www.collaborativepractice.com/professional/resources/iacp-standards-and-ethics.aspx>

<http://www.bccollaborativerostersociety.com/membership/BCCRS-membership-requirement.pdf>

<http://kamloopscollaborativefamilylaw.com/>