

THE BEST INTERESTS OF THE CHILD AND THE POTENTIAL OF  
COLLABORATIVE FAMILY LAW:

A Critical Analysis of Collaborative Lawyers' Perspectives on Important Issues in  
Collaborative Practice

by

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## **Abstract**

Children are very important to the future of Canadian society. In addition to being one of the most cherished aspects of parents' lives, they represent Canada's future politically, economically and socially. Family conflict, and resulting events such as divorce or separation, can represent a significant challenge to healthy child development. The manner in which family disputes are resolved between parents therefore has an important role to play in ensuring the healthy development of children. To that end, it is incumbent upon those engaged with the topic of family dispute resolution, to further explore family dispute resolution methods that have potential to help achieve these goals.

Collaborative family law, with its emphasis on a more holistic approach to resolving family disputes, appears to be one promising method. The literature review contained herein reveals the potential of collaborative law to help children and families. It also identifies several key issues with the collaborative process that collaborative lawyers should think about when trying to achieve this goal.

The interview study that forms a key part of this thesis is focused on the collaborative family law model practiced in the Vancouver area. The study involved semi-structured interviews of ten collaborative lawyers. A set of standard questions, and flexible follow ups as necessary, were asked of each lawyer, concerning difficult issues with collaborative family law as identified in the literature. The goal of these interviews was to obtain lawyers' perspectives on important issues facing their practice. Few such studies have been done in Canada.

The result was an in depth exploration and critical analysis of major issues facing those practicing collaborative family law, and how collaborative lawyers in the Vancouver area address these issues. The success of collaborative family law at maximizing its benefit to families is arguably contingent upon suitable families choosing the collaborative process, as well as the proper execution of the process to suit the individual needs of each family. Hopefully, the discussion herein will further the pursuit of these objectives.

## **Preface**

This thesis is original, unpublished, independent work by the author, Matthew Ledger. The fieldwork reported herein was covered by UBC Behavioural Research and Ethics Board Certificate Number H13-01552.

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I would also like to thank my family, especially my mother, without whose support this would not have been possible.

## **Chapter 1: Study Background and the Effects of Family Conflict on Children**

### **Introduction – Background and Importance of Study**

The importance of children to humanity is indisputable. To many parents, including those that are divorcing or separating, their children are the most cherished aspect of their lives. Children also represent the future of our society, and as such are arguably the world's most important investment. They provide the social, intellectual, economic and political capital that will sustain our society going forward. They will ultimately grow into adults who will be responsible for all the major decisions facing our country in the years ahead. It is arguable that on balance, healthy and psychologically well-adjusted adults will make better decisions for themselves and society than those who are unhealthy. In addition to being a moral obligation, promoting the mental and emotional health of children is therefore essential for Canada's economic, social, and political future.

Making real progress towards this objective is no easy task. A plethora of research, which will be analyzed in greater detail in the first and second chapters of this thesis, shows that the family unit plays a determinative role in shaping a child's growth and development into adulthood. This is even more significant because family relationship behaviours are often passed from one generation to the next.<sup>1</sup> Yet there is little consensus on what constitutes the best interests of children. Measures concerning what constitutes healthy child development are likely to vary from household to household. The diversity of values and perspectives in Canadian society concerning child-rearing complicates matters, and makes absolute determinations in this area very difficult to achieve. In addition to the obvious desirability of preserving a healthy

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<sup>1</sup> J. Reynolds, L. Coleman, C. Houlston, G.T. Harold. *Parental Conflict: Outcomes and Interventions for Children and Families: Executive Summary*, (Bristol: Policy Press, 2014) Executive Summary at 1-4.

degree of individual freedom around raising children, parents arguably have the most influence on their children, and are usually best positioned to understand and support their developmental needs. While parental freedom cannot be absolute, the bulk of the responsibility for achieving this goal must therefore necessarily fall on the individual family units themselves.

However, families are being tasked with shouldering this responsibility at a time of relative family instability in North American culture. Divorce and separation rates remain substantial in North America, and show little sign of abating. In 2002, the National Center for Health Statistics in the United States predicted that 43% of current marriages would end in divorce.<sup>2</sup> In 2005, the US Census Bureau found that 1 in 5 American adults had been divorced.<sup>3</sup> This is particularly significant when one considers that children under eighteen years of age account for more than half of all children affected by divorce, and about half of all divorces involve children.<sup>4</sup> Canada's numbers, though not as high, are still significant. According to the 2011 General Social Survey on Families, approximately 5 million Canadians had separated or divorced within the last twenty years.<sup>5</sup> At that time, 24% of these had at least one child 18 years or younger together with their separated spouse or common law partner.<sup>6</sup> This means that from 1991 – 2011, roughly 1.2 million Canadian parents were no longer in a common law or spousal

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2 M. Mitcham-Smith and W. J. Henry. "High Conflict Divorce Solutions: Parenting Coordination as an Innovative CoParenting Intervention." (October 2007) 15:4 *The Family Journal: Counseling and Therapy for Couples and Families*, 368 at 368. Citing U.S. Census Bureau. (2003, October) *Marital Status: 2000, Census 2000 brief*. <<http://www.census.gov/prod/2003pubs/c2kbr-30.pdf>> accessed 27 September 2006.

3 Ibid. Citing U.S. Census Bureau (2005, June 29) *America's families and living arrangements: 2004 Table A1. Marital status of people 15 years and over, by age, sex, personal earnings, race, and Hispanic origin, 2004*. <<http://www.census.gov/population/www.socdemo/hh-fam/cps2004.html>> accessed 27 September 2006

4 Ibid. Citing Paul R. Amato. "The Consequences of Divorce for Adults and Children." (2000) 62:4 *Journal of Marriage and the Family* 1269-1287. Also citing Linda Elrod. "Reforming the System to Protect Children in High Conflict Custody Cases." (2001) 28:2 *William Mitchell Law Review* 495-551.

5 M. Sinha. "Spotlight on Canadians: Results from the General Social Survey on Parenting and Child Support After Separation or Divorce." Statistics Canada, Catalogue no. 89-652-X – No. 001, ISBN 978-1-100-23114-3, February 2014 at 5.

6 Ibid.

relationship with their child's other parent.<sup>7</sup> This is a substantial number in a country of just over 36 million people.<sup>8</sup>

This instability leads one to the conclusion that Canada's legal and family dispute resolution systems have an important, if indirect role to play in child development, and will continue to do so into the future. It is incumbent on our society to explore ways to promote healthy family transitions arising as a result of divorce or separation. In addition to meeting the needs of parents as clients, the goal of the legal system should be to promote outcomes and processes that maximize the parent's capacity to meet the needs of their children, while minimizing children's exposure to harmful interactions with their parents during this period. This approach is consistent with Canada's governing federal and provincial family law statutes, which mandate that the “best interests of the child” is either the “only” or “paramount” consideration, for the courts when making determinations in this area.<sup>9</sup>

In Chapters One and Two, this thesis provides an in-depth analysis of the literature concerning the effects of family conflict on children, and explores the issue of mitigating these effects during the particularly difficult transition caused by a divorce or separation. In Chapter Three, this thesis examines the literature on a relatively new form of dispute resolution called collaborative family law. Collaborative family law is targeted as a case study because it represents a holistic method of family dispute resolution that has potential to help address this very complicated issue. Another goal here is to provide a discussion of some of the key issues facing practicing collaborative lawyers, as identified in the literature, and by ten practitioners in the Vancouver area, with whom interviews were conducted. This discussion can be found in

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7 Ibid.

8 Statistics Canada. *Estimates of Population, Canada, Provinces and Territories, Quarterly (Persons)*, Table 051-005, online: <<http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=510005>> accessed 26 April 2017.

9 *Divorce Act*, RSC 1985, c. 3, s. 16 (8). *Family Law Act*, SBC 2011, c. 25, s. 37(1)., *Family Law Act*, SA 2003, c. F-4.5, s. 18 (1).

Chapters 4 and 5, along with a review of the interview study's methodology. The hope is that discussing these issues from a child-centred perspective can assist collaborative practitioners in better serving clients and their children.

### **The Impact of High Conflict on Children**

Questions remain as to what constitutes a “harmful interaction” for children, and what elements provide for a “healthy transition” for a family. After all, every child is different, and what affects one child may not have an equivalent impact on another. It is a very difficult if not impossible task, to say for certain what effect particular actions by parents will have on a specific child. Even family counsellors or child scholars with years of training and experience would have tremendous difficulty answering that question, and I do not propose to provide those types of answers here. However, in more general terms, within the academic literature there is a growing consensus concerning the deleterious effects of high family conflict on children. This position is supported by an abundance of social studies information, a brief summary of which is provided below.

Family conflict often occurs irrespective of whether there is a divorce or separation between the parents. Typically, there are ongoing and varying levels of conflict within a family unit and between parents, not all of which is harmful and some of which is healthy. Specific behaviours identified as destructive to children include “interparental aggression or violence, non-verbal conflict, withdrawal during marital conflict, interparental verbal aggression or hostility, aggression by marital partners against objects during marital conflict, conflicts involving threats to the intactness of the family, and conflicts about child-related themes.”<sup>10</sup>

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10 E.M. Cummings and P. Davies. “Effects of Marital Conflict on Children: Recent Advances and Emerging Themes in Process Oriented Research” (2002) 43:1 *Journal of Child Psychology and Psychiatry*, 31 at 35.

When these events are frequent, unresolved, intense or about the child, it places the child at risk.<sup>11</sup> Cummings and Davies note that “marital conflict occurs in a family context”, and that family factors such as marital conflict, parental depression, and other aspects of parenting can “have co-linear effects on children's adjustment.”<sup>12</sup> When parental depression and marital conflict occur at the same time, “joint effects on children are reported.”<sup>13</sup> Many of these factors often occur at the same time, and their confluence can compound the effects on a child's development.

High conflict parental behaviours are characterized in the literature by parental inability to communicate civilly, intense or escalating anger, and entrenched long-term verbal or physical conflict.<sup>14</sup> Psychological and physical abuse are often, but not always, present in the relationship. High conflict parents have a penchant for dualistic thinking, seeing things as black and white, good or bad, all or nothing.<sup>15</sup> They tend to lack awareness and have minimal understanding regarding the effects of their behaviour on their children.<sup>16</sup> The extreme negative behaviours of high-conflict parents are characterized in the literature and by mental health professionals as personality disorders.<sup>17</sup>

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11 M. Goeke-Morey, E.M. Cummings, G.T. Harold, K.H. Shelton. “Categories and continua of destructive and constructive marital conflict tactics from the perspective of US and Welsh children.” (2003) 17:3 *Journal of Family Psychology*, 327–338. See also P.R. Amato. “The impact of family formation change on the cognitive, social and emotional well-being of the next generation.” (2005) 15:2 *The Future of Children*, 75-96.

12 E.M. Cummings and P. Davies. *Supra* note 10 at 33.

13 *Ibid.* at 33.

14 M. Mitcham-Smith and W.J. Henry. “High-Conflict Divorce Solutions: Parenting Coordination as an Innovative Co-Parenting Intervention.” (2007) 15:4 *The Family Journal: Counseling and Therapy for Couples and Families*, 368 at 368. See also Cummings and Davies. *Supra* note 10 at 33.

15 R. Neff and K Cooper. “Parental Conflict Resolution: Six, Twelve, and Fifteen Month Follow Ups of a High Conflict Program.” (2004) 42:1 *Family Court Review*, 99 at 100.

16 M. Mitcham-Smith and W.J. Henry. *Supra* note 14 at 368.

17 R. Neff and K. Cooper. *Supra* note 15 at 100.

Studies suggest that “between 20-25% of children experience high conflict during their parents' marriage.”<sup>18</sup>

Studies show that prolonged exposure to these behaviours has a potentially wide array of negative consequences for child development. Generally speaking, family conflict and child abuse are regarded as key risk factors for emotional and behaviour problems in adolescents.<sup>19</sup> According to Cummings and Davies, “children react to interparental conflict with elevated levels of fear, distress, and anger across multiple domains of responding.”<sup>20</sup> They note that “the long term consequence of this greater distress is an increase in the risk for forms of psychological maladjustment.”<sup>21</sup> The consequences to children of repeated exposure to high parental conflict can include anxiety, depression, increased anger, aggression, as well as poor behavioural and social adjustment into adulthood.<sup>22</sup>

Children also show dramatic responses to high conflict even where the conflict does not directly involve them. Children and divorce expert Robert E. Emery notes that “children view a parent's behaviour as a reflection of the parent's attitude towards them as well, not just the other parent.”<sup>23</sup> This implies that in such high conflict environments, some children are at risk of

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18 J.B Kelly and R.E. Emery. “Children's Adjustment Following Divorce: Risk and Resilience Perspectives.” (2003) 52:4 *Family Relations*, 352 at 353. Citing A. Booth and P.R. Amato. “Parental Predivorce Relations and Offspring Postdivorce Well-being.” (2001) 63:1 *Journal of Marriage and Family*, 197-212., E.M. Hetherington, (1999) “Should we stay together for the sake of the children?” in E.M. Hetherington (Ed.) *Coping with divorce, single parenting, and re-marriage* 93-116, Mahwah, NJ: Erlbaum.

19 B.B. Asgeirsdottir et al. “Associations Between Sexual Abuse and Family Conflict/Violence, Self-Injurious Behaviour, and Substance Use: The Mediating Role of Depressed Mood and Anger.” (2011) 35:3 *Child Abuse and Neglect*, 210 at 210. Citing Haggerty, R., Sherrod, L.R., Garnezy, N., and Rutter, M. (Eds.) *Stress, risk and resilience in children and adolescents. Processes, mechanisms and Interventions*. (Cambridge: Cambridge University Press, 1996). See also, Turner, H. A., Finkelhor, D., Ormrod, R. “The Effect of Lifetime Victimization on the Mental Health of Children and Adolescents.” (2006) 62 *Social Science and Medicine*, 13-27.

20 E.M. Cummings and P. Davies. *Supra* note 10 at 42.

21 *Ibid.* at p. 43.

22 J.S. Wallerstein and J.M. Lewis. “The Unexpected Legacy of Divorce: Report of a 25-Year Study” (2004) 21:3 *Psychoanalytic Psychology* 353. See also Asgeirsdottir, B.B., et al. *Supra* note 19., Cummings and Davies. *Supra* note 10., Van Goozen, S., Fairchild G., Snoek, H., and Harold, G.T. “The evidence for a neurobiological model of childhood anti-social behaviour.” (2007) 133:1 *Psychological Bulletin*, 149-182.

23 R.E. Emery. *The Truth About Children and Divorce*. (New York: Penguin Group, 2004) at 92.

internalizing the conflict between their parents as a reflection on themselves. Additional research indeed shows that “children's cognitions of self, including self-blame and perceived threat to self, [are] affected by marital conflict.”<sup>24</sup> Other children will externalize the behaviour that they are exposed to, taking it out on others.<sup>25</sup> The variation amongst children in terms of how they will react to exposure to high conflict behaviours by their parents, is perhaps partially explained by the fact that “effects [of such behaviour] on children are more a function of children's perceptions of the meaning of conflicts for themselves and their families than simply the frequency or even the physical characteristics of the conflicts.”<sup>26</sup> Thus, how the child processes and internalizes their parents' behaviour plays a role in determining the effect that that behaviour has on their development. The literature shows that the more children are exposed to such conflict, the more sensitive they become to its impact and the more vulnerable they are to its effects.<sup>27</sup> Minimizing high conflict is therefore critical to positive child development.

This is especially important when one considers that high conflict can also have consequences for future generations within that family unit. According to Elrod, “research shows that children exposed to violence and high levels of conflict, bear an acutely heightened risk of repeating the cycle of conflicted and abusive relationships as they grow up and try to form families of their own.”<sup>28</sup> The importance of managing family conflict therefore extends beyond the just the health of that individual or family unit. This problem has the potential to influence the development and health of future generations.

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24 E.M. Cummings and P. Davies. *Supra* note 10 at 40.

25 B.B. Asgeirsdottir, et al. *Supra* note 19 at 211.

26 E.M. Cummings and P. Davies. *Supra* note 10 at 35.

27 *Ibid.*

28 L. Elrod. “Reforming the System to Protect Children in High Conflict Custody Cases.” (2001) 28:2 Wm. Mitchell L. Rev. 495 at 497.



## **Divorce or Separation and its Implications for Children**

As noted above, the social science literature focuses particularly on high conflict and on the quality of parent and child relationships when it comes to determining the quality of child adjustment and the potential for psychological problems. Many note that it is the nature of the conflict between parents, and the child's perceptions, rather than solely the parental separation or divorce, which is a key factor in determining why some children fair better than others when parental relationships break down.<sup>29</sup> Seen through this lens, the final act of divorce or separation should be regarded as merely the culminating event when assessing its impact on child development. This provides a partial explanation for why some children handle their parents' divorce or separation well, while others are severely negatively affected.

The resiliency of many children is well documented. Scholars are careful to point out that the event of divorce or separation itself is not necessarily harmful for children. In fact, the opposite can be true. To many children, divorce can come as a relief from the stressors associated with the conflict between the parents. According to Emery, social scientists have demonstrated that in many cases, “where there was a high degree of conflict in the two parent family, children fare better following the separation in comparison with how they were doing when their parents were together.”<sup>30</sup> He notes that “troubled family relationships before and after separation are responsible for many of children's emotional problems,”<sup>31</sup> and “scientists have determined that many of the psychological problems found in children after divorce actually begin before parents ever separate.”<sup>32</sup> Further to this point, Kelly and Emery note that “although there are differences

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29 J. Reynolds, L. Coleman, C. Houlston, G.T. Harold. *Supra* note 1 at 3. Citing Pryor, J. and Rodgers, B. *Children in Changing Families: Life After Parental Separation*. (Oxford, UK: Blackwell Publishing, 2001), and Coleman and Glenn. *When Couples Part: Understanding the Consequences for Adults and Children*. (London: OnePlusOne, 2009). See also R.E. Emery. *Supra* note 23 at 68.

30 R.E. Emery. *Supra* note 23 at 101.

31 *Ibid.* at 68.

32 *Ibid.* at 67.

in the average psychological well-being of children from happy married families and divorced families, it is also true that the majority of children from divorced families are emotionally well adjusted.”<sup>33</sup> Divorce or separation does not necessarily have to be harmful to child development or adjustment, and can sometimes provide children with relief from pre-existing difficult circumstances.

Yet while Kelly and Emery show that a majority of divorced children are emotionally well adjusted, this does not remove the need for society to address this issue, nor does it prove that the event of divorce itself is “harmless” or “insignificant” in its impact on child development. Each divorce is different, and can lead to diverse levels of conflict behaviour within a particular family. As noted above, exposure to high conflict has detrimental effects on child development. Research also shows that there are a substantial number of children whose conceptions of family are dramatically altered, and whose lives are unsettled significantly by the specific event of divorce or separation of their parents.<sup>34</sup> This is understandable when one considers that even apart from parental conflict, the divorce or separation of their parents can present children with difficult challenges. These challenges include, but are not limited to, the stress of the initial separation, the loss of important relationships, diminished standard of living, and reduced quality of parenting. Children are sometimes also forced to adjust to the potential presence of new relationship figures in their parents' lives, who can become step parents.

To a child, the divorce or separation of their parents is also not a single event. The literature defines divorce as “a process extending over time that [involves] multiple and potential challenges for children.”<sup>35</sup> One of the primary challenges many children face is the trauma of the

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33 J.B. Kelly and R.E. Emery. *Supra* note 18 at 352.

34 R. Ebling, K.D. Pruett, M.K. Pruett. “Get Over It: Perspectives on Divorce From Young Children.” (2009) 47:4 *Family Court Review*, 665 at 678.

35 Kelly, J.B. And Emery, R.E. *Supra* note 18 at 352.

initial separation. This is particularly prevalent where there is inadequate communication between parents and children regarding the separation or divorce, which exists in most cases. In Dunn's study concerning the perspectives of children, 23% reported that no one had talked to them about the divorce, 45% said they had been given minimal explanation, and only 5% said they had been fully informed and encouraged to ask questions.<sup>36</sup> Kelly and Emery note that studies also show that “the majority of children seem to have little emotional preparation for their parents' separation, and they react to the separation with distress, anxiety, anger, shock and disbelief.”<sup>37</sup> They are often inadequately informed by their parents about the separation and divorce, and are “left to struggle alone with the meaning of this event for their lives, which can cause a sense of isolation and cognitive and emotional confusion.”<sup>38</sup> This highlights the need for parents to engage dispute resolution processes that encourage communication with children around the reasons for the separation, as well as logistics of the divorce and what it will mean for their world going forward.

While a child's initial emotional responses to a divorce or separation typically “diminish or disappear over a period of one to two years,”<sup>39</sup> these effects are compounded by the loss of important relationships in the child's life. Chief among these is the sudden removal of one parent from daily life. Non-resident parents can go weeks or months without seeing their children in the initial aftermath of a divorce or separation. Depending on context, this is not necessarily detrimental to children. As mentioned above, in high-conflict or families with abuse, this could

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36 J. Dunn, L. Davies, T. O'Connor, and W. Sturgess. “Family Lives and Friendships: The Perspectives of Children in Step, Single Parent, and Nonstop Families.” (2001) 15:2 *Journal of Family Psychology*, at 272-287.

37 J.B. Kelly and R.E. Emery. *Supra* note 18 at 353.

38 Ibid. Citing Dunn et al. *Supra* note 36., C. Smart. and B. Neale. “It's My Life Too: Children's Perspectives on Post-Divorce Parenting.” (2000) 30 *Family Law* at 163-169. Wallerstein, J.S. and Kelly, J.B. *Surviving the Breakup: How Children and Parents Cope with Divorce*. (New York: Basic Books, 1980).

39 Ibid. Citing Hetherington, E.M., and Clingempeel, W.G. “Coping with Marital Transitions: A Family Systems Perspective.” (1992) 57 *Monographs of the Society for Research in Child Development*.

be beneficial to a child. A child's choice to reduce or avoid contact with a violent or verbally abusive parent may be a healthy response for children who have become realistically estranged. They can control or limit their exposure to abusive behaviours post separation or divorce, a choice not available to them while their parents are married.<sup>40</sup> Research shows that in the wake of a divorce or separation, children who choose not to visit a parent are “responding to a complex set of factors including: the parents personality problems and parenting deficits, the hostile, polarizing and denigrating behaviours of the parents which encourages alienation, the child's own psychological vulnerabilities and anger; and the extreme hostility generated by the divorce and the adversarial process.”<sup>41</sup> However, in non-abusive cases, where both parents are caring and the child has formed strong attachments to both, “the abrupt and total absence of contact is quite distressing or painful.”<sup>42</sup> In divorce or separation situations, children can also lose important extended family relationships or close friends. This is especially true in relocation cases where the child is forced to change locations to live with one parent.

Diminished parenting post-separation is also a typical problem for children, as “parents are preoccupied with their own emotional responses to divorce, as well the demands of integrating single parenting with work and social needs.”<sup>43</sup> In the whirlwind that accompanies a divorce or separation, it is easy for the child's needs to get lost even by the most well-intentioned parents. This problem is exacerbated when one considers that “divorced parents are more prone to emotional liability, depression, alcoholism and drug abuse.”<sup>44</sup> Hetherington, Wallerstein, and

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40 J.B. Kelly and J.R. Johnston. “The Alienated Child: A Reformulation of Parental Alienation Syndrome.” (2001) 39:3 *Family Court Review*, 249 at 253-254.

41 J.B. Kelly and R.E. Emery. *Supra* note 18 at 355. Citing J.B. Kelly and J.R. Johnston. *Supra* note 40 and J.R. Johnston. “Children of Divorce Who Refuse Visitation.” In C. Depner & J. Bray (Eds.), *Non-resident Parenting: New Vistas in Family Living*. Newbury Park: CA Sage, (1993) at 109-135.

42 *Ibid.* Citing Wallerstein, J.S. and Kelly, J.B. *Surviving the Breakup: How Children and Parents Cope with Divorce*. (New York: Basic Books, 1980).

43 *Ibid.* at 354.

44 *Ibid.*

Kelly note that “some children become the sole emotional support for their distraught and needy parents.”<sup>45</sup> This places the child in the role of the adult and burdens them with the unreasonable expectation of supporting their parents through the separation. The consequence of being put in this position is that the child is forced to deny or repress their own needs, in order to ensure their own security through assisting with a parent's emotional stability.

### **Interplay Between High Conflict and Divorce or Separation**

The rise in conflict level between parents during the divorce or separation process can make all of the above effects worse for children. Escalated conflict levels increase the likelihood that the child could be cut off from important relationships, particularly in the extended family. The quality of the parenting is also more likely to be diminished due to decreased constructive communication between parents and active undermining of the parenting strategies of the other. The lack of cooperation between parents is also likely to negatively influence standard of living and the stress of separation.

These examples contribute to the discussion of why the common thread in much of the research examining damaged children, is the presence of high conflict levels between the parents during and following the divorce or separation process. That combination of the divorce process with high conflict between the parents is particularly toxic for children. Mitcham-Smith and Henry state that “high conflict or hostile divorce causes substantial emotional risk and psychological harm for children, caused by parental fighting, custody evaluations, parental

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45 Ibid. Citing E.M. Hetherington, (1999) “Should we stay together for the sake of the children?” in E.M. Hetherington (Ed.) *Coping with divorce, single parenting, and re-marriage*. Mahwah, NJ: Erlbaum, 1999, at 93-116. and J.S. Wallerstein and J.B.Kelly. *Surviving the Breakup: How Children and Parents Cope with Divorce*. (New York: Basic Books, 1980).

alienation, and ongoing family conflict.”<sup>46</sup> Citing Hetherington, Dr. Susan Gamache, a family therapist and scholar, notes that “children whose parents are divorced are twice as likely to have serious emotional, social, or psychological problems, an increase from ten to twenty percent.”<sup>47</sup> Parental conflict in this context “is thought to account for a large part of the increased risk of psychopathology in children who have divorced parents, as there is strong evidence that conflict negatively impacts on a child’s emotional, behaviour and social adjustment.”<sup>48</sup> Thus, the event of divorce or separation cannot be discounted as a potentially traumatic event for a child, despite evidence that some children are able to cope well with and adjust to the event. The manner in which divorce or separation is handled by the parents is therefore crucial.

Of significant importance to the discussion is the effect of divorce or separation in promoting or in escalating high conflict relationships between parents. Elrod notes that more serious harm comes to children “from parents whose chronic conflict traps children in a maelstrom of experiences and emotion that can erode the child's relationship with one or both parents.”<sup>49</sup> This is particularly true when children get caught in the middle between their parents. As their parents' relationship is unwinding, children can become collateral damage in a war between two sides. When embroiled in protracted conflict, either parent can, in their anger, intentionally or inadvertently attempt to use a child as a weapon against the other parent, or force the child to declare loyalty. Kelly and Emery note that “parents who express their rage toward

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46 M. Mitcham-Smith and W.J Henry. *Supra* note 14 at p. 368. Citing K. Kitzmann, K. and R.E. Emery. “Child and Family Coping One Year After Mediated and Litigated Child and Custody Disputes.” (1994) 8:2 *Journal of Family Psychology* at 150-159. See also Mason, M.A. *The Custody Wars: Why Children Are Losing the Legal Battle and What we Can Do About It*. New York: Basic Books, 1999. See also L.D. Elrod. *Supra* note 28.

47 S. Gamache. “Collaborative Practice: A New Opportunity to Address Children's Best Interest in Divorce” (2004-2005) 65 *La. L. Rev.* 1455 at 1458.

48 H.M. Stallman and J.L. Ohan. “Parenting Style, Parental Adjustment, and Co-Parental Conflict: Differential Predictors of Child Psychosocial Adjustment Following Divorce.” (2016) 33:2 *Journal of Behaviour Change*, 112 at 113.

49 L. Elrod. *Supra* note 28 at p. 496.

their former spouse by asking the children to carry hostile messages, by denigrating the other parent in front of the child, or by prohibiting mention of the other parent in their presence are creating intolerable stress and loyalty conflicts in their children.”<sup>50</sup>

The effects on the child are compounded by the fact that in such circumstances, the child is likely to feel some degree of loyalty towards both parents, and to be dependent on each of them to varying degrees. Wallerstein and Kelly stipulate that what can sometimes occur is an “unholy alliance between a narcissistically enraged parent and a vulnerable older child or adolescent.”<sup>51</sup> From the child's perspective, through no fault of their own they experience a damaged relationship with one parent, and because of the divorce or separation process, risk losing something of great importance to them. During this process, the result of this attempted indoctrination against a particular parent is that the child can experience tremendous pain and anxiety.<sup>52</sup> Buchanan and others note that adolescents caught in this situation were more depressed and anxious compared with those of high conflict parents who left their children out of angry exchanges.<sup>53</sup> It is an incredibly vulnerable, powerless position for a child to be in, no matter their age.

The resulting parental alienation arising partially out of this dynamic can also have lifelong consequences for a child's relationship with their parents. The reference to parental alienation here should be differentiated from Parental Alienation Syndrome. There is significant controversy in the academic community as to the existence of Parental Alienation Syndrome that I do not propose to address here, for it is very complex and could itself be the topic of a

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50 J.B. Kelly and R.E. Emery. *Supra* note 18 at 353.

51 J.R. Johnston. “Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce.” (2003) 31 *Journal of the American Academy of Psychiatry and the Law*, (2003) 158 at 158.

52 *Ibid.* at 168.

53 C.M. Buchanan, E. Maccoby and S. Dornbusch. “Caught Between Parents: Adolescents' Experience in Divorced Homes.” (1991) 62:5 *Child Development* 1008 at 1026-1027.

thesis. For the purposes of this thesis, it is sufficient to note that studies suggest that “though there is evidence for parental alignments and alienation among children of divorce, the extent of the problem is unknown.”<sup>54</sup> The reference to alienation used here is simply to describe the feeling the child gets upon hearing one parent denigrate the other, or otherwise involve the child in that denigration. This feeling is likely to vary in intensity for each child, depending on levels of attachment to each parent and the child's exposure to marital conflict and violence. There is commonly a feeling of anger towards one or both parents, and particularly in older children, a feeling of responsibility or a desire to attempt to help resolve the conflict.<sup>55</sup> When this fails, the child can feel the need to blame either parent, and sometimes feel guilty themselves for that failure.<sup>56</sup> This in turn can affect the quality of parent-child relationships into the future.<sup>57</sup>

### **The Effect of Litigious Processes on Divorce or Separation**

The above discussion demonstrates how the unwinding of a family and the event of divorce can increase conflict and detrimental parent behaviour. Parents' subsequent involvement with the legal system following their decision to separate or divorce can sometimes exacerbate this problem. As the literature indicates, there is tremendous importance to minimizing child exposure to conflict during the divorce or separation process. Kelly and Emery cite a plethora of research indicating that in some families “intense anger and conflict is ignited by the separation itself and the impact of highly adversarial legal processes.”<sup>58</sup> One of the most important areas to assess when determining how to approach this problem is the manner in which disputes are

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54 J.R. Johnston. *Supra* note 51 at 159.

55 R.J. Taylor. “Listening to the Children.” (2001) 35:1 *Journal of Divorce and Remarriage* 147 at 150-151. 46.7% of children surveyed said they felt some guilt or anger towards their parents and felt that they as children bore some responsibility for the divorce.

56 *Ibid.* at p. 150.

57 *Ibid.* at p. 151.

58 J.B. Kelly and R.E. Emery. *Supra* note 18 at 353.



resolved. While the relevant British Columbia statutes and binding case law mandate that the only consideration for courts is the best interests of the child,<sup>59</sup> and in the case of the *Family Law Act*, even go so far as to remove the language of custody and access from legal determinations, in a practical sense the traditional adversarial litigation process makes this difficult to achieve. An oppositional contest between the parents remains the context in which family dispute resolution often plays out once parents choose to engage the legal system.

This context is significant for two reasons. First, the legal system itself can promote behaviours in parents that are shown by the research not to be in a child's best interests. Second, because the child does not usually receive formal legal representation in legal proceedings. Throughout the litigation process, lawyers are focused on zealously advocating for their clients, who are typically the parents. In cases where their clients' interests do not coincide with the best interests of the child, a lawyer's responsibility remains first and foremost to their client. Firestone and Weinstein highlight that during the adversarial process the best interests of the children can become secondary considerations as lawyers advocate zealously for their client's rights.<sup>60</sup> In most litigation cases, excepting those cases so extreme that a child advocate is appointed by the Ministry, a child is the only party influenced by the outcome that does not receive legal representation. As minors, children usually lack both legal capacity and the ability to pay legal fees. The protection of a parent's legal rights and the best interests of the child can therefore be fundamentally at odds with one another.

These concerns are supported by the research, which demonstrates that the majority of families emerge dissatisfied and more polarized from the traditional adversarial divorce process.

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<sup>59</sup> *Divorce Act*, RSC 1985, c. 3, s. 16 (8). *Family Law Act*, SBC 2011, c. 25, s. 37(1). This thesis focuses on British Columbia family law legislation as well as the federal Divorce Act, given that the interview study was conducted in Vancouver, British Columbia.

<sup>60</sup> G. Firestone and J. Weinstein. "In the Best Interests of Children: A Proposal to Transform the Adversarial System" (2004) 42:2 *Family Court Review* 203 at 204.

One Connecticut study found that “71% of parents reported that the court process escalated the level of conflict and distrust to a further extreme.”<sup>61</sup> This statistic serves as an indicator that litigation as a dispute resolution tool can provide a fertile breeding ground for conflict and mistrust between parents. As per the discussion above, it is high levels of conflict and mistrust that can have harmful implications for children.

While it is accurate that cases that go to trial represent only a small percentage of all cases that enter the system,<sup>62</sup> the mere fact of parents engaging the litigation process can be damaging to children, particularly as the process progresses. Mitcham-Smith and Henry note that “often parents, in an effort to build a winning case, will participate in exaggeration and distortion of memories and hurtful slandering, and provide false allegations against the opposing parents.”<sup>63</sup> As noted above, the child is caught in the middle of this process, and almost by necessity becomes a battleground between the parents, for whom a successful case is their shot at vindication or revenge against the other, especially in high conflict cases. Boyan and Termini demonstrate in their study that “this conflict between parents, when witnessed by children, may lead to a diminished role of the parent as a legitimate protector, may teach ineffective conflict resolution skills, and may place the child in a loyalty bind between opposing parents.”<sup>64</sup>

Additional research supports the belief that “the damage to children during the ongoing legal

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61 N. Ver Steegh. “Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process.” (2008) 42:3 *Family Law Quarterly* 659 at 659-660. Citing M.K Pruet and T.D. Jackson. “The Lawyer’s Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys.” (1999) 33 *Fam. L.Q.* 283 at 298.

62 5% or less, depending on which source you consult.

63 M. Mitcham-Smith, M. and W.J. Henry. *Supra* note 14 at 369. See also J.B. Kelly. “Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice.” (2002) 10:1 *Virginia Journal of Social Policy & the Law* 129-163., S.H. Ramsey. “The Wingspread Report and Action Plan: High-Conflict Custody Cases: Reforming the System for Children.” (2001) 39 *Family Court Review.*, J. Weinstein. “And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System” (1997) 52 *Miami Law Review* 133.

64 *Ibid.* at 369. Citing Boyan, S.B., & Termini, A.M. *Cooperative Parenting and Divorce*. (Atlanta, GA: Active Parenting Publishers, 1999).

process can leave them in a perpetual state of turmoil within the family.”<sup>65</sup> A system of family dispute resolution which supports or promotes conflict, through the pitting of one parent against the other can therefore place children in a very vulnerable position.

This issue becomes even more pressing when one considers who is most often making use of the traditional adversarial litigation method. Families with children are more common users of litigation. Mitcham-Smith and Henry note that “couples with children tend to use litigation more often than those without children.”<sup>66</sup> While the vast majority of custody cases settle out of court prior to trial, once initiated, the process of litigation can lead to adversarial posturing between parents that can increase conflict. From 2009 to 2010, of the 22,809 single issue custody and access cases tracked by Statistics Canada, approximately fifteen percent took longer than three months to either partially or fully resolve.<sup>67</sup> This is a substantial amount of time for parents to be staking adversarial positions and seeking determinations by judges. For this same group of custody and access cases, over the length of the case, an average of 3.2 pre-trial hearings and judgments that were not dispositive of part or all of the case dealt with custody issues, and an additional 8.1 were required to address access issues.<sup>68</sup> These numbers do not include the more complex family law cases filed with multiple issues. Children and their families are thus being affected, and having their family restructuring handled by the litigation process. The process is not reserved for those families without children.

Studies also indicate that family courts spend the vast majority of their time dealing with

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<sup>65</sup> J.S. Wallerstein and J.M. Lewis. *Supra* note 22 at 361, 366.

<sup>66</sup> M. Mitcham-Smith and W.J. Henry. *Supra* note 14 at 370.

<sup>67</sup> Statistics Canada. *Divorce and Other Family Breakdown Cases Involving a Single Issue By Elapsed Time From Case Initiation to First Disposition*”, Table 6. 2009-2010, online: <<http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11423/tbl/tbl06-eng.htm>> accessed March 2014.

<sup>68</sup> Statistics Canada. *Divorce and Other Family Breakdown Cases Involving a Single Issue By Average Number of Events Over the Length of a Case*. Table 6. 2009-2010, online: <<http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11423/tbl/tbl06-eng.htm>> accessed March 2014.

“high conflict” members of the population. Neff and Cooper conclude that “family courts and related professionals are spending some 90% of their time on the 10% of the population deemed high conflict.”<sup>69</sup> These parents are defined by Mitcham-Smith and Henry as those that “use the courts as a way to control, punish, and publicly condemn their ex-spouse for their wrongdoings and drag out the legal process to inhibit closure, and allow the other parent to move on from the marriage.”<sup>70</sup> The evidence suggests that even after the windup of a family case, the results outlined in a court decision are rarely final, and frequently subject to changing circumstances. As a result, the process of litigating a case is frequently a continuing one. One American study concluded that as many as four post-divorce motions may be filed for each divorce.<sup>71</sup> The litigation process can provide an effective tool for parties who are more inclined to want to damage the other parent, rather than serve their child's best interests. The fact that high conflict personalities and families with children are common users of the adversarial system is potentially damaging for children.

The above is not meant to suggest that litigation is always detrimental to children's interests. There are doubtless parents that can handle the process with maturity and manage their conflict levels, and there are some cases where the interests of children and parents may be best served by engaging in litigation. There is currently a debate about whether families dealing with repeated domestic violence or abuse should be encouraged to consider alternative dispute resolution processes. There are valid arguments both ways concerning whether so called high conflict parents and their children are better served through engaging dispute resolution processes that minimize conflict, provide mental health support and promote communication

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69 R. Neff and K. Cooper. *Supra* note 15 at 99.

70 M. Mitcham-Smith and W.J. Henry. *Supra* note 14 at 370.

71 A. Thompson. “The Use of Alternative Dispute Resolution in Civil Litigation in Kansas.” (2002-2003) 12 *Kansas Journal of Law & Public Policy* 351 at 353.

between parents<sup>72</sup>, or instead by those methods of dispute resolution that protect parents' individual interests and discourage direct communication between them.<sup>73</sup> One would expect that some families and children would be better served by dispute resolution processes that emphasize promoting communication and negotiation capacity while minimizing conflict. Others, such as families with repeated incidences of domestic violence and abuse might be better served by engaging those procedures that minimize parental exposure to each other. This debate will be addressed in greater detail in the pages ahead. Regardless of which view one takes, there is a role for all methods of dispute resolution. To best serve children's interests, the goal should be to match particular clients and families with the process that best suits their family situation, future goals and children's' needs.

### **Importance of Studying Collaborative Family Law**

As noted above, divorce itself is not necessarily a danger to child development. Rather it is the circumstances surrounding it, the execution of it, and the nature of the particular children involved that most likely determine outcomes. The manner in which divorces are resolved is therefore of heightened importance. As a society, we have an obligation to maintain cohesive and supportive family relationships to the extent possible, to enhance children's development. Serving both client and children's interests therefore requires that families have a range of well researched options available to manage a divorce or separation.

Collaborative law, mediation, and cooperative law have all emerged in recent years as alternative methods of dispute resolution for families. In the collaborative law environment, the

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<sup>72</sup> J.H. Difonzo. "A Vision for Collaborative Practice: The Final Report of the Hofstra Collaborative Law Conference" (2009) 38 Hofstra Law Review 569 at 597. Citing Patrick Foran. "Adoption of the Uniform Collaborative Law Act in Oregon: The Right Time and the Right Reasons" (2009) 13 Lewis & Clark L. Rev. 787 at 798.

<sup>73</sup> Ibid. at 595.

goal for both clients and their counsel is mutual agreement rather than a courtroom victory.

Clients choosing the collaborative law method must jointly sign participation agreements and retain collaborative lawyers.<sup>74</sup> These agreements provide the mechanism through which clients contract out of their right to litigate while involved in the collaborative process, as well as on the basis of any disclosures or information revealed during the process. The process itself is based on the model of interest-based negotiation, which seeks to focus parents on what their future goals and objectives are, rather than on instances of past wrongdoing by the other party.

Where necessary, neutral third parties from other disciplines may be brought in to help facilitate agreement. These third parties are hired by both parties as part of the collaborative process, and range from divorce coaches, to child specialists, to social workers, to financial experts.<sup>75</sup> Unlike the experts hired during the course of litigation, they are not paid for by one side, but rather by both sides. Because of this, there is greater likelihood that the parties will trust their judgments and any agreement that ensues. The result is a holistic approach to dispute resolution. Should the process break down and the clients choose to litigate the matter, they are required to obtain new counsel. This ensures that the parties remain focused on settlement, and that the comments they make in the spirit of reconciliation cannot be used against them if they ultimately have to go to court to resolve the dispute. It should also be noted that while these specialists represent an additional cost to the parties, collaborative law can also potentially help mitigate other costs in circumstances where it reduces time spent with lawyers, or facilitates

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<sup>74</sup> S. Webb. "Collaborative Law: A Practitioner's Perspective on its History and Current Practice" (2008) 21 *Journal of American Academy of Matrimonial Lawyers* 155 at 160-161.

<sup>75</sup> G. L. Voegelé and L. Wray et al. "Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes" (2007) 33:3 *William Mitchell Law Review* 971 at 986.

faster arrival at longer lasting agreements.<sup>76</sup> Further research is needed on the effect that the presence of these specialists has on the process, both in terms of costs to clients, and the long term success of agreements.

Similarly, mediation also involves interest based negotiation techniques. The key differences between mediation and collaborative law are the presence in collaborative law of a participation agreement, which can disqualify counsel if the process breaks down<sup>77</sup>, and the presence of a neutral actor in the form of a mediator in the mediation process.<sup>78</sup> Legal counsel is not required for parties to engage the mediation process, but it is required for collaborative law.<sup>79</sup> Cooperative law is similar to the collaborative law process without the participation agreement. Mediation and cooperative law are sometimes implemented as a stage or part of the litigation process.<sup>80</sup> All three represent alternative forms of family dispute resolution that emphasize resolution of conflict through minimizing positional stances and encouraging interest based negotiation. In addition to promoting themselves as cost effective alternatives to going to court, they can serve the additional purpose of facilitating the de-escalation of conflict.

Litigation and those alternative dispute resolution processes that operate within or alongside the courtroom are coming under increasing scrutiny for their capacity to meet the needs of families. Mitcham-Smith and Henry note that “it is becoming increasingly apparent to not only the court system but also to the divorcing parents that these traditional methods are not

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<sup>76</sup> B. Degoldi. “Lawyers Experiences of Collaborative Family Law” (April 2007) L.L.M Thesis, UBC Graduate Studies at 20. Citing B. Daisley. “Collaborative Family Law : Way of the Future?” (2000) 19 (33) *The Lawyers’ Weekly*; B. Landau, “Collaborative Family Law Has Much to Offer Lawyers” (2000) 20 (31) *The Lawyers’ Weekly*.

<sup>77</sup> N.J. Cameron. *Collaborative Practice: Deepening the Dialogue* (Continuing Legal Education Society of British Columbia, 2004).

<sup>78</sup> L. Fisher and M. Brandon. *Mediating with Families: Making The Difference*. (Prentice Hall, 2002).

<sup>79</sup> P.H. Tesler. “Collaborative Law: A New Paradigm For Divorce Lawyers” (2000) 5 *Psychology, Public Policy & Law* 967.

<sup>80</sup> J. Lande and G. Herman. “Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases.” (2004) 42:2 *Family Court Review* 280.

fully meeting the needs of high conflict families in terms of creating long lasting, positive change.”<sup>81</sup> Collaborative law represents an interesting alternative to the traditional alternative dispute resolution processes that operate under the shadow of the court.

Raymond Taylor's study suggests that the children of divorced families prioritize conflict reduction and improved communication skills on the part of their parents as their chief desires during and after divorce.<sup>82</sup> The majority of children interviewed believed that their parents “did not know or understand that they were also hurting during this process.”<sup>83</sup> Many children in this study also expressed a strong desire that their parents seek counseling during the divorce or separation.<sup>84</sup> Children often feel that their needs are ignored or that they are neglected during this process, leaving them feeling “vulnerable and beleaguered.”<sup>85</sup> The divorce process is a tremendously emotional one for all parties, and it seems logical that absent help, parents could neglect to address their children's needs while experiencing their own emotional turmoil. This speaks to the need for many parents to engage counseling, parent education, and improved communication with children during this process.

Alternative dispute resolution methods allow for the flexibility to meet this need, but they also provide families with another benefit; control of their own post-divorce or separation transition. In families without a history of abusive behaviour, regardless of their condition during divorce or separation, with the proper support few would disagree that parents are still the ones who are best and uniquely positioned to understand the needs of their children. Their intimate knowledge of their children's fears, needs and unique personality traits that may require attention

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81 M. Mitcham-Smith and W.J. Henry. *Supra* note 14 at 370. Citing W.G. Austin. “Assessing Credibility in Allegations of Marital Conflict in the High-Conflict Custody Cases.” (2000) 38 *Family and Conciliation Courts Review* 462-477., M.A. Baris. “Working with High-Conflict Families of Divorce: A Guide for Professionals.” (2001) Northvale, NJ: Jason Aronson.

82 R.J. Taylor. *Supra* note 55 at 150.

83 *Ibid.* at p. 150.

84 *Ibid.* at p. 151.

85 R. Ebling., K.D. Pruett., M.K. Pruett. *Supra* note 34 at 678.



in times of instability far surpasses that of a judge or another detached third party. This is significant because in any divorce or separation, if the parents fail to reach agreement, ultimately an independent third party (usually a judge or private arbitrator) is tasked with making determinations about the family's future. Families who are unable to reach agreement by themselves or through alternative dispute resolution ultimately use courts or past court precedents to settle their differences, leaving the decisions to third parties who may not always possess an understanding of each family's unique needs and goals for the future.

Thus, while it may not be advisable in certain cases involving abusive behaviour or domestic violence, conflict resolution should ideally be conducted by the parents themselves where possible, with appropriate assistance. In order to adequately serve the best interests of the child, it is important to investigate and further develop dispute resolution processes that facilitate parent education, help families manage conflict levels, and encourage healthy communication patterns post separation and divorce. The inevitable complexity of each individual divorce or separation case creates the need for dispute resolution processes that facilitate flexible and creative parenting arrangements, which can be tailored to the developmental, emotional and social needs of each child and family. Collaborative law is important to explore further because it is one potential method of dispute resolution that, when effectively implemented by practitioners and utilized by appropriate families, has the potential to promote better communication between parents, more flexibility in settlement options, and potentially improved post-divorce or separation outcomes for children.

## **Application to the British Columbian Legal Context**

The broader challenge facing British Columbia is the effective administration of family services under the 2013 *Family Law Act (FLA)*. The *FLA* is the newest family law legislation in Canada. It represents a shift in the philosophy regarding family law, towards encouraging parents to cooperate and minimize conflict following their divorce or separation. The existing *FLA* is based on recommendations arising out of the White Paper on *Family Relations Act Reform*, which was released by the Attorney General of British Columbia in July 2010. In the document, the Attorney General suggests that a new statute be drafted that “helps support non-court processes”, based on recommendations that “the law more overtly support co-operative rather than adversarial approaches” to family conflict resolution.<sup>86</sup> The White Paper further suggests that “given the broad impact that the experience of separation and divorce can have on children and their parents, it is important that court and non-court processes are effective and responsive to families' needs.”<sup>87</sup> These principles articulated in the White Paper formed part of the foundation for the creation of the *FLA*. Chapter Two of this thesis will further explore the issue of mitigating the harmful effects to children during the particularly difficult transition caused by a divorce or separation.

As explored in detail to this point, it is no secret that family breakups often give rise to both emotional and legal issues between the parties. Recent literature shows that “conflict between parents is an almost universal experience for parents who divorce as they separate themselves emotionally, financially, and physically from their former partner and attempt to

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<sup>86</sup> British Columbia, Ministry of the Attorney General, Justice Services Branch. *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (Ministry of the Attorney General: July 2010) at 3.

<sup>87</sup> *Ibid.* at 4.

establish a new family life.”<sup>88</sup> Conflict in this context “is thought to impair the ability of parents to separate their own needs from those of their children, establish co-parenting relationships, maintain good parent-child relationships, and be able to re-negotiate with their former spouse on an ongoing basis without the need for litigation.”<sup>89</sup> Given these realities, it is arguable that it could be beneficial to have some level of integration and coordination between legal and social services during the divorce or separation process, such that the different complexities of a family's conflict may be addressed in conjunction with one another.

There is also support for the belief that the goal of family dispute resolution should be “the minimal resolution of conflict that facilitates the best possible co-parenting relationship between the most competent parents possible.”<sup>90</sup> The *FLA* states explicitly that one of the central purposes of the legislation is “to encourage parties to a family law dispute to resolve the dispute through agreements and appropriate family dispute resolution before making an application to a court.”<sup>91</sup> In addition, the *FLA* emphasizes that one of its purposes is to “encourage parents and guardians to resolve conflict other than through court intervention, and create parenting arrangements and arrangements respecting contact that are in the best interests of the child.”<sup>92</sup>

In this way, the BC *FLA* embodies and supports a philosophy of cooperation and shared parenting. In terms of helping divorcing couples establish a workable parenting relationship following the breakup of the family, it is therefore reasonable to hypothesize that an

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<sup>88</sup> H.M. Stallman and J.L. Ohan. “Parenting Style, Parental Adjustment, and Co-Parental Conflict: Differential Predictors of Child Psychosocial Adjustment Following Divorce.” (2016) 33:2 *Journal of Behaviour Change*, 112 at 113. Citing H.M. Stallman and M.R. Sanders. “Family Transitions Triple P: The Theoretical basis and development of a program for parents going through divorce.” (2007) 47 *Journal of Divorce and Remarriage* 133-153.

<sup>89</sup> H.M. Stallman and J.L. Ohan. at 113.

<sup>90</sup> S. Gamache. *Supra* note 47 at 1459. Citing J. Kelly. “Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research.” (2000) 39 *J. Am. Acad. Child Adolesc. Psych.* 963.

<sup>91</sup> *Family Law Act*, SBC 2011, c. 25, s. 4b.

<sup>92</sup> *Family Law Act*, SBC 2011, c. 25, s. 4c.

interdisciplinary approach to family conflict resolution has potential to be more effective than a strictly legal approach, since it provides the parties with the opportunity to address both the legal and emotional issues underlying the breakup. Dispute resolution models based on an interdisciplinary approach have been implemented and tested in other jurisdictions, and have had some success at facilitating functional parenting relationships following divorce.<sup>93</sup>

Against this backdrop, a more in depth study of collaborative law as an alternative dispute resolution method is quite pertinent. My study focuses on the collaborative family law model practised in Vancouver, as it is one that frequently involves an interdisciplinary approach to family conflict resolution.<sup>94</sup> Collaborative law is a relatively recent method of family dispute resolution that, according to the literature, is promising in terms of its capacity to better serve children's best interests.<sup>95</sup> Proponents of collaborative family law suggest that it is able to achieve a deeper resolution of marital disputes, which is subsequently beneficial to children.<sup>96</sup> However, it is arguable that the potential for families to realize these benefits is contingent upon parents choosing the process, as well as proper execution of the process itself in a manner that addresses the specific and varying needs of each family.

Parents will arguably only choose the collaborative law method of dispute resolution if they are convinced of the benefit both legally and financially, as well as to their children by doing so. In a recent study conducted by William Schwab, he found that over three quarters of collaborative participants “come to the process concerned primarily about their children.”<sup>97</sup> Cost

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<sup>93</sup> J.H. Brown and L. Bledsoe et. al. “PACT: A Collaborative Team Model for Treating High Conflict Families in Family Court” (2009) 60:2 *Juvenile and Family Court Journal* 49-67.

<sup>94</sup> J. Macfarlane. “The Emerging Phenomenon of Collaborative Family Law: A Qualitative Study of CFL Cases.” (2005) Department of Justice Canada Research Report 2005-FCY-1E at 14.

<sup>95</sup> S. Gamache. *Supra* note 47 at 1455.

<sup>96</sup> *Ibid.*

<sup>97</sup> W.H. Schwab. “Collaborative Lawyering: A Closer Look at Emerging Practice.” (2003-2004) 4:3 *Pepperdine Journal of Dispute Resolution* 351 at 378.

and the recommendations of their lawyer were also found to be incredibly important considerations.<sup>98</sup> While the issue of cost is addressed briefly in this thesis, further research in this area is needed to determine the extent to which it does or does not inhibit the capacity of parents to choose collaborative law.

In regards to its capability at meeting clients' legal needs, the academic literature identifies several key issues, which are explored below in greater detail in subsequent chapters, particularly chapter three. One of the most important issues identified in the literature as affecting the success of family dispute resolution is the potential presence of abusive dynamics between parents. The presence of abuse or a serious power imbalance in a relationship for example, can inhibit the capacity of some people to choose the dispute resolution process that best suits their needs. In order to properly assist clients with selecting and engaging any dispute resolution process, an awareness of any domestic violence or abuse issues within a separating or divorcing family is essential. This is especially true for those working in alternative dispute resolution fields, such as collaborative law, where the parties themselves have control over their own ultimate legal outcomes. Screening for domestic violence and abuse can be very difficult. Too often, parties may not want to disclose abuse, either out of fear of judgment, or because they are unaware that they have experienced abuse. Many abusers are also adept at deception. A lack of awareness of the existence of potential abuse issues can greatly hamper the effectiveness of collaborative law at addressing clients' needs.

Thus, for collaborative practitioners, accurately assessing the suitability of prospective clientele to the process, and providing effective execution of the collaborative process are key factors affecting its efficacy. The literature identifies that inappropriate matching of clients to the

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98 Ibid.

process, poor abuse screening procedures, or practitioner mistakes can also undermine the success of the process. Therefore, the issue of who conducts screening, and how screening questions are phrased to engender honest responses, is of paramount importance.

### **Structure and Organization of the Interview Study**

The abuse issue, as well as other issues identified in the literature, are considerations that are crucial to the effectiveness of collaborative family law. Some of these issues are raised in the context of critiques of collaborative family law, which challenge the effectiveness of the collaborative process at serving clients' legal interests. Many of these critiques come from those outside the practice of collaborative law. In order to properly evaluate and assist collaborative law, a better understanding of lawyers' practices, strategies, and perspectives is required. To that end I undertook an interview study of collaborative lawyers based in Vancouver.

In my study, ten collaborative family lawyers in the Greater Vancouver Collaborative Practice Group were interviewed, with a variety of backgrounds and experience levels. There were five men and five women as part of the interview sample. Each of these practitioners was asked questions concerning the operation of their practice, in particular how they dealt with difficult dilemmas and situations that can arise within collaborative legal practice, as identified by the literature. The questions also canvassed issues that arose from the literature review of the effects of divorce and separation on children. The interviews were semi-structured. Every lawyer was asked the same questions, but there was flexibility enabling follow-up questions where necessary. Follow-ups were asked to flesh out any additional relevant data that might be useful, either in revealing patterns among the lawyers or any unique approaches to a particular issue. Chapters Four and Five of this thesis explore collaborative practitioners' responses in the

interviews. These chapters serve to consolidate and analyze collaborative practitioner knowledge concerning how they deal with dilemmas and difficult situations that can arise with their practice, as identified by the literature.

This study is limited in the sense that it analyzes a specific group of collaborative practitioners. Therefore, its findings should not be generally applied to other collaborative practice groups, but may be used to provide them with ideas for their practice. Because of the emphasis on flexibility to suit differing client objectives in different jurisdictions, and because of the variance in ideology and practice beliefs that each individual collaborative practitioner brings to the process, the implementation of the IACP guidelines can vary significantly from practice group to practice group, and from individual to individual.<sup>99</sup> This diversity needs to be taken into account if one is to truly advance the cause of establishing best practices for the collaborative community. Each practice group may have unique or different ideas and strategies that could be beneficial to other groups. Obtaining information concerning how individuals within each collaborative practice group deal with specific problematic situations and ethical issues, is essential if the practice of collaborative law is to move forward and better serve clients and their children.

The central goal of this thesis is to contribute to the conversation concerning the provision of family legal services in a manner that meets both clients' needs and the best interests of their children. The hope is that through combining research around the effects of divorce on children and families, existing critical analysis of collaborative practice, and the expertise of collaborative practitioners in the field, this thesis will contribute to a richer understanding of how collaborative lawyers actually conduct their practice, and help generate some ideas for improving

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<sup>99</sup> J. MacFarlane. *Supra* note 94 at 7-10.

the practice of collaborative law so that it may better benefit both clients and their children. Scholars note that “children's interests are served by positive relationships with parents, which in turn may require legal attention to the needs of those parents.”<sup>100</sup> Parents will ultimately choose the process that best suits their needs, sometimes regardless of whether it meets their children's needs. Therefore, this thesis will also attempt to provide additional information that will hopefully improve the understanding and effectiveness of collaborative law for both parents and their children.

If the goal of the law is truly to put children first, then it is important to conduct research on and assist with the improvement of processes that come closer to satisfying this intention by making the wellbeing of children a primary, rather than ancillary focus of the process. I hope that what follows will enrich the academic debate, make collaborative practitioners more aware of the criticisms in the literature, and assist with the development of best practices. My study hopefully will also assist with the broader ultimate objective of developing criteria for advising prospective clients and families, and guiding them towards processes that can best serve their particular needs.

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100 N. Semple. “Whose Best Interests: Custody and Access Law and Procedure.” (2010) 48 Osgoode Hall L.J. 287 at 291 para. 7.



## **Chapter 2: Managing the Transition from a Nuclear to Bi-Nuclear Family**

Whereas the first chapter provided a background review of the effects of divorce on children, and an overview of the goals of this thesis, the second chapter will address the broader problem of helping families manage the difficult transition from a nuclear to a bi-nuclear family. Several key areas require discussion. These include: the particularly prevalent role of emotion in the family dispute resolution process, the need for a new conceptual approach of families and legal practitioners to divorce or separation and what it represents, and suggestions for broader emphases that could improve family dispute resolution more generally.

### **The Impact of Emotion on Family Dispute Resolution and its Implications**

When lawyers attend law school, and through much of the practice of law, they are taught a system of laws that frequently operates based on the presumption that human beings are pragmatic creatures. This system assumes that human beings make decisions rationally, and that when engaging with the legal system, they will act in their own self-interest.<sup>101</sup> Taken by itself, this is a flawed assumption. Human beings are all different, with different value sets, different priorities, and different beliefs. It is very difficult to predict with any certainty what particular consideration will motivate a person's decision making. Even in analyzing different decisions made by the same person, some will be based on emotion, and others on reason. This analysis becomes further complicated when one considers that the definition of self-interest can be different for each person. For some, self-interest may be purely economic, for others it may include more abstract goals or those that are difficult to quantify. Thus, despite the fact that

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101 G. Firestone and J. Weinstein. *Supra* note 60 at 203.

money and financial considerations are a central focus of the vast majority of lawyers and judicial decisions, not all human beings rank monetary concerns as their primary consideration when acting in their self-interest. Indeed, even where monetary concerns are a main focus of legal parties, these concerns can be influenced by emotions as well.

This is particularly true when one considers legal conflicts in the context of divorce or separation. The previous chapter highlights the unique and powerful role that emotions often play in family disputes. The literature canvassed therein demonstrates that emotion is often the driving force behind decisions made by parties. These emotions can be heightened and intensified by the divorce or separation process, with detrimental consequences for children. Claire Huntington notes that “through its substance, process, and practice, family law reifies hate, in both the symbolic and real sense (as an emotion and also a symbol of rupture without the possibility of repair), freezing relationships at the moment of breakdown.”<sup>102</sup> The focus of the law on only the breakdown of the relationship means that the negative emotions of the parties can be exacerbated, and that there is a failure of the dispute resolution system to understand the cyclical nature of emotions tied to family relationships. Huntington notes that family law “[solidifies] relationships in the moment of hate and then [fuels] that hate with the adversarial process.”<sup>103</sup> Frequently, this fact plays out in the courtroom or at the negotiation table.

Linda Elrod also illustrates the problem well, noting that “an emotional dispute between two parents who profess love for a child can often turn into a courtroom battle with armies of lawyers... children become the spoils of battle and the court system is held hostage as these high conflict cases drain family, legal, court and mental health resources and clog court dockets.”<sup>104</sup>

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<sup>102</sup> C. Huntington. “Repairing Family Law” (2008) 57:5 *Duke Law Journal* 1245 at 1248.

<sup>103</sup> *Ibid* at 1249.

<sup>104</sup> L. Elrod. *Supra* note 28 at 499.

Within this arena, the temptation for lawyers and parties to regard family disputes as a win lose battle over property and legal entitlements is strong. Emotions play a key role in this temptation. Unresolved feelings of resentment toward the other party arising from the divorce or separation, can quite easily promote a desire to use the legal process to right perceived wrongs done by the other party. Litigation exacerbates this desire, by providing parties with a dispute resolution toolbox that is based on the advancement of individual legal rights against each other. This chapter will discuss the acknowledgement in the literature of the need for a reconceptualization of this approach to divorce and separation. It will also explore some ideas that may assist dispute resolution methods in promoting healthier approaches to this transition for families.

Until recently, under custody and access law, children were regarded as possessions of their parents. In British Columbia, prior to the passage of the *Family Law Act*, in contested cases parents were often deemed to “win or lose” custody of the child, and the decision making rights that came along with it.<sup>105</sup> While joint guardianship was often awarded to both parents by the courts in an effort to mitigate the effects of the battle for custody, the “custody and access” regime arguably represented a parent-centred rather than child centred approach to the problem of what to do with children in divorcing or separating families. As Elrod notes in her study, too often treating the children like property leads to a “combative atmosphere [that] [makes] it more difficult for divorcing couples to reach a settlement and develop a cooperative relationship once the divorce [is] final.”<sup>106</sup> Elrod also highlights the fact that “for many high conflict couples, training in cooperative parenting cannot occur until after the parents have disengaged from the conflict.”<sup>107</sup> Huntington notes that “the law’s privileging of rupture rather than repair starkly ignores the reality that even as formal legal relationships among family members change...

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105 *Van De Perre v. Edwards*, [2001] S.C.J. No. 60., *Kassel v. Louie* (2000), 11 RFL (5<sup>th</sup>) 144 (BCSC).

106 L Elrod. *Supra* note 28 at 503. Referring to a 1997 Oregon Task Force on Family Law as evidence.

107 *Ibid.* at 532.

connections between former family members typically remain. Nearly half of all divorces involve children, and thus, even after the divorce is finalized, the former couple inevitably continues to be bound together as co-parents.”<sup>108</sup> Therefore, approaching children conceptually as parental property to be fought over and divvied up, fails to recognize the importance of a cooperative parenting relationship in mitigating the detrimental impact of family breakup on children.

In addition to the negative effects this behaviour can have on children, this is significant because, through its focus on financial remedy and monetary considerations such as child and spousal support, traditional legal positional bargaining naturally gives primacy to financial considerations over emotional and psychological healing. As a result, this style of process can be predisposed to producing outcomes in favour of those whose idea of dispute resolution is focused on money and possessions.

Currently, within the traditional litigation model, when parties cannot reach agreement on their own, the first formal attempt at resolution in a family dispute is often mediation, which is conducted in the shadow or threat of initiated court proceedings. Elrod notes that “the majority of separating parents, even in the middle of great emotional turmoil, enter into negotiated or mediated parenting agreements.”<sup>109</sup> While engaged in this process, the legal system assumes that each party will hire a lawyer, or represent themselves if they cannot afford one. The belief underpinning this dispute resolution procedure is that each lawyer will advocate for each party, and the mediator will help them reach an agreement from a neutral perspective. However, my experience with mediation has taught me that sometimes the mediator can be so focused on reaching settlement, that they can reduce a deeply complex dispute that contains financial

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<sup>108</sup> C. Huntington. *Supra* note 102 at 1249.

<sup>109</sup> L. Elrod. *Supra* note 28 at 497.

components to a numbers game to facilitate negotiation.<sup>110</sup> Within the context of family law, this approach arguably leaves families susceptible to continued conflict relapses where the emotional issues underpinning the dispute are not resolved.

Those who have experienced abuse or extreme power imbalance may also have difficulty acting in their own self-interest in a traditional legal setting. The assumption that people are acting in their own interests when making legal decisions also has dramatic consequences for parents, because it presumes an individual's capacity for agency when in a heightened emotional or vulnerable state. If a vulnerable party does not have an advocate present, or an alternative means of giving power to their own voice, they run the risk of being overpowered in negotiations. This is especially true where abuse has been present in the relationship. An abuser can use the powerful emotions of the past to get the other party to accept a settlement that is adverse to their own interests. This outcome can also happen innocently. For example, some parties to family disputes may feel that a decision made in their self-interest is a decision made in the interest of another with whom they feel a strong bond, or have a strong relationship. However, the literature shows that where psychological or physical abuse is present in a relationship, abusers are frequently able to manipulate this bond to get people who have these feelings for them to make decisions in the abuser's interests, rather than their own.<sup>111</sup>

Firestone and Weinstein state that “the adversarial court system is not the appropriate forum for assisting dysfunctional families to function better. Resolution of the legal case often

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110 The author has participated in several mediations both as an observer, and as a mediator in Small Claims Court Mediation Training.

111 This is partly why some abused parties fail to leave abusive relationships and this dynamic can carry over to Court proceedings and the negotiation table – which can then make the legal process its own form of abuse and an extension of the control exerted by the abuser. See Elrod, *supra* note 28 at 513., See also D. Epstein. “Effective Intervention in Domestic Violence Cases: Rethinking the Role of Judges, Prosecutors, and the Court System.” (1999) 11 Yale J.L. & Feminism 3 at 6.

does little to improve or resolve the underlying family dynamics.”<sup>112</sup> They highlight many deficiencies with the court system including disempowering rather than empowering people who engage with it, legal advocacy focusing on the rights of parties rather than the responsibility to children, polarized use of experts, focus on the past rather than the future, and the lack of training that legal professionals have in regards to the complicated and sometimes emotional issues facing families.<sup>113</sup> Thus, traditional litigation and its accompanying processes can be ill equipped to deal with the emotional aspect of a family separation or divorce, and as a result can often fail to fully meet the needs of children and some parents. From this view, traditional litigious use of the court system is best utilized as a last resort. Such scenarios include cases where alternative dispute resolution methods prove ineffective because of personality disorders or other issues, or where there are no children from the relationship and the dispute primarily involves property issues.

The changes and stressors caused by divorce or separation can be both emotional and economic, and stress for a family is “magnified when accompanied by ongoing hostility between parents.”<sup>114</sup> Tesler and Thompson note that “unresolved conflicts, fuelled by miscommunications and unacknowledged powerful emotions, are the driving force behind high conflict divorces and the high costs (both emotional and financial) that result.”<sup>115</sup> Given this reality, it is arguable that society would benefit from a system capable of responding to people's emotional needs first or concurrently with their legal needs, so they can be in an adequate position to make decisions about their financial and family future during the settlement process. Absent such a system, the

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112 G. Firestone and J. Weinstein. *Supra* note 60 at 203.

113 *Ibid.*

114 J. Pedro-Carroll, E. Nakhnikian, G. Montes. “Assisting Children Through Transition: Helping Parents Protect Their Children From The Toxic Effects of Ongoing Conflict in the Aftermath of Divorce.” (2001) 39:4 *Family Court Review* 377 at 377.

115 P.H. Tesler and P. Thompson. *Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move on with Your Life*. New York, NY: Harper, 2006 at 55.

more emotionally stable, or less emotionally sensitive, sometimes more abusive party, will arguably continue to gain an advantage in a litigation process that focuses primarily on financial considerations, without considering both parties' potential need for emotional stabilization. One of the primary tasks of family dispute resolution should therefore be assisting parties in managing these emotions, so that they are better positioned to make pragmatic and rational legal decisions based on their interests.

It is also important that methods of family dispute resolution place an emphasis on providing children with access to justice, and a safer way to bring their perspective to the family dispute resolution process. While oppositional court based processes do include methods for introducing the child's perspective, these can sometimes be detrimental to the child's interests simply because of the competing agendas inherent in those processes. Typically children's perspectives are brought to bear in one of four ways: children are interviewed directly by judges, they are interviewed by a mental health professional paid for by one side or the other, an evaluator is appointed by the court to prepare a report on the best interests of the child, or an attorney is appointed to represent the child.<sup>116</sup> This last option usually is exercised only in more severe cases. Very often these methods put the child in a difficult position, as they are frequently implemented irrespective of the child's consent, and leave the child vulnerable to the influences of their parents, forcing them to choose a side.<sup>117</sup>

Another related reality of the legal system is that in all but the most extreme cases, parents have legal representation and children do not. Parents are the ones with the financial and intellectual capacity to pay lawyers and influence decision making around their family's future.

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116 L.M. Smith. "An Exploratory Study of the Role of the Child Specialist in Family Law." (2014) Doctoral Dissertation, Submitted to Oregon State University, Presented Feb. 27, 2014. at 14-15.

117 Ibid. at 15. Citing A.I. Schepard. *Children, courts, and custody: Interdisciplinary models for divorcing families*. New York, NY: Cambridge University Press, 2004.

Their interests in negotiations are naturally given primacy. Yet at the same time, the law in British Columbia requires that any agreement or legal determination made be in the best interests of the children.<sup>118</sup> The enforcement of children's interests can therefore be problematic. As the literature shows, parents engaged in legal battles sometimes only see their own pain and interests. In a way, many parents who are divorcing or separating become children again themselves, and may require professional assistance both to assert their legal rights and continue constructive and effective parenting practices. Providing children with a safe way to vocalize their needs and have them addressed is an integral component to constructive family dispute resolution. To achieve this, it is arguable that effective family dispute resolution must move closer to reconciling tensions between parents' interests and their children's, where they are not already aligned. Processes that can better address this issue are needed.

### **The Re-Conceptualization of Family Disputes by the Parties and the Legal System**

Perhaps the first step in providing legal solutions that can better serve children's interests while protecting parties' legal rights is to change the framework through which parents, lawyers and judges analyze and conceive of family disputes. This involves reconceptualising our view of the divorce and separation process from a predominantly legal dispute between guardians (usually the parents), to a transitional period for a family. While this perspective is not novel in Canadian academic circles, it deserves reinforcement here in case there is a gap between theory and practice. Pedro-Carroll, Nakhnikian and Montes note that the divorce or separation process is “not a single event but a series of transitions and reorganizations modifying the lives of

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<sup>118</sup> *Family Law Act*, SBC 2011, c. 25, s. 37(1). See also s. 4 and s. 8 (3) which stipulates that agreements and orders respecting guardianship, parenting arrangements or contact with a child must be made in the best interests of the child only.



children and parents.”<sup>119</sup> Analysis of divorce or separation in this manner necessarily requires a consideration of the full context of the family's situation, such that the focus is on enhancing the children's future, rather than assigning blame and compensation to individual parents for past events. From this perspective, consideration of past actions is relevant only in the sense that it helps establish behavioural patterns and influences that could be predictive of future actions by parents, which could be beneficial or detrimental to children. The focus is on creating outcomes and utilizing procedures that optimize the capacity of the family to manage the transition from a nuclear to a bi-nuclear family, in a way that minimizes child exposure to parental conflict, while both preserving the legal rights of the parents and effectively serving the interests of their children.

In order to fully appreciate the context of a particular family's situation, an acceptance of the ubiquitous role of emotion in family dispute resolution is essential. The literature offers some support for a dispute resolution system that acknowledges and highlights the role of emotion, particularly within the context of family disputes. Of particular interest is the discussion concerning the interaction between emotion and cognition. Bandes and Blumenthal define emotion as a “set of evaluative and motivational processes, distributed throughout the brain, that assist us in appraising and reacting to stimuli that are formed, interpreted, and communicated in social and cultural context. They influence the way we screen, categorize, and interpret information; influence our evaluations of the intentions or credibility of others; and help us decide what is important or valuable.”<sup>120</sup> In this way, emotions have a tremendous impact on human cognition.

Applying this definition to the context of divorce or separation, the manner in which

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<sup>119</sup> J. Pedro-Carroll. *Supra* note 114 at 377.

<sup>120</sup> S. Bandes and J. Blumenthal. “Emotion and the Law.” (2012) 8 Annual Review of Law and Social Science 161 at 163-164.

emotions can influence legal negotiations becomes starkly clear. Familial relationships are regarded as “dynamic, cycling through emotions of love, hate, guilt, and the drive to repair.”<sup>121</sup> In the context of divorce or separation, these emotions can be uniquely powerful. The adversarial nature of traditional litigation processes can exacerbate the focus on the hate part of the emotional cycle. This focus on hate and on seeing the other party as the enemy can lead to a rise of negative emotions, which can impede the ability of parties to properly evaluate the intentions or credibility of the other party, or to decide what is truly important to them in a legal negotiation. The legitimacy of these emotions may be beyond question, particularly where abusive dynamics are present. However, their presence may make it difficult for parties to conduct themselves effectively in legal settings.

In her work entitled “Repairing Family Law”, Claire Huntington advocates for a shift to a Reparative Model of family law. Her reparative model seeks to “repair or attend to emotional relationships while altering legal relationships.”<sup>122</sup> The benefits of this model are that it is future focused, prioritizes emotional issues between the parties, and that it is flexible and applicable to the contextual needs of each family. It also acknowledges the unique challenges posed by domestic abuse. In these instances, Huntington notes that the repair that needs to occur is within the individuals involved, rather than focusing on repairing a destructive relationship.<sup>123</sup> In this context, the focus on the repair within concerns healing the emotional damage done to either one or both parties by the abusive relationship. Yet the model acknowledges that “most relationships that have deteriorated may well be at a point of acrimony, but can be repaired in some fashion

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<sup>121</sup> C. Huntington. *Supra* note 102 at 1260.

<sup>122</sup> *Ibid.* at 1250.

<sup>123</sup> *Ibid.* at 1251.

and will inevitably continue in some form.”<sup>124</sup> This is a particularly useful conception of family dispute resolution wherever there are children.

The rationale for a new perspective to family dispute resolution put forward in this thesis is also partially based on family systems theory, although the perspective offered here is not completely consistent with its views and objectives, some of which are controversial. According to Susan Brooks, “family systems theory focuses on the dynamics of interpersonal relationships and their contexts.”<sup>125</sup> Brooks also notes that “family systems theory maintains that in order to intervene effectively to help children, one must treat the whole family.”<sup>126</sup> Proponents of this theory also believe that the fundamental flaw in adversarial court based treatment of families is the separation of family members into individuals with rights, which are then pitted against each other.<sup>127</sup> As such, parents are judged and children are placed at the centre of the conflict analysis, and are regarded as “patients” with their own rights.<sup>128</sup> The end result is a divisive process that focuses the spotlight on children and arguably increases the risk that children could internalize and be made to feel responsible for outcomes in their parents' conflict.

Similar to family systems theory, the conceptual approach advocated in this thesis focuses on interpersonal dynamics within the family and on understanding the family as a whole unit, not as a bunch of individual parts with rights. A contextual approach is crucial to understanding and advising a family and helping manage transition post-divorce or separation. Families should be broadly defined to include all possible attachment figures that are important to the development of any children. The focus should be on helping the family as a whole

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<sup>124</sup> Ibid. at 1251.

<sup>125</sup> S.L. Brooks. “Family Systems Paradigm for Legal Decision Making Affecting Child Custody.” (1996-1997) 6 *Cornell J.L. & Pub. Pol’y* 1at 5.

<sup>126</sup> Ibid. at 8.

<sup>127</sup> Ibid. at 10.

<sup>128</sup> Ibid. at 21.

optimize its current condition and on maintaining constructive parenting relationships and positive attachments for a child.

To a pure family systems theorist, the rights and responsibilities of the children and parents are inseparable and family conflict is a shared responsibility. Approaches consistent with family systems thinking require a “de-emphasizing of blame” and a recognition that “all members of the family system play a role in perpetuating destructive patterns and family behaviours.”<sup>129</sup> The focus is on making the family as broad as possible, looking at all the dynamics and interactions at play and arriving at “the least destructive arrangement to the continuity of family relationships.”<sup>130</sup> Maximum contact with biological parents is encouraged.<sup>131</sup> The goal is keeping the family unit together and stable to the extent possible, arguably at all costs.

It is here that the transitional perspective and approach advocated in this thesis departs from the approach advocated by family systems theorists. In my view, while de-emphasizing blame is important for families to focus properly on their future, it is dangerous to carry the belief in shared responsibility too far. Advocating that the rights of children and guardianship figures are inseparable, and that both children and parents share responsibility for dysfunction and conflict, is a potentially dangerous perspective to adopt. It ignores the dependent, unequal power of the relationship between parents and children, and also between some parents. In adopting a strict family systems theory approach, one risks glossing over abusive relationships, and failing to fully appreciate their effects, consequences and origins, which can be unilateral in nature. The culpability of abusers should still be recognized, understood and acknowledged. As well, parents should still bear primary responsibility for creating and maintaining constructive

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129 Ibid. at 15.

130 Ibid. at 22.

131 Ibid. at 18.

patterns and behaviours within their family system. Child dependency on parents, and the importance of helping facilitate constructive and equitable legal agreements, demands that any dispute resolution process hold parents accountable for destructive or abusive behaviour patterns.

The model employed in this thesis borrows the contextual approach from family systems theory but acknowledges that the interests of children and parents can sometime be at odds with one another, where the parent is either incapable or adverse to considering their child's interests when making decisions and putting their children first. The approach to family dispute resolution advocated here endeavours to provide families with the least destructive arrangement to the continuity of *positive and constructive* family relationships. Child attachments to destructive figures and influences arguably should not be maintained where those figures show an inability to adapt their behaviour to suit the needs of their children, even when provided opportunity and assistance. Thus, in cases where abusive dynamics are present in the family it might be preferable, absent processes that can facilitate meaningful change, to provide non-abusive parents with the means to sever contact and child exposure to an abusive parent.

However, absent those conditions, parents must and should continue to parent together following their own separation or divorce.<sup>132</sup> Unlike in other legal disputes, divorcing or separating parents and their children do not usually have the option of ending their pre-existing relationships completely. There is a continued, ongoing family reorganization that has to be recognized and accommodated when parents divorce or separate. Even as they are ending their relationship with each other, parents remain obligated to their children. When parents are not abusive, or in high conflict, the literature shows that their continued presence and involvement with a child, along with a constructive parenting relationship between them is important for child

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<sup>132</sup> J. Carbone. *From Partners to Parents: The Second Revolution in Family Law*. New York: Columbia University Press, 2000.

development.<sup>133</sup> As noted above, for divorcing or separating couples with children, British Columbia law states that the legal system must take children's needs into account above all else.<sup>134</sup> Both the law and social science therefore support the notion that the role of lawyers and judges should be to help families manage the transition from a nuclear to bi-nuclear family from a legal perspective. In this model, the legal system should also provide for ready access to professionals who can help manage the emotional aspects of the transition. Indeed, this transition has already begun. Grossi notes that “practical approaches have developed in different jurisdictions which have accepted the important role that emotions play in the thinking and practices of law.”<sup>135</sup>

Where appropriate, family dispute resolution processes should revolve around providing parents and children with the tools to constructively remain in contact with each other long after separation or divorce. In addition to dispute resolution mechanisms that facilitate the preservation of a parenting relationship, this could also involve encouraging parents to enlist programs and services that help build and maintain constructive relationships between parents and children. The difficulty here is that lawyers alone, and the traditional legal approach to a file, would seem ill suited to achieving this goal. Lawyers are essential to protecting the legal rights of their clients, and parents doubtless can benefit from their presence in order to properly protect themselves during the divorce or separation process. However, as Emery articulates “a lawyer's job is to advocate for [the parent], not their children.”<sup>136</sup> Lawyers are not supposed to take an interest in family relationships or in the long term emotional repercussions of their legal

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133 J.S. Wallerstein and J.B. Kelly. *Surviving the Breakup: How Children and Parents Cope with Divorce*. New York: Basic Books, 1980. See also S.L. Brooks. *Supra* note 125.

134 *Family Law Act*, SBC 2011, c. 25, s. 37.

<sup>135</sup> R. Grossi. “Understanding Law and Emotion.” (January 2015) *7:1 Emotion Review* 55 at 57.

<sup>136</sup> R.E. Emery. *Supra* note 23 at 148.

strategy.”<sup>137</sup> Yet the long term emotional repercussions of the legal battle are critical to the interests of the children and the health of the family system. Any healthy transition for the family into their post-divorce and separation world should address both the emotional and legal issues facing the family.

## **Suggestions for Improving Family Dispute Resolution Processes For Families**

### ***Parent Education***

In order to make this a realistic possibility, one of the first keys to the success of any process at serving family's interests will be its capacity to educate parents. Parent education is integral to providing parents with the means to effectively control their emotions so that they may provide their children with a functional parent-child relationship and environment. As Robert Emery notes “some conflict in a divorce is not only inevitable but necessary. The keys to conflict are managing it productively, keeping the kids out of the middle, and working to resolve the dispute.”<sup>138</sup> Thus, parent education does not just entail informing parents regarding their legal options, the difficulties they may face, and the processes potentially suited to them, although that is of utmost importance.

Proper education of parents also involves informing them of the influence that conflict between them can have on their children, and discussing with them how their children may be affected by their decision to divorce or separate. Jolivet notes how critical it is that parents learn how ongoing conflict and anger between them can affect their children, as well as the potential consequences of high conflict litigation, and possible alternative approaches.<sup>139</sup> It also involves

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137 Ibid. at 149.

138 Ibid. at 142.

139 K.R. Jolivet. “The Psychological Impact of Divorce on Children: What is a Family Lawyer to Do?” (2012) 25:4 *American Journal of Family Law* 175.

informing them of warning signs that their child might be having difficulties, and age sensitive parenting strategies to deal with these situations.<sup>140</sup> Ideally, this education would occur before divorce or separation, as the work of parent education logically gets more difficult once conflict patterns escalate between parents. However, parent education is still critical during that process, because of this potential for escalation. Teaching parents to be sensitive to and supportive towards their children, during a time where they are experiencing vulnerability and emotional stress is critical to minimizing damage done to children during divorce or separation.

Parent education also revolves around teaching communication and co-parenting skills, and helping parents reframe their post-divorce or separation relationship from an emotionally charged one to a more business like relationship in which both parties are invested in caring for their children.<sup>141</sup> Acquiring or enhancing co-parenting and communication skills is a necessity for parents engaging the divorce or separation process.<sup>142</sup> Pedro-Carroll et al assert that the research demonstrates “it is clear that children fare best when parents are warm, supportive, and communicative, exert firm, consistent limits with positive discipline, monitor their activities, and minimize or encapsulate ongoing parental conflict.”<sup>143</sup> One tactic that is consistent among effective legal parent education programs is “active teaching strategies to assist parents in learning co-parenting and communication skills.”<sup>144</sup> These programs “provide opportunities for participants to practice skills in role-plays with audience participation and in small-group practice sessions.”<sup>145</sup>

While such a communal approach is undoubtedly helpful in teaching skills and in

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140 J. Pedro-Carroll et al. *Supra* note 114 at 382.

141 *Ibid.* at 381.

142 M.G. Geasler and K.R. Blaisure. “Nationwide Survey of Court Connected Divorce Education Programs.” (1998) 37:1 *Family and Conciliation Courts Review* 36 at 61.

143 J. Pedro-Carroll, et al. *Supra* note 114 at 379.

144 M.G. Geasler and K.R. Blaisure. *Supra* note 142 at 61.

145 J. Pedro-Carroll, et al. *Supra* note 114 at 380.



normalizing parents' feelings and situations, there may be many parents who would feel uncomfortable in using this forum to enhance their parenting relationship. More private methods of teaching these processes and approaches may be needed to reach some parents. Again, it should also be noted that “co-parenting is not recommended when domestic violence or abuse are present.”<sup>146</sup> When it comes to educational processes, “separating partners should never be in the same [education] session when concerns about safety are present.”<sup>147</sup> Parent education should never come at the expense of the safety of all the participants. The purpose of parent education aspects of a family dispute resolution process is to enhance safety and minimize damage to a family.

Part of this process should also entail heightening the emotional awareness of parents concerning their own feelings as they engage with the process of divorce or separation. Heightening emotional awareness plays an integral role in parent's capacity to learn co-parenting and communication skills. In his book entitled *The Truth About Children and Divorce*, Emery advises parents to focus on controlling themselves and their emotions, words and actions, rather than their ex or their child.<sup>148</sup> Where parents are unable to achieve this goal themselves, the involvement of a psychologist, counsellor, or other mental health professional can be critical to the process. This is especially true where parents are coming out of a high conflict relationship or have personality disorders.<sup>149</sup> Third party assistance of a mental health professional to prevent escalation during the divorce or separation process may be required and should be offered to all families in need.

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146 Ibid. at 389.

147 Ibid. at 389.

148 R.E. Emery. *Supra* note 23 at 68.

149 L. Elrod. *Supra* note 28 at 540.

### ***Emotionally Empowering Parents to Engage the Legal Process***

In addition to emotional awareness being essential for the preservation of healthy parent child relationship and child development, dispute resolution processes also must facilitate the emotional readiness of parents to engage in legal negotiation and decision-making. The need to help parents achieve emotional readiness to negotiate is partly an intuitive one. When a person's brain is unencumbered by powerful emotions it puts them in a better position to understand, appreciate and negotiate their legal and personal interests from a rational perspective. The sometimes irrational and escalating nature with which parents can sometimes approach the litigation process, speaks to an emotional use of the legal system out of anger, grief or a desire to punish and hurt the other party.<sup>150</sup>

From a family systems perspective that emphasizes conflict management and de-escalation, one of the keys to improving legal decision making is assisting parents with control of these emotions. Such control enables a better assessment of individual priorities, understanding of shared mutual interests, and ultimately promises the potential to preserve resources, shorten the divorce and separation process, and minimize child exposure to parental conflict. Part of emotional control involves emphasizing present not past. As part of her reform guidelines based on family systems theory, Susan Brooks emphasizes the need to develop “a complete and thorough assessment of the family's present status, rather than dwelling on past motives or incidents”<sup>151</sup>, except where they inform the way the family currently functions. The literature also highlights the importance of creating conditions for empowerment, self-determination and

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150 R.E. Emery. *Supra* note 23. L. Elrod. *Supra* note 28 at 499. N. Semple. *Supra* note 100 at 309.

151 S.L. Brooks. *Supra* note 125 at 19.

equality of bargaining power during negotiations between the parties.<sup>152</sup> Parties who feel anxious or disempowered may be unable to advocate for their legal and personal interests, or make decisions, when at the mercy of their emotions. Providing an environment and a process that promotes the parties' emotional stability during the divorce and separation process is arguably critical to that goal.

Divorce coaches or family counsellors could have an integral role to play in this area, subject to their cost and whether families devote the time required to utilize them. According to Susan Gamache, a “divorce coach is a licensed mental health practitioner and therapist well versed in separation, divorce, and remarriage issues. Their training could be in clinical psychology, counseling psychology, marriage and family therapy, social work, nursing or any other counselor training program that provides in-depth training in therapeutic process, including family therapy.”<sup>153</sup> Divorce coaches take a systemic view of the family and consider all the different dynamics and interdependent relationships within a family system.<sup>154</sup> Their primary goals include: helping clients identify their experience and clearly articulate it to their spouse, help the client understand their impact on their spouse, provide the clients with information regarding marital transitions thereby normalizing the experience and educating the client on issues, helping clients understand the needs of their children based on general child development information, and assisting in the development of a parenting plan.<sup>155</sup> In this way, they help preserve the emotional stability of the parties and enable them to make sound decisions, while at the same time helping with the parent education process.

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152 M.K. Pruett and T.D. Jackson. "Perspectives on the Divorce Process: Parental Perceptions of the Legal System and its Impact on Family Relations." (2000) 29 J. Am. Acad. Psyc. & L. 18; See also Robert A. Baruch Bush and J.P Folger. *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994.

153 S. Gamache. *Supra* note 47 at 1464-1465.

154 *Ibid.* at 1465.

155 *Ibid.* at 1465-1466.

### ***Provide a Safe Method for Children's Input and Perspective***

In order for family dispute resolution to truly serve family's and children's interests, another required element for any process will be a means of safely including the child's perspective in the process. While this is crucial for all children, this perspective may be especially pertinent from older children, who are typically better able to articulate their input and positions regarding their future. According to Birnbaum, the research shows that “participation of children in child inclusive mediation and other alternative dispute resolution processes is positively correlated with the minimization of harm/risk to children post separation/divorce.”<sup>156</sup> Birnbaum notes that “children's voices are important and need to be heard and listened to by their parents, mental health and legal professionals.... children and their parents have better relationships and there is less parental conflict between the parents when children are part of the process.”<sup>157</sup> This indicates that alternative dispute resolution methods such as collaborative law offer promising solutions for the safe inclusion of children's perspectives into the dispute resolution process, in a manner that is constructive for families.

The challenge is to determine what that looks like and define the appropriate parameters of and mechanisms for child involvement in the divorce or separation process. One of the chief concerns around the involvement of children is to prevent them from being forced to pick a side in the dispute between their parents. The aforementioned research demonstrates that children are vulnerable to being manipulated by their parents' conflict, because of their attachment to them and because they are typically dependent on their parents for safety, security and behavioural modeling. Ensuring the accuracy of the information provided by the child in these circumstances can be difficult. To the extent possible, while involving children, dispute resolution processes

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156 R. Birnbaum. *The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review*. Research Report to the Department of Justice, Canada, 2009 at 63.

157 Ibid. at 61.

should be designed to keep the child insulated. Independence from the perspectives and influences of their parents is crucial to ensure both accuracy of information and child safety.

Processes should also utilize safeguards to prevent against any disclosures made by the child being used to “punish” them in the future. One possible option is the use of reframing or confidentiality measures by the child specialist or other mental health professional.

Confidentiality measures or failing that, necessary reframing of children's perspectives by professionals who interact with parents will enable children to still provide their insight, while protecting them from potential future retribution by either parent. In particular in cases involving abusive families, where the child's perspective may be especially relevant and detrimental to one parent's interests, it may be necessary for the child specialist to be able to communicate with the parties in a way that does not trigger an emotional reaction from the parent that could lead to future abusive behaviour.

Thus, while on its face the involvement of a child specialist seems like an extremely good idea and beneficial initiative, it raises some interesting questions for collaborative teams and other dispute resolution professionals to consider. Most notably of concern are the procedures governing disclosure of the information from the child specialist to the parents and to other collaborative professionals. Is the information disseminated to the parents in such a way so as to insulate the child from future retribution, and to prevent conflict escalation? Is this information obtained by the child specialist in a manner that enables children to be free of their parents' direct or indirect influence, such as a pressure to take one side or the other? Grimes and McIntosh highlight the skills necessary for a good child specialist. Chief among these are including understanding child development, interpreting child communication, and guiding a child focused conversation with parents with a nuanced ability to understand what it appropriate to say and

what is not.<sup>158</sup>

### **Collaborative Family Law Could Further These Objectives**

For its part, collaborative law “is the only form of alternative dispute resolution to design in a position for the child's voice as a standard practice.”<sup>159</sup> As Lynne Smith notes “while adversarial divorce often co-opts the voice of children, alternative dispute resolution creates an opportunity for children to be heard through a specially trained mental health professional called a child specialist.”<sup>160</sup> During the collaborative process, the child specialist typically meets with both parents to understand the perception of each, and then meets privately with the children.<sup>161</sup> Tesler and Thompson note that the purpose of the child specialist is to “provide the child with an opportunity to ask questions and express concerns to a neutral, trained, empathetic professional in a safe environment.”<sup>162</sup> Following the meeting, they share that information with the other members of the collaborative group and then to the parents in order to help formulate and establish a parenting plan that considers the child's real developmental needs.<sup>163</sup> Pauline Tesler believes that the role of the child specialist is to restructure the parenting plan conversation “into an information based, child centred problem solving conversation”<sup>164</sup>, as opposed to a parents' rights conversation.

Collaborative family law piques my interest as a potential solution, because of the unique emphasis of the process on the emotional component of a family dispute. In particular,

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158 A. Grimes and J. McIntosh. “Emerging Practice Issues in Child-Inclusive Divorce Mediation.” (2004) 10:1 *Journal of Family Studies* 113 at 114.

159 L.M. Smith. *Supra* note 116 at 29.

160 *Ibid.* at 13.

161 *Ibid.* at 29.

162 *Ibid.* at 30. Citing P.H. Tesler and P. Thompson. *Supra* note 115.

163 *Ibid.* at p. 30.

164 P. Tesler. “Collaborative Family Law, The New Lawyer, and a Deep Resolution of Divorce-Related Conflicts.” (2008) *Journal of Dispute Resolution*, 83 at 112.

collaborative family law's use of divorce coaches to help parents manage and work through their emotions, and the implementation of child specialists to assist in bringing the child's perspective safely into the process are intriguing potential solutions to very complex problems. As will be explored in more detail later, of the ten collaborative lawyers interviewed for this thesis, four indicate that they use coaches on at least half their files, three indicate that they use them on most of their files, and three indicate that they use them on all or nearly all of their files.<sup>165</sup> It should also be noted that child specialists are not always used. Their usage is more common when there is a serious or intractable disagreement between parents on parenting issues.<sup>166</sup> How effective collaborative family law will be at both managing the legal and emotional aspects of a dispute remains to be seen, but on its face it represents a potentially promising step in the right direction. Chapter Three will shine further light on its potential benefits and identify aspects of the practice that might require careful scrutiny or further attention on the part of collaborative professionals.

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<sup>165</sup> Interview 1, Question 7 of thesis interview data. See also Interview 2, Question 9. Interview 3, Question 6. Interview 4, Question 6. Interview 5, Question 8. Interview 6, Question 8. Interview 7, Question 9. Interview 8, Question 10. Interview 9, Question 6. Interview 10, Question 9.

<sup>166</sup> Interview 2, Question 9. Interview 7, Question 9. Interview 10, Questions 9 and 10 of thesis interview data.

### **Chapter 3: Potential Promise and Issues for Collaborative Family Law**

The analysis in the preceding chapters demonstrates that while it may not be advisable in certain cases involving abusive behaviour or domestic violence, conflict resolution should ideally be conducted by the parents themselves where possible, with appropriate assistance. It is arguable that to adequately serve the best interests of the child, it is important to investigate and further develop dispute resolution processes that facilitate parent education, help families manage conflict levels, and encourage healthy communication patterns post separation and divorce. The inevitable complexity of each individual divorce or separation case creates the need for dispute resolution processes that facilitate flexible and creative parenting arrangements, which can be tailored to the developmental, emotional and social needs of each child and family.

Collaborative law is important to explore further because it is one potential method of dispute resolution that, when effectively implemented by practitioners and utilized by appropriate families, has the potential to promote better communication between parents, more flexibility in settlement options, and potentially improved post-divorce or separation outcomes for children. This chapter examines the literature on collaborative family law, and identifies potential strengths and issues facing collaborative family law in its efforts to serve clients and promote these objectives.

#### **Promoting Effective Communication and Positive Co-Parenting Outcomes**

The literature shows that the quality of parenting following divorce or separation has a strong impact on children from divorced families, particularly on child adjustment.<sup>167</sup> Scholars in the area have suggested that success of co-parenting at promoting positive child adjustment

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<sup>167</sup> Stallman, H.M. and Ohan, J.L. *Supra* note 48 at 114.



depends on a multiplicity of factors. The relationship between parents, the contact between parents and children, and the quality of parenting provided by each parent, all act in conjunction to have an impact on child adjustment.<sup>168</sup> Quality parenting is defined by several authors in the field as involving a “combination of parental warmth, effective discipline and active involvement in the child's life.”<sup>169</sup> The authors also highlight the importance of cooperation between the parents, at promoting positive child adjustment.<sup>170</sup>

The level of trust and effective communication between parents has important implications for all these areas. During and following divorce or separation, trust and effective communication between parents is often difficult, and in some cases may be impossible to achieve. Yet the literature identifies trust and effective communication between parents, two hallmarks of quality parenting, as essential to a functional, cohesive post-divorce parenting relationship that is in children's best interests.<sup>171</sup> If the parents do not trust each other, at least with regards to the parenting of their child, it can have detrimental consequences for that child. By way of example, in such situations the primary parent might allow the child less access to the other parent. Such a scenario inhibits one parent's ability to maintain active involvement in a child's life, one of the key contributors to quality parenting where abusive dynamics are not present between the parents.<sup>172</sup> Lack of trust between parents can also inhibit coordination on disciplinary efforts. It can potentially lead to each parent trying to undermine the other. Any of these scenarios can have a detrimental effect on the quality of the parenting provided. That said, while pursuing trust and effective and communication between parents is a desirable outcome, it

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<sup>168</sup> A. Sigal et al. “Do Parent Education Programs Promote Healthy Post-divorce Parenting? Critical Distinctions and a Review of the Evidence” (2011) 49:1 *Family Court Review* 120 at 123.

<sup>169</sup> *Ibid.* at 124.

<sup>170</sup> *Ibid.* at 125.

<sup>171</sup> H.M. Stallman and J.L. Ohan. *Supra* note 48.

<sup>172</sup> See discussion in Chapters 1 and 2 of this thesis.

is important to note that in certain cases involving domestic violence or abusive behaviour, trust and effective communication may be unrealistic and child exposure to the abusive parent could be detrimental itself.<sup>173</sup> Outside of those cases however, trust and quality communication between parents is shown to play an integral role in child adjustment.

According to the literature, collaborative family law as a dispute resolution method possesses many characteristics that portend its potential capacity for facilitating greater trust and more effective communication between parents. Stu Webb, the alleged founder of collaborative law, spent seventeen years in adversarial family practice before concluding that “family lawyers needed to be working with and representing clients for settlement.”<sup>174</sup> Although many family law lawyers of all types do represent clients with settlement as a goal, certain methods of alternative dispute resolution arguably do more than the courtroom to support this objective. Clients engaged in the collaborative process are expected to “seek out shared values and congruent objectives, and engage in civil, transparent conversations.”<sup>175</sup> With the help of collaborative professionals such as lawyers and divorce coaches, clients are encouraged to rise above their own emotions and predispositions to conflict resolution.

For added incentive, clients choosing the collaborative law method must jointly sign participation agreements.<sup>176</sup> These agreements provide the mechanism through which clients contract out of their right to litigate while involved in the collaborative process, as well as on the basis of any disclosures or information revealed during the process. Should the process break down and the clients choose to litigate the matter, they are required to obtain new counsel. This

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<sup>173</sup> See discussion in Chapters 1 and 2 of this thesis.

<sup>174</sup> S. Webb. *Supra* note 74 at 156.

<sup>175</sup> Tesler, P. *Supra* note 164 at 88.

<sup>176</sup> S. Webb. *Supra* note 74 at 160-161.

ensures that the parties remain focused on settlement, and that the comments they make in the spirit of reconciliation cannot be used against them, if they ultimately have to go to court to resolve the dispute. Since the focus of the process is on fostering conditions which promote mutual agreement between the parties, collaborative law has promising prospects for engendering and repairing trust and promoting healthy communication, particularly when compared to litigation.

Cox and Matlock note that the process promotes healthy communication that clients appreciate, because “people are afforded the opportunity to make their case without interruption or objection,”<sup>177</sup> while the lawyers model good communication and “act as referees and keep things from getting emotionally out of control.”<sup>178</sup> Citing Pauline Tesler, one of the principal advocates for collaborative family law, William Schwab suggests that collaborative family law “helps divorcing spouses work toward the best co-parenting relationship possible.”<sup>179</sup> One of the main principles underlying collaborative law is the belief that family conflicts should be managed with an eye to cooperative settlement.<sup>180</sup> Through the use of interest based negotiation tactics, and a participation agreement that prevents use of the court system while engaged with the process, collaborative law takes the divorcing couple outside the adversarial realm of litigation and places them in a relaxed, cooperative setting.<sup>181</sup> From a big picture perspective, in the collaborative environment, the goal for both clients and their counsel is mutual agreement rather than litigation victory. This has positive implications from a parenting perspective,

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177 G.G. Cox and R.J. Matlock. “The Case for Collaborative Law.” (2004-2005) 11 Tex. Wesleyan L. Rev. 45 at 56.

178 Ibid. at. 56.

179 W.H. Schwab. *Supra* note 97 at 357.

180 Tesler, P. *Supra* note 164 at 87.

181 G.G. Cox and R.J. Matlock at 56.

because of the potential to leave parents' relationships more intact following completion of the divorce process.

Another aspect of the collaborative process that portends its capacity for promoting positive co-parenting environments is the cooperative attitude of the collaborative lawyers involved in the process. While the client is ultimately responsible for all legal decisions made, both in litigation and collaborative law, it would be naive to assume that lawyers do not exert any influence over their clients. In any lawyer-client relationship, particularly those involving inexperienced clients, clients are often quite deferential to their lawyers, since the lawyer is usually the expert on their legal rights. Indeed, the term advocate implies that the lawyer is authorized to speak for their client when using the language of the law.

Advocates that practice collaborative law receive collaborative law training, and many are skilled in mediation.<sup>182</sup> Collaborative practitioners utilize an array of skills such as conflict resolution, coaching, and counselling.<sup>183</sup> One of their primary goals is “modelling cooperative behaviour to their clients.”<sup>184</sup> They are therefore well versed in regarding the other side not as the enemy, but as somebody who they must bargain and negotiate with. As such, their own trust levels with each other can be higher. Lawyers involved in the collaborative process are better able to trust the intentions of the other side, because all parties have agreed to be there in a collaborative spirit. The lawyers themselves have a commitment to the shared value of cooperation<sup>185</sup>, and even create a community of practice amongst themselves, dictated in part by practice standard guidelines implemented the IACP and tailored to specific collaborative group

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<sup>182</sup> Ibid. at 48.

<sup>183</sup> Ibid. at 60.

<sup>184</sup> J. Macfarlane. *Supra* note 94 at 31.

<sup>185</sup> Ibid. at 33.

objectives or beliefs.<sup>186</sup> Collaborative lawyers are not pressured to agree to anything that is not reasonably in their clients' interests. They are concerned both with their clients' interests and with the broader picture, the creation of a mutual voluntary agreement which enables both parties to move on with their lives and have a functional relationship as parents. The more relaxed approach also allows for more flexibility and creativity regarding legal solutions.<sup>187</sup>

Another characteristic of collaborative law that bodes well for its capacity to facilitate healthier communication patterns between divorcing couples is its interdisciplinary nature. Where parties and their lawyers are unable to reach agreement, neutral third parties from other disciplines may be brought in to help facilitate agreement. These third parties are hired by both parties as part of the collaborative process, and range from divorce coaches, to child psychologists, to social workers.<sup>188</sup> Divorce coaches and child specialists allow parties and their children to work through their emotions and needs associated with their separation, prior to or concurrently with addressing the legal aspects of the dispute.<sup>189</sup> This option assists the family in making the transition and enhances the emotional stability of the parents and children throughout the negotiation process.<sup>190</sup> When successful, this process arguably promotes better decision making at the negotiation table and assists families with focusing on the transition and their future, rather than assigning blame for past events.

The combination of these two benefits has positive implications for co-parenting.<sup>191</sup> Furthermore, unlike the experts hired during the course of litigation, the coaches and specialists

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186 Ibid. at 33. See also International Academy of Collaborative Professionals. *Standards and Ethics*. (Sept. 2015) online: <[https://www.collaborativepractice.com/media/114222/IACP\\_Standards\\_\\_Ethics\\_\\_Sep\\_2015\\_.pdf](https://www.collaborativepractice.com/media/114222/IACP_Standards__Ethics__Sep_2015_.pdf)> accessed in November 2016.

187 J. MacFarlane. *Supra* note 94 at 20.

188 G.L. Voegele and L. Wray, et al. (2007) "Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes" 33:3 William Mitchell Law Review 971 at p. 986.

189 J. MacFarlane. *Supra* note 94 at 20. See also S. Gamache. *Supra* note 47 at 1465-1466.

190 J. McFarlane. *Supra* note 94 at 19-20.

191 Ibid. at 19-20.

are not paid for by one side, but rather by both sides. Because of this, there is greater likelihood that the parties will trust their judgments and the resulting agreement that ensues from them. The result is a holistic approach to dispute resolution. The advantage of the collaborative process is that it utilizes legal, social and psychological perspectives to create an atmosphere where parties in disagreement can more easily get past their emotions and reach a rational and mutual agreement.<sup>192</sup> These additional factors better enable parties to work together throughout the process, and to behave consistently, two things which are important to trust development and repair, and to their co-parenting relationship going forward.<sup>193</sup>

### **Important Areas of Focus and Potential Issues**

The academic literature around collaborative family law has raised several issues with collaborative family practice, to which practitioners should pay attention in order to ensure its capacity to meet clients' needs. These concerns arise from two main areas: the suitability of clients to the collaborative process, and the execution of the collaborative process itself. With regard to suitability of clients, the primary issues raised by the literature revolve around the screening process for abusive behaviour and domestic violence, assessing the trustworthiness of prospective clients concerning full disclosure of information (a lynchpin of the collaborative process), and ensuring proper informed consent for clients, particularly concerning client awareness of the different role of the lawyer and any settlement pressure they may face arising from signing the participation agreement.<sup>194</sup> With the execution of the collaborative process, the

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<sup>192</sup> P. Tesler. *Supra* note 164 at 92,107-112.

<sup>193</sup> R.J. Lewicki and C. Wiethoff. *Trust, Trust Development, and Trust Repair: The Handbook of Conflict Resolution: Theory and Practice*. San Francisco: Jossey-Bass, 2000 at 87.

<sup>194</sup> An American study conducted in 2004 suggested that the participation agreement was not found to place undue pressure on a majority of clients, but the sample size was small enough in this study (25 clients) that it's wise not to rule out this possibility. See W.H. Schwab. *Supra* note 97. at 379-380.

primary areas of interest are: the legal training or type of lawyer that is suited to the collaborative process, methods for ensuring disclosure of relevant information between parties, procedures for managing emotional and financial imbalances between parties and ensuring both parties' readiness to engage with legal negotiation, safe methods for obtaining the child's input, disclosure of sensitive information between collaborative professionals, and the causes of process breakdown and what it could mean for clients when it occurs.

### **Ensuring Suitability of Clients to the Collaborative Process**

#### **Issue 1: Screening Process for Abuse and Domestic Violence, And Viability of Collaborative Process in These Cases**

According to the literature, perhaps the most critical issue facing collaborative practice is the establishment of a rigorous screening process, designed to determine clients' potential suitability to the collaborative process. Screening is critical, in particular due to the possibility of abuse or violence in the prior relationship between the parties. Such abuse can be physical or psychological, and can take many forms.<sup>195</sup> Brett Degoldi states that “when a party to negotiations has been the victim of abuse, that party may feel coerced to enter into the negotiations because abuse and power are closely linked.”<sup>196</sup> Clients who are ending coercive relationships may not have freely decided to engage the collaborative process. The possibility exists that abusers may threaten the other party to force them to engage the collaborative process so as to avoid the independent will of a judge.<sup>197</sup> Another possibility is that a victim may be

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<sup>195</sup> E. Pence and M. Paymar. *Domestic Violence Information Manual: The Duluth Domestic Abuse Intervention Project* (1993), online: <[http://www.euowrc.org/05.education/education\\_en/12.edu\\_en.htm](http://www.euowrc.org/05.education/education_en/12.edu_en.htm)> accessed on 27 November 2012.

<sup>196</sup> B. Degoldi. *Supra* note 76 at 60.

<sup>197</sup> J.H. Difonzo. *Supra* note 72 at 595.

attracted to the supposed quickness of collaborative family law, and may try to rush the process to avoid further contact with an abuser. Collaborative family lawyers will need to be on alert to these scenarios. Collaborative family lawyers will need to be on alert to these scenarios.

Furthermore, collaborative family law is predicated on the facilitation of empowerment and personal choice for clients. However, scholars in the field have rightly pointed out that “the desire to respect personal choice and facilitate self-empowerment is sometimes at odds with the impulse to protect those whose ability to choose has been eroded by prolonged exposure to abuse.”<sup>198</sup> This dynamic can dramatically affect the nature of negotiations, and threatens to prejudice an abused party. Clients who are victims of abuse may lack the capacity to contract entirely of their own free will. Indeed, it is an ongoing debate whether abuse victims “could meaningfully be able to participate in the collaborative process, either because they fear their abusers or are focused on seeking revenge, neither of which is a state of mind consonant with facilitating interest based negotiation.”<sup>199</sup> Collaborative family lawyers therefore need to be vigilant in their attempts to determine and manage abusive dynamics in client's relationships.

This task is made more onerous by the fact that abuse can often be difficult to detect, since parties can be reluctant to discuss such matters with their lawyers because of embarrassment or fear. Citing research on family courts and domestic violence, Herbie DiFonzo notes that abused parties are often reluctant to disclose information surrounding abuse and can tend to downplay it.<sup>200</sup> A real danger exists that where lawyers are the primary intake option for potential clients, abusive behaviour will be missed, as individual lawyers are more likely to lack the training to properly identify cases with abusive dynamics. It is arguable that the assistance of

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<sup>198</sup> Ibid. at 593.

<sup>199</sup> Ibid. at 595.

<sup>200</sup> Ibid at 598. See also N. Ver Steegh and C. Dalton. “Report from the Wingspread Conference on Domestic Violence and Family Courts” (2008) 46 Fam. Ct. Rev. 454 at 460.



mental health professionals in initial client interviews would be beneficial in helping identify unsuitable cases.

In addition to abuse, there is also the difficulty posed by the subtle nature of power imbalances. Economic dependency and subtle emotional control are two characteristics of relationships that have the potential to prejudice negotiations, if they are not detected and addressed by collaborative practitioners. Clients have complained about the inability of the collaborative process to adequately resolve this problem.<sup>201</sup> While it is unrealistic to expect that any one screening procedure can infallibly identify and weed out or manage parties that are abusive, it is reasonable to expect collaborative family lawyers to implement a rigorous screening process that protects clients from potential coercion and abuse, and allows them to find the system of dispute resolution that gives them the best chance to advocate for themselves. This extends in particular to collaborative family lawyers and family lawyers involved in mediation, where the parties must directly negotiate with one another.

This responsibility is codified in the *FLA*. Section 8 of the *FLA* stipulates that family dispute resolution professionals must “assess, in accordance with the regulations, whether family violence may be present.”<sup>202</sup> If they believe family violence to be present in the relationship, they are also required to assess “the extent to which the family violence may adversely affect the safety of a party or a family member of that party, and the ability of that party to negotiate a fair agreement.”<sup>203</sup> This obligation also mandates that professionals discuss the range of dispute resolution options available to parties, and the advisability of these options given the particular family circumstances, as well as refer them to any additional resources necessary to address their

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<sup>201</sup> M. Keet, W. Wieggers, and M. Morrison. “Client Engagement Inside Collaborative Law” (2008) 24 Can. J. Fam. L. 145 at 171.

<sup>202</sup> *Family Law Act*, SBC 2011, c. 25, s. 8 (1).

<sup>203</sup> *Ibid.* s. 8(1).

unique dynamics and resolve the dispute.<sup>204</sup> There are also regulations under the *FLA* that require, as part of the qualifications for a family dispute resolution professional, the completion of “at least fourteen hours of family violence training, including training on identifying, assessing, and managing family violence and power dynamics in relation to dispute resolution process design.”<sup>205</sup> The explicit reference to family violence screening and management obligations in the *FLA* is indicative of the importance of this issue.

It is also important to note that the literature does not suggest that every abusive or high conflict case should be screened out by collaborative practitioners, nor does the *FLA*. As noted above, the *FLA* simply stipulates that family dispute resolution professionals must properly screen clients for violence, and take account of it in their recommendations to parties concerning appropriate dispute resolution processes. Should abused parties choose their process, dispute resolution professionals are also obligated to tailor their own process to provide adequate support. In addition to possible process alterations, this also involves providing parties with proper referrals to additional resources, which can assist in the effective management of abuse during the dispute resolution process.

Chrisman et al argue that “the collaborative process affords abused parties greater power over outcomes and may be instrumental in restoring at least a portion of those parties’ inner strength and self-esteem.”<sup>206</sup> There are several features of the collaborative process that would be beneficial to some high conflict clients. Both parties are represented by a lawyer throughout the

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<sup>204</sup> Ibid. s. 8(2).

<sup>205</sup> *Family Law Act Regulation*, BC Reg 347/2012, Part 3, s. 4 (2) (d) (iv). Note that the context of this regulation concerns family law mediators wishing to “qualify as family dispute resolution professionals.” While it is somewhat unclear and untested whether this regulation would be found to have application to collaborative lawyers, since the collaborative law process represents a similar model of alternative dispute resolution, that requires a similar professional skill set from collaborative lawyers to execute, one can infer that it should and likely would apply.

<sup>206</sup> J.H. Difonzo. *Supra* note 72 at 457.

process. Dr. Susan Gamache notes that “both clients have their advocate in the room with them. This generally allows the clients to feel safe and supported, even in relatively high conflict situations.”<sup>207</sup> While there is a debate about whether the premises of collaborative family law can support such clients, it is arguable that collaborative law still offers more security to clients than self-represented litigation or mediation. Each party has an advocate whose role is to protect their interests while advancing negotiations and the best interests of any children.

The collaborative process is also interdisciplinary. Foran notes that “collaborative law provides abused parties access to mental health practitioners, coaches and counselors to help in managing conflict and manipulation.”<sup>208</sup> Pauline Tesler, one of the key figures in the collaborative movement, highlights the important role professionals from other disciplines can play in the resolution of high conflict cases. She argues that in one of her more complicated cases, the interdisciplinary team, comprised of a child specialist, financial expert, and a divorce coach, was essential at providing information concerning underlying issues that the lawyers themselves had been unable to pick up.<sup>209</sup> Mental health professionals are better trained to detect underlying emotional issues and power dynamics that may inhibit negotiations. The use of divorce coaches by some collaborative lawyers allows emotional issues that are preventing resolution to be addressed by the parties as well. According to Dr. Gamache, “having two family therapists in the room allows for a carefully controlled process. Clients are coached in expressing their concerns and in listening to the other party.”<sup>210</sup> In some high conflict cases, coaches and child specialists can bring the emotional temperature down between the parties, and actually serve to protect them. Because of client control over the process and the involvement of

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<sup>207</sup> S. Gamache. *Supra* note 47 at 1468.

<sup>208</sup> J.H. Difonzo. *Supra* note 72 at 597.

<sup>209</sup> P. Tesler. *Supra* note 164 at 108.

<sup>210</sup> S. Gamache. *Supra* note 47 at 1468.

professionals from diverse areas of expertise, collaborative family law can also allow for more nuanced solutions in terms of managing abusive behaviour.

However, the collaborative process requires clients to contract out of their right to have the matter adjudicated by a third party, and removes the safeguards of court supervision by requiring the parties to negotiate face to face. The possibility exists that this requirement may be traumatic for some clients, particularly for those who have experienced abusive behaviour or violence from a partner. The resulting emotions a face to face encounter could stir in them may inhibit their capacity to advocate for themselves and negotiate an agreement that is in their best interests. Indeed, it is debatable whether abuse victims “could meaningfully be able to participate in the process, either because they fear their abusers or are focused on seeking revenge, neither of which is a state of mind consonant with facilitating interest based negotiation.”<sup>211</sup> The fact that they cannot opt out of the process without switching lawyers could prejudice them.

Several of the questions posed to interviewees in this study attempt to gather more information about existing abuse screening processes utilized by collaborative lawyers, as well as their perspectives on how collaborative law can manage potentially abusive relationship dynamics. When assisting families with dispute resolution, the many contextual factors professionals are forced to consider around this issue are indicative of how complicated this process is. The context, circumstances and needs of each individual family member likely vary to some degree. It is imperative that collaborative family law professionals develop a comprehensive, reasonably consistent screening process. Ideally, this process should assist in identifying cases where collaborative law would be uniquely positioned to help, those that may be unsuitable, and provide a referral procedure to be employed if necessary so that clients can get

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<sup>211</sup> J.H. Difonzo. *Supra* note 72 at 595.

the help they need to constructively move on with their lives.

## **Issue 2: Assessing Trustworthiness of Clients re: Disclosure**

According to many of its advocates, a key lynchpin of the collaborative process is the trust between the parties concerning disclosure of relevant information, whether related to behaviour or finances. As Schwab points out “collaborative negotiating involves a certain element of risk, namely that the other side will take advantage of your good faith approach to sharing important information.”<sup>212</sup> For the process to work and for negotiation to proceed in a manner beneficial to the family, both sides must be able to trust that they are providing each other with accurate information necessary to make legal decisions. The specific manner in which this is managed is crucial to the client experience. The collaborative process is predicated on the timely, full and candid disclosure of information related to the collaborative matter without formal discovery.<sup>213</sup>

Because there is no court enforcement mechanism, disclosure is dependent both on the good faith of the parties, and on the collaborative lawyers to detect any failure by one of the parties to disclose material information. Only the threat of the dissolution of the process can be used to compel disclosure. The lack of easily identifiable means to compel disclosure places extra importance on the trustworthiness and honesty of the clients themselves. The manner in which collaborative practitioners handle difficulties in this area can determine the success of the process. The capacity to assess client integrity in the early stages is therefore critical for the collaborative process to function as intended. Lawyers will need procedures and strategies to assist them in being reasonably accurate at determining when a client may be providing

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<sup>212</sup> W.H. Schwab. *Supra* note 97 at 361.

<sup>213</sup> J.H. Difonzo. *Supra* note 73 at 585. See also J. MacFarlane. *Supra* note 94 at 68.

dishonest or incomplete disclosure. Questions asked of the interviewees in this study address how lawyers assess the honesty of their clients, as well as the tactics lawyers use to elicit full and fair disclosure from them.

### **Issue 3: Ensuring Informed Consent by Clients**

There are many aspects of the collaborative process that are dramatically different from the traditional court based approach that people envision when they consider the legal system. One of the most important aspects is ensuring that lawyers provide clients with enough information concerning the process to allow them to properly give informed consent. Informed consent is especially crucial because of the legal entitlement to court support that clients are giving up by entering into the collaborative process. Clients must be informed regarding the procedural differences, but also the difference in the values and beliefs that underpin them. John Lande critically expresses some theorists' descriptions of the collaborative process as “directing the lawyers to take instructions from the clients' higher functioning self, and to politely disregard the instructions that may emerge from time to time during the divorce process, when a less high functioning self takes charge of the client.”<sup>214</sup>

Despite the critical angle he adopts, this approach actually has some very promising implications for families. Promoting and facilitating clients' higher functioning selves is critical to minimizing the destructive elements of family disputes and preserving constructive parenting relationships. The presence of mental health professionals such as divorce coaches, being involved concurrently or prior to the dispute resolution process, could help address manipulative conduct through the promotion of self-awareness among clients. Collaborative law appears to be

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214 J. Lande and G. Herman. *Supra* note 80 at 283. Citing J. Jackson. “The First Four Way Meeting Do's and Don'ts.” (2001) 1:3 *Collaborative Review* at 209.

especially open to providing this option to clients, and thus has potential to promote the realization of clients' higher functioning selves.

Yet this departure from traditional litigation practices also underscores the importance of explicit discussions with clients concerning the disclosure requirements, the role of the lawyer and the scope of representation, the extent of private lawyer-client consultation and the full consequences of the disqualification agreement.<sup>215</sup> While there is little doubt that most collaborative lawyers would walk prospective clients through the participation agreement, there is some concern around the abstract language used in these agreements that “may not be meaningful to clients.”<sup>216</sup> The emotional and time sensitive nature of many family disputes can further complicate this, since the parties may not be thinking rationally during that initial meeting. Studies have also noted that more inexperienced collaborative lawyers can have difficulty anticipating the issues that arise in the process or the broader implications to clients of an extra-legal, voluntary negotiation process.<sup>217</sup> Clients sometimes have complaints about the process not proceeding as expected, particularly with regard to disclosure requirements, the pace of negotiations, methods of ensuring compliance with interim agreements, and fees.<sup>218</sup>

Engaging collaborative lawyers with the question of how to ensure informed consent, particularly with respect to new clients who may be unfamiliar with the process, is of vital importance to the ultimate success of collaborative law. The key to great client service is to meet or exceed expectations, and informed consent is critical to the management of client expectation. As Julie McFarlane points out, the exercise of individual discretion, as well as regional variations in the way in which basic collaborative law principles are interpreted and applied, further

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<sup>215</sup> J. MacFarlane. *Supra* note 94 at 64.

<sup>216</sup> *Ibid.* at 64.

<sup>217</sup> *Ibid.* at 64.

<sup>218</sup> *Ibid.* at p. 64-65. See also M. Keet, et al. *Supra* note 201 at 164.

complicates the task.”<sup>219</sup> It makes it even more important that lawyers clarify their methods of practice, as well as what clients should expect at the beginning stage in language that is comprehensible to clients. Questions asked of collaborative lawyers in this study attempt to achieve this objective.

### **Execution of Collaborative Process**

#### **Issue 1: Collaborative Lawyer Training – Views in Debate**

One question surrounding the execution of collaborative family law in the literature is lawyer training. According to the International Academy of Collaborative Professionals (“IACP”), which provides training guidelines, in order to practice collaborative family law, lawyers must be in good standing with the IACP and their own local collaborative practice group. They must also have good standing with their local law society, as well as a minimum of twelve hours of collaborative law training, and thirty hours of client centred, facilitative conflict resolution training. Prospective collaborative lawyers must also receive fifteen hours of additional specialized mediation or communications training.<sup>220</sup> They must also practice in a manner consistent with the IACP ethical guidelines.<sup>221</sup>

At this time, there is debate concerning what constitutes optimal training for ensuring competency in collaborative legal practice. Larry Spain defines competency in this area as “knowledge in a substantive area undertaken on behalf of a client, but also the skills and a thorough understanding of the processes to be used by the lawyer in realizing client goals and

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<sup>219</sup> J. MacFarlane. *Supra* note 94 at 65.

<sup>220</sup> International Academy of Collaborative Professionals. *Standards and Ethics*. See heading titled *Minimum Standards for Collaborative Practitioners*, Section 2, online: <[https://www.collaborativepractice.com/media/114222/IACP\\_Standards\\_\\_Ethics\\_\\_Sep\\_2015\\_.pdf](https://www.collaborativepractice.com/media/114222/IACP_Standards__Ethics__Sep_2015_.pdf)> accessed in November 2016.

<sup>221</sup> *Ibid.* at Section 1.3.



objectives.”<sup>222</sup> While there are recommended ethical practice and training guidelines set forth by the IACP as outlined above, the manner in which each group of collaborative professionals actually adheres to these guidelines is unclear. Implementation of these guidelines can be loose because of the emphasis on flexibility in collaborative practice. The guidelines themselves are often subject to individual interpretation, which is frequently defined by that individual lawyers' values and approach.<sup>223</sup> The flexibility that collaborative family law requires to be effective arguably makes training practices even more important. Practitioners need to be deft at adhering to ethical guidelines, while using a diversity of approaches to effect individualized solutions for their clients.

One of the main difficulties with collaborative training is that it asks lawyers to switch streams from what they have been taught in their prior professional life. Stu Webb notes that the primary role of the collaborative lawyer is to “assume a position in support of the clients. Collaborative lawyers provide support for settlement, clearing miscommunications and keeping the clients as open as possible for productive conversation.”<sup>224</sup> They may also take the interests of the family as a whole, and in particular children, into account in their discussions with clients.<sup>225</sup> This stands in stark contrast to the adversarial model of representation, which emphasizes the protection of the client’s individual legal rights, and encourages advocacy for those rights as the main focus. Scholars in the field note the difficulty in changing streams from adversarial to collaborative methods. Law schools, with their focus on case law, tend to emphasize adversarial training. While some may offer courses in collaborative law, they are not

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<sup>222</sup> L.R. Spain. “Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated Into the Practice of Law” (2004) 56:1 *Baylor Law Review* 141 at 170.

<sup>223</sup> J. MacFarlane. *Supra* note 94 at 8-11.

<sup>224</sup> S. Webb. *Supra* note 74 at 158.

<sup>225</sup> See P. Tesler. “Collaborative Family Law.” (2003-2004) 4 *Pepp. Disp. Resol. L.J.* 317.

required.<sup>226</sup> Training in adversarial thinking thus takes place from the moment a prospective lawyer starts his or her legal education, but collaborative law methods are not taught until such time as the lawyer decides to switch methodology and join a collaborative practice group, sometimes many years after embarking on the practice of law.

One of the most comprehensive reports around education and training in collaborative law has come from the United States. In November 2009, Hofstra University School of Law hosted a conference exclusively focusing on collaborative law practice. While the conference was in response to the passage of local collaborative law legislation, which was not the law in British Columbia, it produced many generally applicable recommendations around collaborative practice. Several family law organizations, including the IACP, participated in the conference.<sup>227</sup> The conference was organized into Working Groups, each of which tackled a different legal or practical issue facing collaborative practice.

They identified five core areas in which prospective law students who wanted to practice collaboratively would require additional training. These areas included the psychological components of divorce (understanding loss and anger), ADR courses, interdisciplinary practice, lawyering theory and practice, and client centred “humanistic lawyering.”<sup>228</sup> The training Working Group also arrived at the conclusion that it was important to train new lawyers in collaborative law before, or while they are trained in litigation. The rationale for this theory was that “becoming a collaborative lawyer after years of practicing trial law requires rebuilding from the bottom up an entirely new set of attitudes, behaviours, and habits.”<sup>229</sup> The conference also

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<sup>226</sup> J. H. Difonzo. *Supra* note 72 at 607.

<sup>227</sup> *Ibid.* at 569.

<sup>228</sup> *Ibid.* at 607

<sup>229</sup> *Ibid.* at 608.

produced recommendations for allowing law school clinics to provide collaborative representation to the poor.<sup>230</sup>

Concerning this last recommendation, in British Columbia, there is some avenue for clients who are unable to afford collaborative law to obtain collaborative services. The BC Collaborative Roster society “offers a pro bono program for people going through separation or divorce who want, but cannot afford to hire collaborative family lawyers.”<sup>231</sup> To participate, combined spousal assets must not exceed \$100,000, and combined annual income must not exceed \$75,000 per year in the Greater Vancouver Area. Priority is given to families on the basis of need.<sup>232</sup> It is arguable that it would be beneficial to lower income families to support the provision of collaborative family law in a more comprehensive manner. More studies should be done that focus on the demand for and utility of collaborative family law for lower income families.

In general, the extent to which the collaborative training standards required by the IACP satisfy the objectives set out in the aforementioned report is debatable. The picture is even murkier when one considers the flexible nature of collaborative practice. It is reasonable to assume that “best practices” would strike an appropriate balance between flexibility to the needs of each client, and consistency that clients can rely upon. Therefore, the interviews in this study sought to gather more data surrounding the local application of the training standards in Vancouver, and to obtain lawyers' perspectives on whether the training they received enhanced

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<sup>230</sup> Ibid. at 609.

<sup>231</sup> BC Legal Services Society. *Family Law in British Columbia: Collaborative Family Lawyers*, online: <[http://www.familylaw.lss.bc.ca/help/who\\_CollaborativeFamilyLawyers.php](http://www.familylaw.lss.bc.ca/help/who_CollaborativeFamilyLawyers.php)>, accessed on 10 December 2016.

<sup>232</sup> BC Collaborative Roster Society. *Pro Bono Collaborative Divorce Project*, online: <<http://www.bccollaborativerostersociety.com/practice/probono/>>, accessed on 10 December 2016.

their capacity in the five areas where the report indicated that law students and lawyers might need additional training. The literature also raises the question of whether it might be advantageous to have a separate stream of collaborative training for lawyers, both coming out of and within law school. Such a stream would assist students in determining possible career paths following completion of law school. This debate also raises doubts as to whether it is beneficial to lawyers or their clients to have a policy of litigation practice experience for lawyers who wish to engage in collaborative practice. Depending on the individual, litigation experience could arguably inhibit one's capacity to do work collaboratively. Also of notable interest for further research is the domestic violence and abuse screening undertaken by collaborative lawyers.

## **Issue 2: Methods for Ensuring Disclosure of Relevant Information Between Parties**

The importance of proper disclosure by clients to the collaborative process has been discussed extensively above. The forthright sharing of relevant information by participants is a key cog of the collaborative process. “The parties are expected to be respectful, provide full disclosure of all relevant information, and address each other's legitimate needs.”<sup>233</sup> Disclosure plays an integral role in the promotion of a co-operative atmosphere and is essential to allow for competent legal decision making that serves the interests of clients and families. Yet Lande notes that “research shows that while collaborative lawyers generally explain the formal operation of the full disclosure agreement and disqualification agreement, some collaborative law parties do not anticipate the consequences.”<sup>234</sup> Assuming that any process designed to filter out dishonest individuals or those with “scores to settle” is necessarily going to be imperfect, it is also critical for collaborative practitioners to develop tactics and methods that will help promote the

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233 J. Lande and G. Herman. *Supra* note 80 at 283.

234 *Ibid.* at 285.

disclosure of relevant information between parties once the process has begun.

This raises several interesting questions. The literature observes that collaborative lawyers have varied philosophies in respect of disclosure. Julie MacFarlane notes that “norms vary widely among collaborative lawyers. Some lawyers are committed to bringing each and every bit of information to the table that they believe will help build trust.”<sup>235</sup> Building trust is regarded by some as important because of the capacity of mistrust to inhibit disclosure and thus undermine the collaborative process.<sup>236</sup> This “everything on the table” approach potentially raises privacy and confidentiality issues. However, if done properly it is arguably closest to the full disclosure ideal that underpins the collaborative process. The varied nature of philosophy around disclosure highlights the need for this study’s investigation into the methods of ensuring disclosure that are implemented by collaborative lawyers in Vancouver.

### **Issue 3: Ensuring Client Readiness to Negotiate, Managing Emotional and Financial Imbalances, and any Safety Concern**

Parties rarely begin a divorce or separation in the same place, either emotionally or financially. Functioning optimally, a family dispute resolution process should seek to place both parties on an equal footing concerning their capacity to negotiate, either prior to or concurrently with the negotiation process. An “equal footing” is characterized by each party possessing a sense of empowerment, and has both emotional and financial components. The emotional component revolves around ensuring that both parties are able to exercise control of their emotions and make rational decisions for themselves. Exercising control does not mean forcing clients to suppress their emotions. Wieger and Keet note the danger that “in an effort to preserve

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235 J. Macfarlane. “Experiences of Collaborative Law” (2004) *Journal of Dispute Resolution* 179 at 207.

236 Ibid. at 211.

the ideal of the higher self, collaborative lawyers may inadvertently suppress their clients' anger and other intense emotions that can legitimately arise from abuse.”<sup>237</sup> Thus, somewhat counter intuitively, in order for people exercise emotional control it may be necessary initially to help them find safe ways to release, express, and process these emotions without it derailing the negotiation process.

Yet it is clear that during the negotiation and decision making phases of the dispute, all parties are better served if they have the capacity to manage their more difficult feelings. One of the primary goals of any dispute resolution process should therefore be to assist in developing clients' capacity in this area. Divorce coaches may be particularly useful in this regard. Working in concert with the lawyers, it is conceivable that they could give collaborative law an advantage over some other methods of dispute resolution available to divorcing or separating couples. One of the questions asked of collaborative lawyers in my interview sample, is how often divorce coaches are used by lawyers in the collaborative process.

The financial aspect of creating an equal footing involves ensuring that both sides are sufficiently informed about their financial positions and issues facing them so that they may properly bargain. Although it is not always the case, women can find themselves at a financial disadvantage during legal negotiations. Wieggers and Keet note that “economically, women are more likely than men to have lower and often untested earning power, and less access to the income generating assets of a marriage. They may also have less accurate information regarding assets and future earning potential.”<sup>238</sup> Voegele, Wray, and Ousky highlight the fact that in the litigation process, people frequently make “exaggerations of value” and create “settlement

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237 W. Wieggers and M. Keet. “Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities.” (2008) 46 *Osgoode Hall L.J.* 733 at 739, para. 19.

238 *Ibid.* at 736 at para. 6.

thresholds as standard negotiating practice.<sup>239</sup> They assert that in the collaborative process, the continued presence of these tactics could be destructive to the process, and could lead to adverse outcomes and distorted settlement efforts. Lawyers and clients are therefore expected to be more forthcoming, which places additional emphasis on informed consent by clients to this approach in order for the process to function properly.<sup>240</sup> The development of mechanisms to balance emotional and financial wherewithal between the parties is critical to promoting equitable and just legal outcomes, as well as preserving to the extent possible, functional post-divorce relationships.

Providing level playing fields for both parties is difficult even absent severe power imbalances or abusive relationship histories. However, where these things are present, in order to ensure a baseline of client safety, collaborative lawyers also must possess an understanding of power and abuse dynamics. Once the process begins collaborative lawyers must employ tactics that implement this knowledge in order to promote equality of bargaining power between the parties. In the literature, Wiegiers and Keet note that CL's potential in [managing inequality] “flows largely from the integration of the lawyers in the process because counsel can facilitate the provision of more thorough legal advice and more individualized negotiating support.”<sup>241</sup>

They also point out the dangers, noting that “this potential however, will not be fully realized unless lawyers demonstrate high levels of sensitivity to imbalances, utilize effective screening strategies, provide timely and specific legal advice, and work at achieving deeper and more effective client-lawyer communication.”<sup>242</sup> Susan Gamache notes that the collaborative process “cannot reach everyone”, and advises that “some of the issues that may screen a family

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239 G.L. Voegele and L. Wray et al. *Supra* note 188 at 1019.

240 *Ibid.*

241 W. Wiegiers and M. Keet. *Supra* note 237 at 736, at para. 9.

242 *Ibid.*

out of the collaborative process include “family violence, mental illness, extreme power imbalance in the couple relationship, unwillingness to disclose information relevant to the separation process, and pervasive distrust of the other party.”<sup>243</sup> As mentioned previously, recognition of extreme cases when clients are not suitable to the process, is essential to the success of the collaborative method at providing effective client service. Effective safety protocols are also necessary in the event clients with these issues decide to engage the collaborative process. This thesis further explores collaborative lawyers responses to questions concerning how they facilitate clients’ emotional readiness to negotiate, and provide clients with minimum levels of financial knowledge and safety such that they may properly advocate for themselves during negotiations.

#### **Issue 4: Ensuring Child's Perspective Enters Process Safely**

As discussed in the literature review in previous chapters, children are often in an extremely vulnerable position during the divorce or separation process. Depending on their age, their input can be critical to decisions made by both their parents, and the broader legal system. During this time, they are susceptible to manipulation from either parent, on whom they are usually dependent and attached to varying degrees. In high conflict families, parents' influence can extend to the point where the child may rightfully fear punishment for offering a perspective that is detrimental or unfavourable to one parent. The legal standard outlined in the *FLA*, which arguably reflects society's desire, is that the best interests of children should be the only consideration when crafting parenting arrangements<sup>244</sup>, so it is essential to find constructive and safe ways to give them a voice in the process.

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<sup>243</sup> S. Gamache. *Supra* note 47 at 1479.

<sup>244</sup> *Family Law Act*, SBC 2011, c. 25, s. 4c.



Theoretically, the use of the divorce coach and child specialist by the collaborative process offers a potential avenue for children to provide perspective while protecting child safety. Susan Gamache observes that “children can experience a warm and supportive environment with the child specialist in which to explore the sensitive aspects of the divorce. By remaining neutral to the parents and advocating only for the children, the child specialist provides the expertise and the vehicle to keep the children's interests in view.”<sup>245</sup> Divorce coaches can also play a role in acting as a neutral communicator, relaying the child's perspective to the parents in a non-threatening and non-judgmental manner. They can allow parents to “receive support and encouragement for their own best parenting.”<sup>246</sup> The theory is that the addition of the expertise of child specialists and divorce coaches, creates conditions where children's perspectives on their future can enter into the dispute resolution process in a manner that is not divisive to the family, dangerous to the children, or detrimental to the post-divorce or separation co-parenting relationship. It is important to investigate collaborative lawyers perspectives on methods for entering the child's perspective into the process, as well as their view of the effectiveness of these techniques. To that end, each collaborative lawyer in my study inquire was asked when they seek children’s’ perspectives, and how that perspective is introduced into the process by the team of collaborative professionals.

### **Issue 5: Confidentiality Concerns – Scope of Disclosure Between Parties and Disclosure of Sensitive Information Between Collaborative Professionals**

A client's right to privacy and confidentiality is an essential underpinning of any legal dispute resolution process. Within the adversarial system, clients have come to expect and rely

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245 S. Gamache. *Supra* note 47 at 1481.

246 *Ibid.*, at 1483.

upon a certain degree of confidentiality regarding legal discussions. Confidentiality in this context functions as a protective measure, designed to optimize outcomes for each individual and to permit them to save face. Alternative dispute resolution methods such as collaborative law rely on fully transparent disclosure between parties in order to function effectively. There is necessarily going to be some tension between a clients' desire for privacy and the requirement of full and frank disclosure between the parties that allows the collaborative process to be successful.

Specific areas of concern identified in the literature include the scope of disclosure required between the parties, as well as the nature of disclosure between collaborative professionals for the purposes of advancing the process. The interaction of lawyer-client privilege with the disclosure principles of the collaborative process is important to examine. Regarding the scope of disclosure, MacFarlane notes that the way in which collaborative lawyers choose to interpret the disclosure requirement can influence the kind of information clients are required to provide. Depending on the nature of the disclosure provisions in the participation agreement, there is concern that clients may be pressured to disclose information that may not be materially relevant to a legal issue in dispute, but in the opinion of a collaborative practitioner, necessary to move the process forward.<sup>247</sup> The debate in the literature centres around whether this compromise undermines client rights and objectives. The answer to this question partially lies in whether clients have been provided with appropriate information regarding this aspect of the process. The other key question is who is driving the determination of whether information is materially relevant, the lawyer or the client. Interest based negotiation arguably requires a wider determination of relevancy, and sometimes disclosure may be as much about establishing trust between parties as it is important to parties' individual legal and non-legal interests.

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<sup>247</sup> J. MacFarlane. *Supra* note 94 at 68.

Pauline Tesler notes that ideally, “each client works with a trained divorce coach to learn highly focused communication, stress reduction, values clarification, assertiveness, and/or anger management skills aimed at helping the client move as effectively as possible through the collaborative divorce process. The child specialist provides balanced, non-judgmental, non-evaluative information about the child’s needs and challenges during the divorce process, as an aid to developing high quality parenting plans.”<sup>248</sup> When clients elect to use these services, there is inevitably some sharing of information between these professionals and each party’s lawyers, particularly where the lawyers feel that having knowledge of such information can facilitate the effectiveness of the process. Proponents of the collaborative process tout the sharing of information between the coaches and the lawyers as being essential to their capacity to manage the conflict, understand family dynamics, and facilitate agreements between parties.<sup>249</sup>

However, some critics have also raised concerns about the sharing of information between collaborative professionals during the process. While divorce coaches, child specialists and financial planners can be “retained jointly by the parties as third party neutrals,”<sup>250</sup> each party may “often retain separate mental health professionals as coaches throughout the process.”<sup>251</sup> These coaches, through their involvement in the process, are often privy to private information about the party they are coaching, some of which may be relevant to the dynamics of a particular family dispute. Confidentiality practices and standards “differ among the professions”<sup>252</sup>, which theoretically creates variability regarding what information can be shared with lawyers and otherwise disclosed. Gathering more information on how collaborative lawyers in the Vancouver area address the confidentiality issue is critically important. At the very least,

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248 P. Tesler. *Supra* note 225 at 331.

249 S. Gamache. *Supra* note 47 at 1467.

250 J.H. DiFonzo. *Supra* note 72 at 588.

251 *Ibid.* at 588.

252 *Ibid.* at 589.

one would imagine the disclosure practices and guidelines for a particular group of professionals on a file should be communicated to the parties at the outset, ideally in the participation agreement, so there are no surprises.<sup>253</sup>

### **Issue 6: Issues with Process Breakdown**

The literature has also identified some potential difficulties when the collaborative process breaks down. One issue is the conditions that permit attorney withdrawal. According to the IACP Ethical Standards, attorneys may withdraw if a client is refusing to engage in the collaborative process, either through failing to disclose material information or engaging in behaviour that undermines the collaborative process.<sup>254</sup> Of particular concern is the provision that “a collaborative practitioner must suspend or withdraw from the collaborative process if the practitioner believes that a collaborative client is unable to effectively participate in the process.”<sup>255</sup> Difonzo notes that this gives collaborative attorneys full discretion in deciding whether to withdraw, and places increased importance on the nature of advice given to the client and the nature of the demand made on the client to alter their behaviour.<sup>256</sup> Collaborative lawyers must be extremely vigilant in their exercise of this discretion, and in giving clients the opportunity to alter their behaviour prior to termination. Additional specific information around how collaborative lawyers handle this in practice will be useful in arriving at best practices.

Another issue is the proper transfer of the file into the litigation process. Disclosure of information following the breakdown of a file is a key issue. There is an inherent dilemma

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<sup>253</sup> Ibid., at 589.

<sup>254</sup> International Academy of Collaborative Professionals. *Standards and Ethics*. (Sept. 2015) See section titled *Ethical Standards for Collaborative Practitioners*, 9.1-9.3, online: <[https://www.collaborativepractice.com/media/114222/IACP\\_Standards\\_\\_Ethics\\_\\_Sep\\_2015\\_.pdf](https://www.collaborativepractice.com/media/114222/IACP_Standards__Ethics__Sep_2015_.pdf)> accessed in November 2016.

<sup>255</sup> Ibid. at Section 9.4.

<sup>256</sup> J.H. Difonzo. *Supra* note 72 at 583.

between the “withdrawing attorney's ethical duty to take reasonable steps to protect a client’s interests and the limitations the collaborative lawyer may have in sharing information or assisting in transferring the case to litigation counsel.”<sup>257</sup> Typical participation agreements contain provisions surrounding confidentiality which prevent information disclosed in the collaborative process from being used in subsequent litigation.<sup>258</sup> This creates a cloudy situation concerning the appropriate extent of assistance to be given to subsequent counsel. There is nothing in the existing IACP Ethical Guidelines governing this transition. The guidelines say only that the withdrawing collaborative attorney must provide counsel with a list of professional resources concerning alternative representation options.<sup>259</sup> There is a need for additional information concerning collaborative practitioners views on ways to manage this transition, so that clients are better able to understand what faces them in the event they have to terminate their collaborative process.

Also important is the cost to the clients of having to withdraw from the collaborative process. There is a plausible argument that the cost to the client, both in terms of time and money, is considerable in the event that the collaborative process fails, or clients are forced to withdraw. The literature suggests that this may exert undue pressure to settle on clients who are either emotionally drained or financially capable of paying for additional legal representation if the process breaks down.<sup>260</sup> This argument is reasonable, and it potentially represents a significant impediment to the growth of collaborative law, specifically in its capacity to assist

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<sup>257</sup> L.R. Spain. *Supra* note 222 at 164.

<sup>258</sup> *Ibid.* p. 164. See also J. McFarlane. *Supra* note 94. See executive summary at p. x.

<sup>259</sup> International Academy of Collaborative Professionals. *Supra* note 254 at Section 9.5.

<sup>260</sup> J. McFarlane. *Supra* note 94 at 69. See also M. Keet, et al. *Supra* note 201 at 190-192.

clients with more modest incomes.<sup>261</sup> It is therefore incumbent on collaborative professionals to think about how best to address this problem, both for their own good and their clients'. This study attempts to gather information concerning what steps collaborative lawyers when a process breaks down, what they do when they encounter clients with fixed budgets, and the ways in which they manage the termination of their process.

### **Chapter Summary**

The literature has identified several areas of interest for those studying collaborative family law. Each of these issues represents a different area of analysis that has potential application to the effective delivery of collaborative family law. The discussion above provides a brief overview of each of the areas, and highlights the issues and concerns in each area that have the potential to impact collaborative law practice and the clients who utilize it. My study seeks to add to the debate in the literature concerning these areas, through providing the perspective of collaborative practitioners in Vancouver who are currently engaged in the practice of collaborative law. A more detailed discussion of my study methodology will be provided in Chapter Four. In addition to this study's methodology, Chapter Four focuses on issues raised in the literature concerning ensuring the suitability of clients to the collaborative process. Chapter Five focuses on potential issues around the execution of the collaborative process. These subsequent chapters will illuminate and discuss the perspectives and methods of Vancouver collaborative lawyers with respect to these issues, as well as the potential implications for collaborative family law clients, and their children.

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<sup>261</sup> G.G. Cox and R.J. Matlock. *Supra* note 177 at 52. Matlock and Cox note that at the time of their study, collaborative law in Texas was largely utilized by those who make over \$50,000 in that jurisdiction.

## **Chapter 4: The Interview Study: Matching Clients with Process**

The purpose of this chapter is twofold. First, it seeks to review in greater detail the methodology used in the interview study in order to help the reader better understand the rationale behind the interviews, and the information they sought to gather. Secondly, this chapter reviews collaborative lawyers' perspectives and approaches, when dealing with issues relating to matching prospective clients to the collaborative process. Prioritizing the suitability of clients to the collaborative process is arguably critical to ensuring that the collaborative process serves the interests of clients and their children.

### **Overall Study Purpose**

As previously stated, an overarching goal of this thesis is to explore and enhance information on issues surrounding family dispute resolution from a best interests of the child perspective. While the legal and social interests of children and their parents do not always align during the family dispute resolution process, it is unquestionably a desirable objective, and some would argue a legal and moral imperative, for any family dispute resolution process to attempt to maximize outcomes for both parents and their children. For reasons outlined in previous chapters, one of the most intriguing and potentially promising methods of dispute resolution in this regard is collaborative family law. Therefore, a central goal of this thesis is to further examine the methods and ideas of collaborative family lawyers when dealing with difficult issues and situations in their practice. This critical exploration will hopefully further illuminate the debate in the area. It should also serve to provide different perspectives and solutions to difficult problems, which may have some utility for collaborative practitioners themselves in terms of

assisting in improving their practice.

### **Interview Objectives and Focuses**

In order to gather data on current practices of collaborative family lawyers, ten collaborative practitioners from the Vancouver area were interviewed.<sup>262</sup> The questions asked of them were formulated with two key goals in mind. First, gathering data which could contribute to a discussion around helping to ensure the suitability of potential clients to the collaborative process. Second, providing a thorough analysis and exploration of methods used by practitioners when managing difficult situations. The hope was that this exercise might help consolidate practitioner knowledge in the area, and hopefully assist practitioners in the execution of the collaborative process itself.

The questions were focused on gathering information concerning eight critical issues of concern relevant to both these goals, as identified in the collaborative law literature. Relevant to the goal of ensuring a match between the client and the collaborative process, these issues included: client pre-screening, with a focus on identifying potential power imbalance, abuse and disclosure problems, and ensuring informed consent for prospective clients. The issues concerning execution of the collaborative process included collaborative lawyer training, particularly with regard to their approaches and characteristics, methods for promoting disclosure between clients once the process begins, tactics to help get clients ready to negotiate as well as manage imbalances between the parties and any safety concerns, methods used to ensure the child's perspective enters the process safely, confidentiality issues, and the causes of process breakdown and what this could mean for clients. The general purpose of each interview was to

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<sup>262</sup> This study was submitted to and reviewed by the UBC Behavioural Research Ethics Board, from which it received approval on Sept. 27, 2013.



explore the existence and impact of these issues on collaborative practice, the methods employed by collaborative lawyers to address them, and to investigate lawyers' perceptions of collaborative law more generally concerning what the process means for clients. The data gathered was then further analyzed with an eye to its ramifications for children of divorcing or separating parties who choose the collaborative process.

### **Methodology**

One of the main purposes of conducting qualitative research is to “characterise people's experiences of the world, to gather information concerning “the way in which the world is real to those who are studied.”<sup>263</sup> Qualitative research seeks to “describe variation, describe and explain relationships, and describe individual experiences.”<sup>264</sup> The rationale for employing qualitative methodology here is that gathering information concerning Vancouver collaborative lawyers' observations, experiences and methods is both pertinent and meaningful. This rationale is particularly true when one realizes the potential importance of realizing collaborative family law's capacity to achieve positive dispute resolution results for families.

Gathering qualitative data around collaborative lawyers' perceptions of what they do, how they problem solve important issues, and analyzing their methods from a legal rights and best interests of the child perspective, hopefully has utility for a collaborative practice group and possibly for family law more generally. Combined with a literature review concerning the effects of divorce on children, the hope for this research is to provide information to collaborative

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263 See University of Bristol. *Qualitative Methodologies*, online: <http://www.bris.ac.uk/Depts/DeafStudiesTeaching/dissert/Qualitative%20Methodologies.html> accessed 15 May 2012.

264 N. Mack, C.M. Woodsong, K.M. Macqueen, G. Guest and E. Namey. “Qualitative Research Methods: A Data Collector's Field Guide.” (2005) Research Triangle Park: NC Family Health International, at 3. See Module 1. Table 1.

family practitioners that will assist them in meeting both their clients' legal needs, and the needs of clients' children. Since collaborative practitioners are the ones engaged in the daily delivery of legal services to families, it is understanding their realities and perspectives, as well as their ultimate use of information arising from any study of their practice, that is arguably most critical to this objective.

Collecting qualitative data also allows for the full exploration of the context in which collaborative family law operates. Given the departure collaborative family law represents from more traditional legal dispute resolution processes, a deeper more thorough understanding of its context and any practitioners' assumptions underpinning their work is critical to any exploration of collaborative practice.<sup>265</sup> Some of the “legal” methods employed by collaborative practitioners can sometimes go against traditional legal practices, which are concerned primarily with advancing and advocating for an individual parent's legal rights, while taking into consideration the best interests of the child through judicial determinations at the end of this process. Given that a very small percentage of family disputes result in a judgment, it is arguable that a more upstream assessment and advocating for the best interests of children is desirable. Collaborative law, along with other methods of alternative dispute resolution, represent potential avenues for achieving this goal.

Thus, to analyze collaborative family law solely from a strictly traditional individual legal rights prism would be to totally ignore the paradigm shift inherent in collaborative practice. Acquiring qualitative data on collaborative practitioners' perspectives and methods is therefore important. This must also be followed by critically analyzing the data from a perspective that considers both the best interests of the child, as well as the protection of parents' legal rights.

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265 W. Trochim. *The Qualitative Debate*. Web Center For Social Research Methods: Research Methods Knowledge Base, 2006, online: <<http://www.socialresearchmethods.net/kb/qualdeb.php>> accessed 10 October 2011.

This arguably leads to a more balanced analysis. The approach taken here incorporates the specialized knowledge of collaborative practitioners while considering the interests of all parties affected by their work.

For this study, semi-structured interviews were conducted in order to gather qualitative data. Each semi-structured interview contained twenty-nine open-ended questions, covering six broad categories. These questions were asked of ten collaborative practitioners in Greater Vancouver. In order to formulate the questions and their categories, key themes were identified from a review of the existing literature around collaborative family law. The same themes were investigated with each practitioner. Twenty-nine standard questions were asked of each, and follow up questions were used as necessary to dig deeper into various issues. The standard set of questions asked of each interviewer allowed for a level of consistency in the data.

Given the limited time available during interviews, probes were used judiciously, where an answer was either incomplete or gave rise to additional questions around a particular theme. The order of the questions sometimes varied depending on the practitioner's previous answers. This allowed for better flow to the interviews, as well as for deeper probes where answers raised more questions or triggered interesting ideas. The predominantly open ended nature of the questions allowed practitioners to fully delve into their personal experiences with their own law practices. Open ended questions also encouraged them to emphasize particular factors that they saw as more relevant, which then allowed the researcher to see which factors/methods they each prioritized as being more pertinent to a particular issue.

For this reason, where possible questions in certain areas were asked in such a way as to avoid prompting a particular response.<sup>266</sup>

To conduct the data analysis, the interview data was broken down into several categories, each of which represented a key theme or pertinent area for discussion concerning the collaborative process. Each interviewee's answer to each question was analyzed to determine which categories the answer addressed. The categories were then sorted under eight key issues identified by the collaborative law literature review. The answers concerning each category gave rise to various sub-issues, ideas, or solutions that were raised by the interviewees. These were itemized. The frequency of particular suggestions and ideas was recorded in order to determine which ideas, methods and solutions were most common among practitioners that were interviewed. Particularly novel or interesting approaches were also highlighted even if they were in the minority, since they could also represent a new way of addressing a particular problem. Approaching data analysis in this way allowed for the identification of the most common beliefs and approaches used by collaborative lawyers. This approach also enabled this research to highlight solutions that may be less common, but that should still be brought to the attention of those engaging in the practice of collaborative family law, or family dispute resolution more generally.

The study participants were recruited using the Vancouver collaborative practice group website.<sup>267</sup> The prospective interview group was selected at random, using the following criteria: candidates had to be actively practicing collaborative family law, it was important that there be a balance concerning gender in the sample, that there be a variety of family law experience in the

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266 For example, when gathering data on screening procedures, lawyers were not asked directly whether they felt that clients would hide information from them. Rather, they were asked open questions about how they conducted screening, how they got at sensitive information, to see if they acknowledged this possibility on their own.

267 See "Collaborative Divorce Vancouver" website. Accessed at <[www.collaborativedivorcebc.com](http://www.collaborativedivorcebc.com)>

sample, and that there be a variety in the types of firm environments in which they were participating. These criteria were formulated with an eye to ensuring diversity of the sample, and thus a diversity of perspectives informing the data generated by the interviews.

Ten collaborative family lawyers were asked to participate in the study. They were initially contacted via e-mail. Attached to each e-mail was a letter of introduction and an informed consent form, in case they had interest. Interested respondents then replied and a meeting date was arranged. Each lawyer gave their consent to speak with the author in a confidential interview. Each interview was recorded using a computer. The interviews ranged from forty-five to ninety minutes, depending on the length of answers provided by the lawyer and the need for follow-up questions. All interviews were conducted by the author, at the individual lawyer's law firm, or at Allard Hall at the University of British Columbia, as requested by the lawyer. Each interview was comprised of five demographic questions and twenty-four substantive questions. The interview schedule is attached at Appendix C. The interviews generated 107 single spaced pages of type written transcripts. Where quotes are used from the interview transcripts in the thesis, reference is given to the interview number and the question number where it can be found.

### **Participant Profiles**

The participants in this study comprised ten collaborative family lawyers from the Greater Vancouver Area who were members of the Vancouver collaborative practice group. They were of varying age and experience. Within the sample there were five male and five female collaborative family lawyers. A sample with balanced gender distribution and varying levels of experience and age was sought to ensure the diversity of perspectives provided. At the time of

the interviews, nine of the ten lawyers maintained practices in Vancouver itself, while one interviewee had established a practice in Richmond.

All participating members of the Vancouver collaborative practice group are required to have a minimum of: five days interest based mediation training, or three days interest based mediation training and two days principled negotiation training.<sup>268</sup> They must also have completed two days of multi-disciplinary collaborative training before they can become a member.<sup>269</sup> Each practitioner in the sample also has different levels of experience practicing collaborative family law. Among the lawyers surveyed, practice experience ranges between one and thirty-five years. Three of the lawyers interviewed have between zero and ten years' experience, three have between ten and twenty years, and four have more than twenty years of experience. Those in the sample who have less experience practicing law have spent the bulk or entirety of their legal careers practicing collaboratively.

In order to ensure that the sample reflected some variance in practice approaches, the sample contained three lawyers operating in small firm environments (under ten lawyers), three operating as sole practitioners, and four in medium or larger firm environments. Half of those sampled worked in firms that had practices consisting predominately of family or estate law. The other half operated in general service law firms. Some of the sampled lawyers from all ranges of experience have experience practicing in the litigation model as well, and a few have current legal practices which combine both approaches. Four of the ten lawyers interviews had clearly combined legal practices involving both collaborative and litigation files. Another two had

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268 See Collaborative Divorce Vancouver. "2015-2016 CDV Membership Application Form", Section 1, online: <<http://www.collaborativedivorcebc.com/docs/2015-2016-CDVMembershipApplicationForm-Lawyers.pdf>> accessed July 2016. Pursuant to Article 2, Section 2.3b (ii) of the *Society Act: Bylaws of Collaborative Divorce Vancouver*, online: <<http://www.collaborativedivorcebc.com/about/CDV-Bylaws.pdf>> accessed July 2016.

269 Ibid.

limited combined practices wherein they would carry litigation files to a judicial case conference, but if the file went beyond that stage they would transfer it to a litigation lawyer.

### **Interesting Implications of Participant Profiles**

As mentioned above, only four of the ten lawyers interviewed had strictly collaborative legal practices. Another two lawyers would carry litigation files only until the Judicial Case Conference stage before transferring them to a litigation lawyer. This meant that, depending on the definition used, at least forty percent of the interview sample practiced both collaborative law and litigation concurrently, despite the fact that in many ways they are diametrically opposed methods of family dispute resolution that require a different perspective from the legal practitioner.

Thus, one question explored further in the interviews is the effect, if any, that having combined practices has on a lawyer's mindset or approach to a file. Collaborative and adversarial approaches are thought by some in the literature to require opposite skill sets and mentalities. The collaborative approach relies primarily on interest based negotiation and the finding of common interest to facilitate settlement, whereas the litigation focus is on zealous advocacy of individual rights which often leads to positional bargaining. It is interesting then, that a significant percentage of the sample is engaged in blended legal practice. This raises the question of whether a joint practice could compromise a lawyer's effectiveness in one or the other area. It also highlights the need for further research and a debate about whether lawyers should have different training streams for litigation and collaborative practice.

The prevalence of combined practices amongst the Vancouver collaborative practice group is also interesting given the “paradigm shift” that collaborative family law purports to

represent. Collaborative law was founded in 1990 by Stuart Webb, who “became disillusioned by the toll taken on families and children who participated in adversarial litigation. He sought to develop a form of practice where lawyers would be rewarded for helping clients resolve issues and not for exacerbating family conflict.”<sup>270</sup> Given this context it is fascinating that a substantial percentage of the lawyers in this sample are comfortable conducting combined practices. While some lawyers acknowledge the difficulty they experience in doing so,<sup>271</sup> and others practice exclusively collaboratively, the continued existence of combined practices perhaps illustrates that the economic reality for some lawyers can trump the ideological conversion that collaborative law's founder both felt and envisioned for others following his footsteps. The sample demonstrates that the “paradigm shift”, while undeniable and complete for some, means different things depending on the lawyer in question and the firm environment in which they operate. This elevates the importance of developing common baseline standards and methods for collaborative practice within a particular practice group. The Vancouver Collaborative Group has attempted to do this through its training guidelines, common expectations, regular meetings of its members, and standard practice requiring clients to sign a participation agreement.<sup>272</sup> Hopefully this study will also contribute to that endeavour.

While the interview sample demonstrated that many lawyers had not abandoned litigation entirely for collaborative practice, all of the lawyers in the sample did note that when practicing collaboratively, they shifted away from adversarial approaches to family dispute resolution, operated less combatively, and were more inclined to cooperative methods. Common amongst them was the belief that the process enabled greater trust between lawyers and thus allowed them

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270 N. Ver Steegh. “The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non-Collaborative) Lawyers.” (2009) 38:2 *Hofstra Law Review* 699 at 703.

271 Interview 9, Question 40.

272 See Collaborative Divorce Vancouver, online: <[www.collaborativedivorcebc.com](http://www.collaborativedivorcebc.com)> accessed 30 July 2016.



to model behaviour for clients.<sup>273</sup> This was achieved in part through the creation of the safe room and the familiarity between the lawyers, who quickly get to know each other through joint membership in the practice group and repeated involvement on files.<sup>274</sup> Because of these factors, lawyers were also able to take a different approach to settlement, such as using milder legal language and more creative solutions.<sup>275</sup> The changes in their approach, even where operating combined practices, will be canvassed in greater detail in the pages ahead.

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273 Interview 1, Question 16. Interview 3, Question 12. Interview 4, Question 10. Interview 8, Question 20. Interview 9, Question 14. Interview 10, Question 16.

274 Interview 1, Questions 16 and 17. Interview 3, Question 12. Interview 8, Question 20. Interview 9, Questions 14 and 19. Interview 10, Question 16.

275 Interview 1, Question 47. Interview 4, Questions 35 and 36. Interview 10, Questions 39 and 40.

## **Interview Data Analysis: Matching Prospective Collaborative Clients to the CFL Process**

### **Issue 1: Screening Process: Including for Abuse and Domestic Violence, and Viability of CFL in these cases**

#### ***General CFL Screening Process for Suitable Prospective Clients***

The screening process for prospective clientele is arguably one of the most important areas for exploration, in order to ensure that families' needs are met by the delivery of legal services. In an ideal world, every lawyer, no matter their method of practice, would engage with clients to help them determine whether a particular dispute resolution process suits an individual family's needs and objectives. The matching process between lawyer and client would be a two way dialogue, with the lawyer highlighting the strengths and weaknesses of their method as applied to the client's particular case and goals. The reality is that, at present, while this can and does happen, the matching process is sometimes left to the individual clients to determine for themselves, after lawyers have gone through their options with them as required by law.<sup>276</sup> This reality is predominantly based on the need to preserve client self-determination, as well as a desire on the part of many lawyers to bring as many clients as possible into their practice. Screening procedures, where they exist, are often inconsistent and involve the consideration of different factors depending on the lawyer involved.

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<sup>276</sup> *Family Law Act*, SBC 2011, c. 25, s. 8(2).

However, in family law, given the dramatic implications that family dispute resolution can have for the development and health of children and their families<sup>277</sup>, it is arguable that lawyers engaged in all methods of dispute resolution have an obligation to screen their clients, with the overarching goal of helping ensure a minimum level of suitability between prospective clients and a particular dispute resolution method. This obligation functions to ensure a fit between lawyer and client, as well as between the client and particular dispute resolution process. The criteria for what constitutes “suitability” when assessing a client can and should be the topic of much future research and debate. This thesis merely seeks to explore some potential screening criteria that might either be useful to, or are being presently utilized by, practicing collaborative family lawyers. Ultimately, well formulated, two way screening procedures for use in each family dispute resolution process would arguably help ensure more satisfactory outcomes for both clients and their families. They are also critical to prevent the distortion of legal outcomes, and accompanying additional damage to families, that can occur due to the existence of abuse, violence, or extreme power imbalance in a spousal relationship.

For this reason, the screening process employed by collaborative family lawyers was canvassed in great detail during collaborative lawyer interviews. The first aspect of the analysis was to examine the factors considered by collaborative family lawyers when determining client suitability for their process in a general sense. The factors were obtained by asking each collaborative lawyer what factors or indicators they looked for when deciding whether to recommend their process to prospective clients. All ten collaborative lawyers indicated that they conducted their own client intake interviews, to gather information, and to assess client

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277 See literature review in Chapters 1 through 3 of this thesis. Two of the collaborative lawyers interviewed for this study explicitly indicated that the presence of children alone would cause them to recommend collaborative law. It is therefore important to further investigate the conditions around which collaborative law could be helpful to clients and their children, since this is a belief underpinning the approaches of some collaborative practitioners.

suitability to their process.<sup>278</sup>

Seven of the ten lawyers focus on the general attitude of the parties as a key consideration when deciding whether to recommend the collaborative process. They emphasize the importance of synergy between the client's expectations of their own and their lawyer's behaviour, and the stipulations of the collaborative process itself. One lawyer's approach is to “ask them what their expectations are about me as a lawyer and as an advocate for them. Are they expecting me to take positions that I think are unreasonable? What are their hopes, dreams and fears?”<sup>279</sup> Some lawyers have their staff do a quick preliminary screening of their clients to “make sure that they don't think they're coming to a litigation lawyer... that they don't think I am going to chew up their spouse in court.”<sup>280</sup> Another collaborative lawyer notes:

For collaborative to work people need to take a deep breath, say what they really mean, and allow the process to work. If they're always thinking, there's no way I am going to pay spousal support, or, if I say this it will be used against me, [the process] won't work.<sup>281</sup>

Thus in a general sense, many collaborative lawyers feel that there needs to be a match between the goals of the client and their general attitude, and the goals of the lawyer practicing collaboratively.

They also highlight specific attitudinal traits in their clients that often give them pause in recommending the collaborative process to them. Some collaborative lawyers are particularly concerned with clients' attitudes towards transparency. Four out of the ten lawyers emphasize client attitudes toward transparency and full disclosure as being very important to their recommendation of the collaborative process. One lawyer states that “If I sense that there's been

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278 Interview 1, Question 21. Interview 2, Question 17. Interview 3, Question 15. Interview 4, Question 16. Interview 5, Question 18. Interview 6, Question 20. Interview 7, Question 19. Interview 8, Question 29. Interview 9, Question 20. Interview 10, Question 18.

279 Interview 1, Question 20.

280 Interview 5, Question 10.

281 Interview 2, Question 37.

anything hidden then I would not put them in that process.”<sup>282</sup> Another lawyer notes that she would hesitate to recommend the collaborative process if “the level of deceit by one party toward the other was just too high.”<sup>283</sup> Another emphasizes the presence of a personality disorder that could inhibit transparency in negotiations and perpetuate conflict, as a circumstance where they would hesitate to recommend the process to prospective clients.<sup>284</sup> Several of the lawyers indicate that client attitudes are typically fleshed out through questions about a prospective client's objectives, hopes, and fears regarding the future and the process.<sup>285</sup> These conversations and assessments begin in pre-screening. They also sometimes continue through the first four way meeting with all the parties, so that everyone can get a sense of each other's goals and objectives.<sup>286</sup>

This emphasis on the attitude of clients towards the collaborative process is not coincidental. Collaborative law's effectiveness as a system of dispute resolution is arguably dependent upon the buy in of both clients to the process of arriving at a good faith agreement. Both transparency, and a willingness by the parties to use the process to find solutions to the dispute between them, are critical characteristics for creating lasting legal agreements. Absent these, any alternative dispute resolution process that emphasizes client self-determination becomes vulnerable to recidivism and unjust outcomes. This result is potentially very destructive for families, given the risk of ongoing conflict such outcomes could create. The screening of client attitudes towards the collaborative process, and in particular toward the key procedures and ground rules that underpin it, is therefore very important to the ultimate success of the

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282 Interview 1, Question 20.

283 Interview 10, Question 17.

284 Interview 2, Question 14. One of the other lawyer's interviewed felt that collaborative law was the only process that could help these people. Their views are discussed further below.

285 Interview 1, Question 20. Interview 2, Question 37. Interview 5, Question 10.

286 Interview 2, Questions 16 and 17.

process at meeting families' needs.

The ability of the client to afford the collaborative process is also a frequent consideration among collaborative lawyers when deciding whether to recommend this process to clients. While it is probable all the clients consider this issue in their initial discussions with collaborative lawyers, several of the collaborative lawyers make explicit mention of the barrier this can pose to clients ultimately selecting the process. One lawyer notes as follows:

Collaborative law is not cheap. So from a lawyer's perspective, you have to be cognizant of the fact that if they can't afford to have two lawyers in a room having discussions with them, and possibly two divorce lawyers as well, and a financial specialist and a child specialist, then unfortunately they just simply cannot be involved in that process.<sup>287</sup>

That same lawyer notes that “at the end of the day, [collaborative law] is not a service that lawyers offer or people with low income. So that's a big, big problem.”<sup>288</sup> Some of the lawyers supply specific cost figures, one citing around ten thousand dollars for his client, with a similar cost for the other client.<sup>289</sup> Another lawyer states that the cost of the collaborative process with him can range between five and ten thousand.<sup>290</sup> The average he quotes is fifty six to fifty seven hundred.<sup>291</sup> One lawyer also indicates that, from his experience in mediation, litigation, and collaborative work, “if there are no children, the collaborative model can be a bit more expensive than a straight mediation or negotiation model.”<sup>292</sup>

Some of the lawyers were quick to mention, however, that they can to some degree tailor the process to suit the financial means of their clients,<sup>293</sup> and that in many cases collaborative law can turn out to be significantly cheaper than litigation files that reach the court stage.<sup>294</sup> This

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287 Interview 3, Question 13.

288 Interview 3, Question 13.

289 Interview 3, Question 30. Interview 8, Question 42.

290 Interview 8, Question 18.

291 Interview 8, Question 42.

292 Interview 7, Question 12.

293 Interview 5, Question 31. Interview 8, Question 42. Interview 9, Question 37.

294 Interview 8, Question 18.

may indicate that there is some flexibility to the cost of the collaborative process, and thus a potential to expand access for those families with more modest financial means. Nonetheless, overall, the comments from collaborative lawyers demonstrate the reality that a family's financial means will play a role in their ability to benefit from collaborative law, as it currently operates.

### ***The Impact of Conflict or Violence on Collaborative Lawyers' Process***

#### ***Recommendation to Clients***

The other most common responses among the collaborative lawyers concern the conflict level, and the presence of violence in the relationship between parties. Five out of ten lawyers emphasize the level of conflict as being something that may preclude their recommendation of the collaborative process to clients. One of the more interesting observations on this topic is that the timing of a client's visit to a collaborative lawyer, relative to when the separation occurs, can be important. One lawyer notes:

You want to catch them early in their process of separation. The further along they are, the more difficult it is to get them to sit down and discuss things. The bitterness has gone up, the arguments have become more prolific, the children are already showing signs of emotional hurt from the separation.<sup>295</sup>

These problems are seen to be compounded if separating couples have already spent money fighting in court proceedings.<sup>296</sup>

From a conflict management perspective, this observation is logical. It has ramifications for dispute resolution generally, not just collaborative law. A problem that needs resolving, and should be the subject of future attention, is how to help ensure timely visits to dispute resolution professionals by separating parties. A key component of effective dispute resolution is finding ways to promote client participation in the process at an earlier stage in their separation, in order

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295 Interview 3, Question 13.

296 Ibid.

to maximize the potential for effective resolution of the dispute. One potential solution might be to strengthen the links between the various intake points for family legal services. For example, if relationship counsellors with the consent of clients were in a position to provide timely referrals to legal professionals, perhaps that would help expedite client participation in dispute resolution processes.

Six of the ten lawyers in the interview sample also emphasize the presence of violence as being a situation where they would hesitate to recommend collaborative law. There is some disagreement on the level of violence that would lead to a lawyer suggesting that clients find another dispute resolution process. One lawyer's red line is drawn "where people are fearful of being in the same room."<sup>297</sup> Another echoes the presence of extreme fear as being exclusionary, saying she would not recommend the collaborative process where "the level of fear by one party of the other is just simply too high."<sup>298</sup> Another suggests that "extreme violence" is the line, noting that there "are degrees" and that for example "if somebody has come to us from a transition house or there are already protection orders in place, I would not recommend collaborative."<sup>299</sup> She is careful to note that "extreme violence is not limited to physical violence. This applies to emotional and psychological violence too."<sup>300</sup> This is important, since it indicates a fundamental awareness of the varying nature of violence, and the destructive nature of psychological violence, that is not yet ubiquitous within our justice system.<sup>301</sup>

Yet there seems to be some inconsistency among the lawyers over whether the existence of even extreme violence functions as an exclusionary criteria for collaborative family lawyers

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297 Interview 2, Question 14.

298 Interview 10, Question 17.

299 Interview 9, Question 18.

300 Interview 9, Question 18.

301 S. Boyd and M. Ledger. "British Columbia's New Family Law on Guardianship, Relocation and Family Violence: The First Year of Judicial Interpretation" (October 2014) 33:3 *Canadian Family Law Quarterly* 317-352.



when assessing prospective clients. If clients with extreme violence in their relationship insist on using the collaborative process, some lawyers indicated that they would accept their cases.<sup>302</sup>

One lawyer notes “that's not to say that the collaborative process can't work even when there is a large degree of conflict. It is possible to do the collaborative process when two people can't sit in the same room.”<sup>303</sup> From another lawyer's perspective, “obviously we look at violence and power imbalance that's huge. It's not to say that if there is family violence it takes it out of the process. It comes down to the willingness of the client and the supports that are there. The more high conflict and the more red flags there are, the more you're going to need coaches and other support professionals to do it.”<sup>304</sup>

The presence of family violence is thus not always regarded as cause for not recommending the collaborative process to clients. The collaborative process is seen from this perspective as superior to simple mediation, or negotiations between counsel.<sup>305</sup>

The rationale for this view seems to stem from a steadfast belief in the collaborative process by many practitioners, especially as compared to court-based or simple mediation processes. One lawyer summarizes this belief well, stating:

I always thought [the collaborative process] was appropriate. Because if you say it is not appropriate, then what you are doing is committing the abused spouse to the court process, which is itself abusive. So the client, who is abused, is subjected to lengthy examinations for discovery, which there is very little you can do to control.... they are asked questions that a lawyer may not find objectionable but that to the client are extremely personal and belittling... And judges won't control that. I've done personal injury trials with abuse issues and they won't control it because they are afraid of the Court of Appeal. And so that process, the abused party won't do it. They'll give up.<sup>306</sup>

The characterization of the court process as being worse for victims of domestic violence, or

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302 Interview 9, Question 18.  
303 Interview 4, Question 13.  
304 Interview 1, Question 20.  
305 Interview 7, Question 12.  
306 Interview 6, Question 17.

otherwise disempowered parties, is sometimes found amongst collaborative practitioners.<sup>307</sup>

Whether this reflects reality is something that deserves further attention and future research.

From this view, collaborative family law is seen as the only dispute resolution method available to families that offers this support as a built in part of the negotiation process. Several of the collaborative lawyers are quick to suggest that their process could work for any case, or nearly any case.<sup>308</sup> The lawyers supporting this view highlight the presence of coaches, the use of six-way meetings with coaches present during negotiations, and the ability to caucus clients in separate rooms<sup>309</sup>, as key supports built into the collaborative process that facilitate the safety and empowerment of clients as they engage the process.<sup>310</sup> Contrary to the view of some collaborative practitioners that personality disorders could be a potential exclusionary criterion for prospective clients, other lawyers believe collaborative law has particular utility in cases involving mental illness or personality disorders, largely because of the presence of the coaches who are trained mental health professionals.<sup>311</sup> It is therefore regarded by some of its proponents as superior to the court system at managing high conflict or abuse cases.

It seems fairly obvious that proponents of the collaborative law process would regard their own method as superior to the court based dispute resolution system. After all, it is in their self-interest to have belief in the superiority of their method, and many collaborative lawyers are former litigation lawyers who have found the collaborative method much more effective, enjoyable, and fulfilling to practice. One therefore needs to be cognizant of these facts when analyzing this information. Still, it is logical to expect that there is validity to their perspective. It

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307 Four of the ten lawyers interviewed expressed this view unprompted. See interview 6, question 17  
Interview 7, Question 12. Interview 9, Questions 16, 17 and 19., Interview 10, Question 17.

308 Interview 6, Question 17.

309 Interview 8, Question 25.

310 Interview 6, Question 17.

311 Interview 6, Question 17. Interview 8, Question 25.

is easy to envision how the collaborative environment and the presence of mental health practitioners as part of the legal dispute resolution process, could potentially facilitate the empowerment of previously disempowered individuals, as well as encourage the active participation of those less inclined to negotiate in good faith with their spouse.

However, absolute faith in their process by collaborative lawyers could potentially be problematic. To effectively achieve its objectives, it is arguable the collaborative process must be able to consistently provide the supports required to empower victims of domestic violence to properly engage in legal negotiations, in a way that will not endanger their safety or result in unjust outcomes. This necessitates that collaborative lawyers, and the other professionals involved in the process, be prepared for and able to detect and address violence in their clients' relationships. In some cases, the need for these supports could result in the transfer of high costs to clients, many of whom may not be able to afford them. In order for collaborative law to properly support the largest number of people, in cases where there is domestic violence, collaborative lawyers will arguably need to be flexible in finding approaches to help people afford the most fully supportive version of the process.

Comments such as those referenced above highlight the importance of analyzing both the reasons why collaborative lawyers feel that their process can handle high conflict situations, and the ways in which collaborative lawyers manage high conflict in their process. The existence of a debate amongst collaborative lawyers themselves about what factors constitute exclusionary criteria when it comes to prospective clients, indicates the need for future research and discussion between the lawyers themselves. One goal of this research should be to promote greater consistency of practitioner approaches in the area of screening and recommending particular processes to clients. As well, it is important for future research to explore further ways

to expand legitimate access to the collaborative process.

There is one criterion for recommendation that seems to have consistent support and common use within the collaborative community. In the mind of many collaborative lawyers, a client's capacity for legal decision making is rightly seen as critical to their ability to exercise their legal self-determination. Five of the ten lawyers interviewed indicate that one of the things they look for is an inability for the client to make decisions or advocate for themselves. One of these lawyers notes that “when somebody comes into my office I want to find out: What are their goals? What do they need from the dispute resolution process? What's their capacity to participate? Do they have enough self-awareness? Can they ask for their needs to be met?”<sup>312</sup>

Another lawyer notes:

The cases where I would hesitate [to recommend the collaborative process] are where I really feel that it would be impossible to come to a reliable agreement. Where the power imbalance is so significant, and the level of deceit by one party toward the other, or the level of fear by one party or the other, is just simply too high. Essentially what we are looking for is a situation where the parties are not able to make a decision for themselves.<sup>313</sup>

In particular, such evidence of a power imbalance plays a key role in many lawyers' analysis of this factor.<sup>314</sup>

These comments demonstrate that an overarching focus for dispute resolution processes is to ensure effective advocacy by participants. Whether a process facilitates the capacity of its clients to engage in effective advocacy, is perhaps the most important criterion when evaluating a dispute resolution process. It should be a goal of any dispute resolution process to ensure that its users are able participate in a manner that empowers them and maximizes their capacity for self-determination. In more difficult cases, this would ultimately be measured by whether that

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312 Interview 5, Question 10.

313 Interview 10, Question 17.

314 Interview 1, Question 20. Interview 2, Question 14. Interview 4, Question 13. Interview 5, Question 10. Interview 9, Question 16. Interview 10, Questions 17 and 21.

particular process places a party who has suffered domestic violence or abuse, or extreme disempowerment, in a position to be able to advocate for and make legal decisions for themselves. It is also arguable that in so doing, processes should promote decision-making that is constructive for the parties, and does not undermine child development where there are children. On this front, it may be that collaborative law is further along in implementing creative approaches that will facilitate this for its clients. Collaborative law and the lawyers who practice it seem to give special focus and primacy to this objective.<sup>315</sup> Their methods will be analyzed in further detail in the following chapter. It also follows from this discussion that it may be important for all lawyers as gatekeepers of their processes, to assist clients in process selection by endeavouring to assess the suitability of a particular client to that process.

### *Collaborative Lawyer Screening for Abuse and Violence Specifically*

Given the apparent faith of some in the collaborative law community in the ability of their process to handle cases involving domestic violence and abuse, and the emphasis placed by others on using the presence of violence as an exclusionary criteria, a deeper analysis of collaborative lawyers' screening process seems prudent. One of the key themes that emerges throughout this study is the primacy given to the safety and support of collaborative law clientele. This is a key point of emphasis for many collaborative lawyers. They clearly take great pride in the ability of their process to provide support for their clients. One of the critical elements to providing safety and support for families and clients using the collaborative process, is the capacity of collaborative lawyers to screen for domestic abuse and violence that may be present in their client's relationship. As defined by the *Family Law Act*, this abuse can be both physical and psychological, and can include elements such as one party having complete control

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315 Interview 10, Questions 10, 37, 39 and 40.

over and knowledge of the family finances.<sup>316</sup> To that end, the interview questions of collaborative lawyers in this study focus on how they screen their clients for abuse. Specific focuses include what indicators the collaborative lawyers look for, the timing and duration of domestic violence screening, how the lawyers address the problem if domestic abuse is discovered, and the difficulties they encounter when screening their clients.

### *How Collaborative Lawyers Screen for Abuse and Violence*

The first area of analysis concerns the factors that collaborative lawyers look for when attempting to determine whether abuse or domestic violence is present. When conducting screening, six out of the ten collaborative lawyers in this study place explicit emphasis on assessing the parties' ways of communicating with each other. Six out of the ten lawyers also focus on how the party feels in the presence of the other party. Two of the ten lawyers also mention that they conduct a power dynamics assessment that includes a consideration of the financial relationship between the parties, in addition to an emotional dynamic.<sup>317</sup> One lawyer notes:

In situations where, for instance, there is a tremendous imbalance of bargaining power, either because my client does not have the intelligence or financial wherewithal to do some things, it may be that collaborative is not the right way to go. But usually I can recommend it and I recommend it in this context.<sup>318</sup>

This statement shows that in extreme cases, the existence of power imbalance concerning the finances can function for some lawyers as an exclusionary criterion, although this lawyer views not recommending the process as more of a last resort.

These general themes underpin many of the types of questions that collaborative lawyers

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316 *Family Law Act*, SBC 2011, c. 25, s. 1. See definition for “family violence.”

317 Interview 5, Question 14.

318 Interview 2, Question 11.

ask clients when conducting their screening. All the lawyers indicate their belief in the importance of screening for family violence, though they appear to vary in how they approach that task. This variation is evidenced by the things they highlight when articulating how they obtain relationship information from their clients. In response to that question, eight lawyers expressly indicate that they ask clients questions concerning power and control dynamics. One lawyer is especially strident about this, articulating the belief that “every single practitioner should be screening for power or control dynamics.”<sup>319</sup> Five lawyers explicitly note that they ask questions concerning what conflict looks like. When addressing this topic, two of those five lawyers highlight that they investigate the frequency of pushing and shoving. Others focus more on the ways the parties communicate with each other.<sup>320</sup> Some emphasize both in their responses.<sup>321</sup>

Five of the lawyers sampled make explicit mention that they use family violence screening tools such as MASIC to design their questions.<sup>322</sup> Many of these tools are provided at the “Screening for Family Violence” course, which is now mandatory for all family lawyers.<sup>323</sup> One of these lawyers also uses a self-designed conflict assessment chart and a three page intake form. Two of the lawyers mentioned that they use these tools as a baseline for flexible approaches. They piece their questions together from several tools and from their own experience.<sup>324</sup> This indicates two things: One, that lawyers are using the myriad of information at their disposal and adopting different approaches to the problem of family violence screening. Two, that some prefer to remain flexible in their approach and to formulate their own questions

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319 Interview 5, Question 14.

320 Interview 9, Question 23.

321 Interview 5, Question 14. Interview 1, Question 25. Interview 4, Question 14.

322 Interview 3, Question 18.

323 Interview 3, Question 17

324 Interview 3, Question 18.

based on experiences and effectiveness.<sup>325</sup> This shows that there is variance in their approach to domestic abuse screening, even as the lawyers are using many of the same tools and principles.

Another theme emerging from the screening questions is the importance many lawyers place on observing their client's body language, tone of voice, and reactions when answering screening questions. Specific behaviours lawyers look for include eye contact, shoulders clenching.<sup>326</sup> Reactions they look for include anxiety, crying, and topic avoidance.<sup>327</sup> The capacity of lawyers to pick up body language cues and other often subtle indicators is critical to their domestic violence screening method. A keen and attentive eye is required. What to look for is part of the training that collaborative lawyers undergo, though it is an imperfect science. One lawyer notes “I ask them about what conflict looks like. How often does pushing and shoving happen? Assuming that there is... to try to gauge what their reactions are. But they're not perfect and people can hide it.”<sup>328</sup> This emphasizes the importance of training in this area, and in taking sufficient time to screen clients.

In an effort to decrease the likelihood and effectiveness of clients hiding domestic violence, collaborative lawyers focus on building a rapport and a trust with their clients from an early stage. Their operating theory is that when a client trusts them, that client will be more open with them about potentially sensitive information.<sup>329</sup> They employ procedural and personal tactics in service of this objective. One of the more notable of these tactics is to ask initial questions in an inclusive manner. One lawyer notes “I think it's incredibly important to make all of your screening questions inclusive so that people who are not experiencing anything will opt

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325 One lawyer did indicate that they prefer family violence screening to be same in every case. See interview 7, Question 21.

326 Interview 3, Question 16. Interview 5, Question 19.

327 Interview 6, Question 24. Interview 8, Question 27. Interview 4, Question 21.

328 Interview 1, Question 25.

329 Interview 6, Question 21, Interview 10, Question 20.



out, but the people that are experiencing things don't feel ashamed or singled out.”<sup>330</sup> Inclusive questions typically require a more open ended, less direct approach. For example, instead of asking a client “Does slapping happen in your relationship”, instead the lawyer should ask “What will it be like to sit down in the same room as your spouse?”<sup>331</sup> These questions give the clients less of a feel of being interrogated and more of a chance to tell their story, which can lead to the provision of details that might otherwise get left out in response to more direct questioning.

Another tactic collaborative lawyers sometimes implement to build this rapport, is to provide clients with the promise of confidentiality during initial questioning. This does not apply to financial disclosure, which will be discussed later and by law must be provided.<sup>332</sup> Perhaps the clearest explanation of the reasoning behind this approach is that:

A client may never disclose if it is not kept confidential. And then once it is disclosed we can talk about how it can be dealt with. But it is not my job to disclose that to the coach or to the other lawyer. Especially if that is not going to make my client feel safe. It is always about what is going to make them feel safe and respecting that first of all.<sup>333</sup>

This apparent primacy given to the safety of the participants, if universally applied, would alleviate some of the concerns raised above about the potential dangers of direct negotiation between parties who have an abusive relationship. However, there appear to be mixed approaches on this, as some lawyers prefer the flexibility of process management provided by sharing all information with the collaborative team.<sup>334</sup> For now, from a screening perspective, it is sufficient to note that this is one tactic implemented by collaborative lawyers to facilitate disclosure of domestic violence concerns.

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330 Interview 5, Question 19

331 Interview 5, Question 19.

332 *Family Law Act*, SBC 2011, c. 25, s. 5.

333 Interview 1, Question 28.

334 These will be discussed in further detail in the following chapter.

### *Timing of Screening for Domestic Violence*

The timing and frequency of domestic violence screening is also an interesting point of discussion. Seven of the ten lawyers explicitly indicate in their responses that they conduct domestic violence screening in their first meeting with the client.<sup>335</sup> These meetings range in duration from thirty minutes to two hours depending on the lawyer, with the most common response being ninety minutes to two hours.<sup>336</sup> These screening meetings are conducted by each lawyer with their client in advance of the initial four way meeting involving all parties.<sup>337</sup> Screening for violence is not the only purpose for these meetings. They also allow lawyers to gather information regarding relationship dynamics, the client's fears regarding the process, and their hopes and dreams for the future. In some cases, following these meetings lawyers will engage in preliminary discussions with each other regarding broad relationship dynamics, which can attune both lawyers to watch for possible abusive dynamics during the four way meetings.<sup>338</sup> Preliminary investigative meetings between lawyer and client, and lawyer and lawyer are thus an essential component of the collaborative process.

The nature of these screening meetings is particularly notable for two reasons. One, the relatively immediate nature of screening is indicative of the urgency and importance that many collaborative lawyers place on screening for domestic violence. However, the fact that domestic violence is primarily screened for at the initial meeting between lawyer and client, would also seem to be at odds with the fact that creating a rapport with clients is essential to domestic violence screening. It is logical to consider that developing a trust and a rapport between a client

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335 Interview 1, Question 25. Interview 2, Question 21. Interview 4, Question 14. Interview 5, Question 19. Interview 7, Question 21. Interview 8, Question 34. Interview 10, Question 11.

336 Interview 4, Question 14. Interview 7, Question 21. Interview 8, Question 29. Interview 9, Question 22.

337 Interview 2, Question 16.

338 Interview 8, Question 34.

and lawyer may take more than an initial meeting to achieve. The collaborative lawyers in this sample indicate this in their responses. Some lawyers highlight the important of trust.<sup>339</sup> One lawyer notes that “you never get everything initially and they have to feel comfortable. So it might be a couple of interviews and then maybe they'll tell me half the story and then they'll retain me and say, “well I have to tell you some other stuff.”<sup>340</sup>

Perhaps it may be useful for collaborative lawyers to regularly conduct multiple screening meetings in advance to develop that rapport. Indeed, several collaborative lawyers in the sample acknowledge and emphasize the need for continual and ongoing screening of clients where domestic violence is concerned.<sup>341</sup> There is evidence in this sample that multiple preliminary meetings between each client and their lawyer, prior to four way meetings between the parties, are a part of some collaborative practices. It is arguable that clients and lawyers could benefit from this becoming more standard practice.

### *Difficulties of Screening for Domestic Violence*

The importance of thorough and repeated domestic violence screening procedures is reinforced by the difficulties lawyers can face when screening for domestic violence. Several of these difficulties are articulated in collaborative lawyer's responses to questions around their screening procedures. Four of the ten lawyers in the interview sample acknowledge the possibility that people sometimes successfully hide abusive relationship dynamics from their lawyers, or may initially avoid uncomfortable topics.<sup>342</sup> One lawyer notes that this sometimes manifests in a desire on the part of the client to rush the process, either to hide the abuse or to get

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339 Interview 6, Question 21. Interview 9, Question 22., Interview 10, Questions 11 and 20.

340 Interview 9, Question 22.

341 Interview 1, Question 25. Interview 8, Question 27. Interview 10, Question 20.

342 Interview 1, Question 25. Interview 3, Question 16. Interview 4, Question 21. Interview 10, Question 11.

away from it as quickly as possible. In the view of such clients, to disclose the domestic violence could inhibit process completion.<sup>343</sup> Lawyers should therefore be sensitive to clients who wish to expedite the process, and such requests might be cause for further investigation. Screening for abusive dynamics is further complicated by the fact that, while there are some common indicators such as body language, anxiety, and crying, there is no typical manifestation of abuse or power imbalance.<sup>344</sup> The symptoms, effects, and nature of the abusive dynamic can vary with each individual relationship, making them more difficult to detect. When screening for abusive dynamics, context is therefore extremely important. It is arguable that it can take some time for lawyers, who are new to the clients, to develop a full understanding of the relationship context.

Another broad difficulty with screening for abusive dynamics is that the success of any screening is heavily dependent on the lawyer. The screening process is naturally susceptible to the particular biases of a lawyer, or variances in a given lawyer's capacity to perceive signals of abusive dynamics. In their responses, while collaborative lawyers predominantly acknowledge the challenges of domestic violence screening, and are readily aware of their shortcomings as psychologists, there are two responses that are particularly indicative of the problem this poses.

One lawyer notes:

I also know, and I am ninety-nine percent correct on this... at the end of the meeting I can also get the sense if there really are no domestic violence or screening issues I've picked up.... yeah there may be some economic questions, but really this is not a situation of a domestic, physical, emotional or financial violence case.<sup>345</sup>

The same lawyer goes on to say “I can usually pick up enough to say, “well, I have to ask you these questions, but from what you have told me I don't get the sense like there's issues about

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343 Interview 1, Question 29.

344 Interview 5, Question 17.

345 Interview 8, Question 27.

that.”<sup>346</sup> Another lawyer notes the infrequency in his practice of clients' hiding abusive dynamics, saying that “if they trust you, usually they want to tell you that stuff.”<sup>347</sup> Both responses indicate these lawyers' belief that discerning domestic violence or abuse in client relationships is not a particularly difficult task for them to achieve, or beyond their abilities. They downplay the possibility that they might miss potential domestic violence or abuse.

This is particularly notable given another principle difficulty lawyers face in a changing legal environment, which is arriving at a consistent definition of what constitutes “severe” or “extreme” domestic violence amongst professionals.<sup>348</sup> New concepts such as psychological or financial violence are well defined in the *FLA*<sup>349</sup>. However, they are still relatively new from a practical perspective. Judges have had some difficulty early on in applying these concepts in the case law, which indicates the possibility for variance in application amongst collaborative lawyers as well.<sup>350</sup> This is relevant because in addition to inconsistency in what qualifies as domestic violence, there is also inconsistency amongst collaborative lawyers in what level of violence would cause them not to recommend the process to clients. As discussed in the previous section, three lawyers indicate their belief that there is not necessarily a need to screen out cases with domestic violence.<sup>351</sup> Others infer in their statements that only extreme violence cases warrant exclusion.<sup>352</sup> This is a potential danger for clients until all legal practitioners, and society in general, acquire a deeper understanding of the dynamics of psychological abuse, and formulate more consistent screening protocols. This problem is not unique to collaborative lawyers. It is something worth thinking about for all providers of legal services.

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346 Interview 8, Question 27.

347 Interview 6, Question 21.

348 Interview 2, Question 2 and Interview 9, Question 18.

349 *Family Law Act*, SBC 2011, c. 25, s. 1. See Definition of “family violence.”

350 S. Boyd and M. Ledger. *Supra* note 301.

351 Interview 6, Questions 17, 22, 23. Interview 8, Question 25.

352 Interview 6, Question 17. Interview 8, Question 25. Interview 9, Question 18.

The process of collaborative family law actually has an existing potential solution to help address this problem. The active presence of coaches and mental health professionals as a natural part of the process has important potential for screening. All collaborative lawyers in the Vancouver practice group sample operate with a network of mental health professionals at their disposal when needed. Two of the collaborative lawyers indicate that they receive client referrals from the divorce coaches.<sup>353</sup> This demonstrates that it is not unusual for mental health professionals to act as gatekeepers for the collaborative process. One can make a plausible argument that mental health professionals are better equipped for domestic violence screening than collaborative lawyers. Their presence at the front end, either to recommend or not recommend the process to prospective clients, would arguably provide significant assistance in better matching clients with appropriate dispute resolution processes. At the very least, it could provide collaborative lawyers with more complete information on relationship dynamics existing between clients. This would put them in a better position to effectively execute their process, and help clients and their families.

## **Issue 2: Assessing Trustworthiness of Clients Concerning Disclosure**

One of the key tenets underpinning the collaborative process is the full and fair disclosure of information by participants. The Vancouver Collaborative Practice group requires all participating clients to sign a standardized participation agreement.<sup>354</sup> Contained within the participation agreement is a clause mandating the full and fair disclosure of all pertinent financial

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353 Interview 6, Question 23. Interview 8, Question 30.

354 Collaborative Divorce Vancouver. *Vancouver Collaborative Law Participation Agreement*, online: <<http://www.collaborativedivorcebc.com/docs/Participation-Agreement-Lawyer.pdf>> accessed 30 July 2016.

information, as well as all other relevant information.<sup>355</sup> Anything other than full disclosure is grounds for terminating the process, and for the withdrawal of collaborative lawyers from representing their clients. The consequences of non-disclosure, regardless of whether it is caught or not, can be detrimental to participants in the collaborative process. This detriment comes either in the form of an inequitable agreements or additional legal costs. Therefore, identifying possible disclosure problems at an early stage is an essential element to the success of the collaborative process at meeting clients' legal needs. Maximizing lawyers' screening capabilities concerning clients' disclosure of information is arguably an important objective for collaborative lawyers.

Many of the suggestions and issues raised by the participants above in regards to domestic violence screening, also apply when screening for disclosure problems more generally. Screening practices are also extremely important to the issue of detecting potential dishonesty in financial disclosures. Six of the ten lawyers in the study sample suggest that in the collaborative process, disclosure requirements are broad in scope. Disclosure requirements of participants are often extensive, widened to include all relevant financial documentation and background information. Several lawyers note that they tell their clients to disclose even “the little details”, and allow the lawyers to determine the relevancy of a particular detail.<sup>356</sup> Another lawyer comments “I want to demand full disclosure and I want to have my client prepare to give full disclosure.”<sup>357</sup> Because the parties do not have the benefit of discovery or the cross-examination procedures found in litigation, there is extra onus on the lawyer to prepare their own client to provide full disclosure, and to demand disclosure from the other party during the process. Early identification of potential disclosure difficulties is paramount.

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355 Ibid. See section 5.

356 Interview 1, Question 23. Interview 4, Question 17.

357 Interview 8, Question 31.

The collaborative lawyers in this sample highlight several things they look for when attempting to identify potential disclosure issues with prospective clients. Similar to their screening tactics for abuse issues, the most common technique collaborative lawyers employ involves looking for suspicious body language, eye contact or tone of voice.<sup>358</sup> One lawyer describes this practice as follows:

It's mostly body language. How open and receptive they seem. How closed do they appear to be? Whether they're making eye contact or not... What kind of ticks they may have. Those kinds of things. Their appearance although less significant, that can also be a factor.<sup>359</sup>

Another commonly cited cue for potential disclosure issues is topic avoidance by clients.<sup>360</sup> This includes scenarios where someone is avoiding a particular question, taking a long time to think about things, or appears unsure of their responses which fail to directly address a question.<sup>361</sup> This practice is akin to a border guard looking for dishonest travelers, although collaborative lawyers can have the benefit of multiple preliminary meetings, and considerably more time with new clients. It is often a gut determination, and indeed three of the ten collaborative lawyers in this sample specifically cite their gut and personal intuition as something they rely upon in this area.<sup>362</sup>

There are also certain differences in what the lawyers look for when they are screening for potential non-disclosure issues concerning financial information. Unlike abuse scenarios, there are more concrete methods for discerning non-disclosure of financial information. The primary technique involves matching financial documentation with the information provided by the client. Three of the collaborative lawyers in the sample mentioned that they often look for a

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358 Interview 3, Question 16. Interview 4, Question 17. Interview 5, Question 20. Interview 7, Question 25. Interview 8, Question 35. Interview 9, Question 23.

359 Interview 7, Question 25.

360 Interview 4, Question 21. Interview 6, Question 27. Interview 7, Question 25. Interview 8, Question 35.

361 Interview 8, Question 35.

362 Interview 5, Question 20, Interview 8, Question 35. Interview 10, Question 25.



discrepancy between declared income and items owned by the client. Examples include looking for people who drive expensive cars yet claim to only earn a thousand dollars a month.<sup>363</sup> Bank statements, tax returns, financial statements from businesses are items which contribute to and validate the sworn financial statements provided by the parties.

There did not seem to be much concern among the collaborative lawyers in the sample regarding detecting financial disclosure issues. One lawyer's perspective is that “when you have done this work for a little while you don't have to be an accountant or a forensic auditor to see that doesn't add up.”<sup>364</sup> One collaborative lawyer summarizes the process clearly, noting:

By the time you start looking, we have such a level of analysis and each lawyer is working with their client to get the exchange of information, that the gaps in information become fairly obvious. When the two stories do not match, then you just have to keep asking questions.<sup>365</sup>

The sworn financial statements, if determined to be false, provide cause for the withdrawal of legal representation by collaborative lawyers and the termination of the collaborative process.<sup>366</sup> They also have approaches and techniques they use with clients to encourage disclosure, which will be discussed further in the following chapter. Because of these, most of the lawyers in the sample seem very confident in their ability to detect disclosure problems in this area.

However, some of the lawyers' responses in this study do raise a potential difficulty collaborative lawyers may face when screening for client dishonesty concerning financial disclosure. The most obvious difficulty comes from the comparatively brief time that clients spend with their lawyers prior to initiating the collaborative process. While there are often multiple preliminary meetings between lawyers and their clients, a collaborative lawyer is still

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363 Interview 1, Question 23.

364 Interview 5, Question 20.

365 Interview 10, Question 25.

366 Collaborative Divorce Vancouver. *Vancouver Collaborative Law Participation Agreement*. *Supra* note 354 at section 13.

representing someone who they do not know particularly well. Because of this, lawyers are naturally going to be sometimes reliant on their clients to identify problems in the other party's financial disclosure, such as hidden assets. Clients who are educated in the financial aspects of their relationship are better positioned to alert their lawyers to inconsistencies in the other party's financial disclosure. One lawyer acknowledges that “if somebody wants to hide something, I'm not going to find it.”<sup>367</sup> A couple of the lawyers in the sample note that this difficulty is more likely to arise if client knows nothing about the family's financial situation.<sup>368</sup> This implies that a base level of financial knowledge is important for clients who engage with the collaborative process. The other client having some financial knowledge enhances the likelihood that the screening process for dishonesty will be effective. At the very least, this highlights the importance of lawyers spending as much time as possible getting to know their clients.

The confidence that many collaborative lawyers have in their capacity to detect financial dishonesty, while not necessarily unjustified, could also itself be an obstacle to detection in some instances. Five of the respondents in this sample make statements that indicate a strong belief that this is not a major difficulty for them. One lawyer notes:

I don't think that somebody who wants to hide assets is probably coming to [their] office in the first place. Just from our firm and how we present what we do they are probably going to be looking for a different kind of lawyer.<sup>369</sup>

Another lawyer echoes this sentiment, noting that “I don't think those people are drawn to the collaborative process once they realize that there is going to be a lot of back and forth, and that the lawyers are both trying to investigate matters.”<sup>370</sup> These statements indicate that for some collaborative lawyers, the collaborative process itself discourages clients who may be interested

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367 Interview 5, Question 20.

368 Interview 10, Question 25. Interview 5, Question 20.

369 Interview 1, Question 23.

370 Interview 2, Question 23.

in financial dishonesty or in hiding assets, because of the cooperative nature of legal representation provided by collaborative lawyers. Another reason cited for this belief is the costly nature of non-disclosure to clients. In the eyes of one lawyer, financial documentation is usually provided because “you have to produce it in court anyway and so you are just costing yourself more money if you are hiding documents. It just doesn't happen and it doesn't help them.”<sup>371</sup>

While the collaborative lawyers in the interview sample have considerably more practice experience than this author, and their reasoning is logical, it is equally logical to suggest that collaborative lawyers would want to be mindful of the possibility that clients could be dishonest about financial disclosure. As discussed earlier in the literature review, it is plausible that some clients in abusive relationships may seek out collaborative law or other alternative dispute resolution processes, with the goal of achieving a more favourable resolution while avoiding rigorous cross examination under oath.<sup>372</sup> The sworn financial statements required by many collaborative lawyers in this sample do mitigate somewhat against this practice. However, in the event of incomplete or dishonest disclosure, the onus is still on the victimized party to take the matter to court to void any agreement on those grounds. For people who have a limited budget, this may be a difficult expense to incur. Collaborative lawyers must therefore be vigilant when investigating and screening for financial dishonesty, in order for the collaborative process to act as a proper deterrent to this behaviour.

### **Issue 3: Ensuring Informed Consent by Clients**

Collaborative law represents a novel, holistic, and some would argue more family centred approach to family dispute resolution. The relatively new availability of the collaborative

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371 Interview 6, Question 27.

372 W. H. Schwab. *Supra* note 97 at 361.

process, combined with its many differences from traditional litigation, places prospective clients in a more vulnerable position. They may not be familiar with nature of the process, the alternative approach of the collaborative lawyer, or any other manner in which the process could influence their legal rights differently from the litigation process. Several authors canvassed in the literature review raise this concern. Informed consent is therefore critical, both in enabling legal self-determination for families, and in ensuring better fits between parties and the dispute resolution processes they choose. Under the *FLA*, collaborative lawyers have a duty to inform parties about the various legal options available to them.<sup>373</sup> The nature of informed consent as concerns the collaborative process is the focus of this section. The discussion below outlines three main areas that prospective clients should be alerted to in fulfillment of the informed consent objective: the nature of the collaborative process versus other legal processes, the specialized role and approach of the collaborative lawyer, and any settlement pressures they may face during the process.

### ***Informed Consent Concerning the Unique Nature of the Collaborative Process***

Another goal of the interviews in this study is to explore how collaborative lawyers differentiate the collaborative process from other dispute resolution options available to clients in their initial client meetings. All ten of the collaborative lawyers in the interview sample indicate that they explain the difference between collaborative law and other processes to their clients in an initial meeting.<sup>374</sup> It is the nature of their explanations, and how they might differ, that is of particular interest to this researcher. One area of focus in the interview data is the collaborative

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373 *Family Law Act*, SBC 2011, c. 25, s. 8 (2).

374 Interview 1, Question 12. Interview 2, Question 11. Interview 3, Question 10. Interview 4, Question 8. Interview 5, Question 10. Interview 6, Question 10. Interview 7, Question 11. Interview 8, Question 15. Interview 9, Question 10. Interview 10, Question 11.

participation agreement. In their responses, seven of the ten collaborative lawyers in the sample specifically emphasize that they walk their client through the participation agreement or draft agenda, as part of preparing them for the process. This review involves highlighting what the agreement means, outlining the financial disclosure requirements it imposes, and discussing the fact that it bars parties from going to court for the duration of their involvement with the collaborative process.<sup>375</sup>

The timing of this discussion is also important. Some lawyers indicate that they send prospective clients a copy of the participation agreement at first contact.<sup>376</sup> Others are more inclined to wait until the client expresses special interest in the collaborative process, or decides to use the collaborative process.<sup>377</sup> Efforts have been made among the Vancouver Collaborative practice group to standardize the participation agreement for all members, to limit variations in practice.<sup>378</sup> However, there seems to be some variation in the timing of this discussion depending on the preferences of the practitioner.

One could argue that participation agreements should be shown to clients at the outset, in order to assist with their choice of dispute resolution process. The participation agreement functions as a key cog of the collaborative process, and is essential to differentiating the process from other alternative dispute resolution measures that often take place in the shadow of litigation, such as mediation. As such, for clients to be adequately informed so that they may properly consent to the process, it is arguable that a review of the participation agreement should occur as part of the initial meeting with prospective clients, not just at the initial four way meeting between the parties or after clients have decided to use collaborative lawyers.

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375 Interview 4, Question 8.

376 Interview 1, Question 12. Interview 5, Question 10.

377 Interview 4, Question 8. Interview 7, Question 11. Interview 6, Question 11.

378 Interview 8, Question 17. The respondent notes that “little tweaks” are sometimes made to suit the particular circumstances of a case.

Standardizing the timing of participation agreement reviews would be beneficial to helping ensure informed consent by clients.

Another important area, from an informed consent perspective, is the nature of financial disclosure required by the collaborative process, and the consequences of non-disclosure for clients. Three of the lawyers in the sample emphasize the importance of discussing this with prospective clients as part of preparing them for the process, in addition to the rundown of the participation agreement.<sup>379</sup> As discussed in the previous section, the disclosure requirements are often broad. One lawyer notes that in her preliminary discussions with a client, she is assessing their “willingness to number one, have everything on the table. If I sense that there has been anything hidden then I would not put them in that process.”<sup>380</sup> The consequences of non-disclosure are severe. Non-disclosure leads to the dissolution of the collaborative process and necessitates both clients hiring new lawyers. Given this, reminding clients of these requirements multiple times prior to them choosing the process, is arguably an essential component of informed consent.

Other important topics for discussion in preliminary meetings with clients that are repeatedly raised by the lawyers in this sample are the cost of collaborative process relative to other processes, and the number and length of meetings the process will typically require.

One lawyer notes:

I give clients the options, but generally when a client is coming to me they are either at the lawyer to lawyer negotiation stage, or there are enough issues in play that I persuade them to focus on collaborative from a cost point of view of a five, eight, ten thousand dollar adventure. Whereas if it is going to go to court, I tell them, put a ten and just keep adding zeroes, it could go up to hundreds of thousands of dollars.<sup>381</sup>

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379 Interview 1, Question 20. Interview 4, Question 8. Interview 8, Question 18.

380 Interview 1, Question 20.

381 Interview 8, Question 18.

This comment is interesting, because it highlights the belief among many collaborative practitioners that their process is a much cheaper alternative to court.

Framing the choice in this manner could lead many prospective clients to choose collaborative over litigation or mediation, because of the relative certainty of a cost ceiling in a successful collaborative process. This is particularly notable given that the cost will often vary depending on the number of meetings required and the number of professionals involved on a collaborative file. In addition, if the collaborative process breaks down, clients are then out any incurred expenses, and are forced to go hire new litigation lawyers to resolve their dispute. This places additional importance on the accuracy of the initial planning with the client regarding the number of meetings. Providing clients with some measure of cost certainty in preliminary meetings regarding this process, to the extent that it is achievable, is a key element of ensuring clients have the information necessary to make an informed decision on the best process for them financially.

### *Nature of Preliminary Meetings Can Impact Informed Consent*

The manner in which collaborative lawyers outline the different processes available to prospective clients can also be important. Two of the lawyers note that they use a grid, or a diagram, to illustrate the continuum of options available to clients. They share slight differences in the nature of their continuum and where collaborative law resides on it. One lawyer notes:

Obviously I favour everything that's closer to the kitchen table approach, and then I draw lines talking about the different ways matters can be resolved. These include collaboration, arbitration, mediation, negotiation, and discuss all the differences between all those respective models, and why in this situation, I prefer collaborative, usually but not entirely.<sup>382</sup>

Another lawyer notes that he regards a formal collaborative file as an alternative to court, rather

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382 Interview 2, Question 11.

than as an alternative to other mediated or lawyer negotiation options.<sup>383</sup> That is to say, not dramatically different from the other models of alternative dispute resolution. These differences in perspective highlight a key way in which the information presented to clients regarding choice of process can differ.

Of particular interest from an informed consent perspective is the potential for pressure to choose one process over another. It is only natural that regardless of the type of family dispute resolution a lawyer may practice, they are more likely to be partial to their own method when discussing potential options with clients. Collaborative law is not unique in that respect. In response to the question of how they prepare clients, only four of the ten lawyers in the sample emphasize that they obtain info on the client's goals and needs prior to recommending a particular process, although it should be noted that there may be more that do this and neglected to emphasize it.<sup>384</sup> One lawyer notes:

Because I virtually always say they should go collaborative, I try to keep [the preparation meeting] relatively short. I'm still evolving on that. But it depends on the client.... I tell them about the different processes available, and I strongly encourage them to do collaborative, and if they are agreeable then we approach the other side to see if we can do collaborative.<sup>385</sup>

This approach to preparing clients is more likely to lead them to choose collaborative, particularly where a client has no preconceived notions about the process that might best suit them. While this comment is not necessarily reflective of the entire interview sample<sup>386</sup>, several lawyers in the sample indicate to clients that they prefer the collaborative process to the other processes. This is natural, but lawyers should also endeavour to ensure that they are helping clients make decisions that are best for them based on each client's unique circumstances.

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383 Interview 8, Question 15.

384 Interview 1, Question 11. Interview 5, Question 10. Interview 7, Question 11. Interview 10, Question 11.

385 Interview 6, Question 10.

386 Most of the lawyers in the sample highlight limited scenarios where they would consider not recommending the collaborative process, some of which are discussed in previous sections.



Providing fulsome information on the collaborative process, as well as other processes is critical to this objective.

### *Informed Consent Concerning the Role of the Lawyer*

Another element of the collaborative process that is critical to informed consent is the different role of the lawyer. The responses in the sample highlight several important themes in the data. The first is the importance of ensuring a match between the client's expectations of the lawyer as an advocate, and the lawyer's view of the correct approach to resolving their dispute. Three of the lawyers in the sample emphasized that this is an important factor when deciding whether to recommend the collaborative process to clients. They highlight the need to assess the client and their comfort level with you as a lawyer, as well as their comfort level with the process.<sup>387</sup> Some of the lawyers in the sample emphasize that they ensure that clients are aware of the lawyer's values and beliefs, and explore client's expectations of them as lawyers to ensure a fit between them. Those who stress this appear to take this obligation very seriously. One lawyer describes this exploration as follows: "I ask them what are their expectations about me as a lawyer and as an advocate for them. Are they expecting me to take positions that I think are unreasonable?"<sup>388</sup> Another lawyer even goes so far as to have her staff "conduct a preliminary screening to make sure they don't think they're coming to a litigation lawyer."<sup>389</sup>

An additional theme that emerges from these responses is collaborative practitioner's steadfast belief in collaboration with clients, and the client ownership of the negotiation process. In this view, the role of the lawyer is as facilitator and unifier, rather than as an advocate for the client's desired legal position. In the preliminary meeting, one lawyer who practices both

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387 Interview 6, Question 10.

388 Interview 1, Question 20.

389 Interview 5, Question 10.

litigation and collaborative law tells her clients:

Even if I litigate this, I am going to want a four way [meeting]. And you're going to have to take ownership of this file. If you don't and you want to hide behind a lawyer and destroy your family, go to one of those other guys. Because I'm not interested.<sup>390</sup>

This quote demonstrates the perceived dichotomy between litigation and collaborative law in the minds of collaborative practitioners, and underscores the importance of lawyers' discussing their different role in preliminary meetings with clients.

The responses of the collaborative lawyers in this sample highlight two primary ways in which the role of the lawyer in the collaborative process differs from traditional positional legal representation. These include the lawyer's focus when representing a collaborative client, and the interactions between the lawyers for each party. When conducting legal representation from a positional perspective, focus on the law is often critical. The law becomes the baseline from which both parties' advocates operate, and attempt to gain a strategic advantage over each other. Prior case law, key statutory provisions, and the application of each individual case to the law often drive the discussion between lawyers, along with financial considerations.

In the collaborative setting, while the law still has a role to play, its importance is often seen as secondary to the interests and future goals of each party. Only two of the ten lawyers in the sample emphasize in their responses that they focus on the law. One lawyer describes it as an “integrative law approach.... what you can achieve in the process may not be what the law says, or you can rely on the law. You have the options and there is much more creativity... it's not just about what the law is but what does this person need to move on.”<sup>391</sup> Another lawyer notes that “we are there to advise them on the law, to make sure there is no advantage taken of any power

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390 Interview 9, Question 11.

391 Interview 1, Question 45.

imbalance or superior skill in communicating between the parties.”<sup>392</sup> From this point of view, allowing for flexibility of outcome to suit particular circumstances, and facilitating the safe promotion of each party's interests, are the highly valued objectives of each lawyer.

To that end, a more commonly articulated focus of the lawyers is keeping a conscious and thoughtful attitude towards everyone. Seven of the ten lawyers in the sample reflect this imperative in their responses. One lawyer states:

What we're really wanting to create, is the opportunity for the parties and anyone involved in that particular family, and it's not just kids it could be grandparents... that everyone comes out of it with the best possible result that works for everybody.<sup>393</sup>

Another lawyer notes that in order to achieve this goal:

I am always thinking what am I saying, what are the impact of my words, watching the non-verbal language of the parties, making sure everyone has had a chance to talk, not cutting people off.<sup>394</sup>

This goal reflects a much more holistic, and less individual centred view of family advocacy and legal representation.

Six lawyers in the sample articulate that they are guided by the hopes and fears of their clients, and also by their perception of what is best for the family system and for the children. For this latter consideration they often rely on the interpretations of the divorce coaches and child specialists with whom they work in close concert on many files. One lawyer describes it as follows:

You hear the hopes and fears of the parties and you are trying to think, well they both want this and they both want that. The best example is pretty much everybody wants what is best for their children. What that means to them can be different, but everybody wants what is best for their children. So if you can give them objective goalposts that will benefit their children they will listen to you.<sup>395</sup>

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392 Interview 10, Question 12.

393 Interview 10, Question 12.

394 Interview 8, Question 20.

395 Interview 2, Question 38.

From such a perspective, the team's "focus is on their future outcomes for their children."<sup>396</sup> The two lawyers are working with both clients as opposed to against either one, to achieve the resolution that maximizes outputs for everyone based on the future hopes and dreams for the parties and their children.<sup>397</sup> It should be noted here that the literature supports that not everyone always wants what is best for their children. The instinct to use the child to punish the spouse is one that is very prevalent in family litigation<sup>398</sup>, and is one that all alternative dispute resolution processes should seek to discourage and repress. Still, these comments from collaborative lawyers indicate that their approaches to negotiations could assist parents in pursuing their children's best interests.

The shift in mentality means that some lawyers place an explicit emphasis on getting the other party to trust them, rather than trying to convince a third party of the merits of their client's legal position. This manifests itself in that instead of tailoring your case to suit a particular judge's perception of important factors<sup>399</sup>, lawyers instead can spend their energy attempting to earn the trust of the other lawyer's client. As a result, they also have to pay considerable attention to prepping their own client so that:

They're not surprised when I am nice to their spouse. Because people are freaked out usually. So I always explain that your spouse needs to trust me. So when I am talking to her and listening carefully, it is actually for your benefit. She needs to trust me and I'm not manipulating her.<sup>400</sup>

Because this represents such a radical departure from traditional legal advocacy, the importance of informing clients of this difference prior to their engagement with the process is paramount.

That same lawyer acknowledges this, noting her observation based on experiences with roughly

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396 Interview 8, Question 20.

397 Interview 9, Question 14.

398 L. Elrod. *Supra* note 104.

399 Interview 2, Question 38. Uses the example of a judge who loves dogs, so the lawyer will focus on the fact that the opposing client abused dogs when delivering his client's case.

400 Interview 5, Question 10.

two hundred collaborative files, that “the less emotional surprises there are, the more steady [the process] is. Because people don't feel sold down the river.”<sup>401</sup>

Central to achieving this objective, because clients are more apt to trust the perspective of their own lawyer, is the difference in the nature of communication with the other lawyers on the file. Communication between lawyers is often more personal. Phone conversations are regarded by some lawyers as vastly superior to e-mail communications in this context.<sup>402</sup> Their communication is also more open and honest. One lawyer notes:

There is probably nothing I would not tell the other lawyer if I trust them. Because I know they are only going to tell their client what is appropriate. Obviously if your client tells you not to, then you don't. But they rarely do that. The clients know in advance because I have told them that we carefully plan. We brief and debrief. That everything about the process is thought out. So they know they have to tell me if they don't want me to talk about it.<sup>403</sup>

Another lawyer describes it as follows:

Instead of being driven by looking at one person with the glass half full and the other half empty as the only possible result, it is a question of can we share things in such a way that both parties come out of it with their needs met. And in order for me to achieve that, there has to be open communication and trust with the other side as well.<sup>404</sup>

This plays itself out throughout the process. As opposed to formal depositions or cross-examinations, evidence is provided through relaxed conversation. The prevailing attitude among the lawyers is to sit down and talk about discrepancies, rather than be confrontational.<sup>405</sup> The old litigation adage of having the backup document prior to engaging in conversation is seen as less necessary.<sup>406</sup> In their responses, several lawyers indicate that they often agree with the other lawyer in the presence of both clients.<sup>407</sup> The open communication style necessitates a level of

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401 Interview 5, Question 10.

402 Interview 1, Question 45.

403 Interview 6, Question 28.

404 Interview 10, Question 12.

405 Interview 4, Question 12.

406 Interview 9, Question 14.

407 Interview 8, Question 20. Interview 9, Question 14. Interview 10, Question 12.

familiarity and a bond between collaborative lawyers that can only be achieved through repeated work exposure and the tight knit practice group, which Vancouver collaborative lawyers feel they have.<sup>408</sup> Multiple lawyers do explicitly indicate in their responses that they are already notifying clients ahead of time of the open nature of communication, and in some cases, repeatedly throughout the process.<sup>409</sup>

This communication style also requires self-awareness on the part of collaborative lawyers, who need to know what dynamics they and their personality are bringing to a particular file, in order to effectively communicate with the other lawyer in a manner that is not destructive to the process.<sup>410</sup> From the perspective of collaborative lawyers, it also has other benefits, such as behavioural modeling. One lawyer regards one of their main objectives as:

Modeling a level of communication between us as counsel that we would aspire our own clients to have afterwards. So as long as they are very clear on that. The key is to continually touch base with the client on that, because it is socially a very different perspective.<sup>411</sup>

Several of the lawyers are very conscious of the need to inform clients, and hopeful that their method of communication with each other will encourage clients to engage in similar dialogue with each other going forward.

The level of trust required between two lawyers to allow this type of communication carries inherent risks, which should also be made apparent to the client prior to them choosing the process. During these open communications, something may be disclosed that the other side could then take advantage of if the collaborative process dissolves. While the subject matter of the collaborative process is explicitly off limits during any future litigation between the

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408 Interview 6, Question 28. Interview 8. Interview 9, Question 14, Interview 10.

409 Interview 4, Question 12. Interview 5, Question 10. Interview 6, Question 28. Interview 10, Question 12.

410 Interview 2, Question 38.

411 Interview 10, Question 12.

parties<sup>412</sup>, it may be that the collaborative process provides the party with an idea of what questions to ask, or where to look during subsequent litigation. Something could also be disclosed, such as abusive behaviour that may affect the safety of one of the parties outside the process. Special care should be taken by lawyers when sharing these details. The possibility also exists that the client may be offended or insulted by friendly bantering between opposing lawyers, as is acknowledged by some in the interview sample.<sup>413</sup> The responses of many lawyers in the sample referenced above do indicate awareness of these risks. However, they seem largely comfortable in their ability to address those risks with each other, as well as cognizant of the benefits of this communication style.

### ***Informed Consent Concerning Possible Settlement Pressures***

The third main aspect of collaborative law which new clients should be made aware of is the potential for settlement pressure that can occur in the collaborative process. To some extent, this is the job of the collaborative lawyer, to help promote settlement while protecting their client's legal rights. They also have the added goal of nurturing the prospects for a continued constructive relationship between the parties, consistent with the needs of each particular family. From that broader perspective, settlement pressure is not always a bad thing. However, in certain instances it can be, since a primary goal of any alternative legal dispute resolution process is to preserve self-determination for clients. It is only natural that given the belief collaborative lawyers have in their process for producing lasting and positive outcomes, participants in the process may be subject to additional pressures to reach settlement that could impact the effectiveness of the process for them specifically. As such, it is useful for this study to explore

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412 Collaborative Divorce Vancouver. *Vancouver Collaborative Law Participation Agreement*. *Supra* note 354 at section 14.

413 Interview 8, Question 20. Interview 9, Question 14.

what those pressures might be with collaborative lawyers. It is also helpful to highlight ways for collaborative lawyers to make clients aware of these effects prior to them choosing the process.

The responses of the collaborative lawyers in the sample indicate some ways in which clients could face pressure to settle when they engage with the collaborative process. The primary way is through the disqualification provisions in the Vancouver Collaborative Group Participation Agreement, coupled with the subsequent cost of process breakdown to the client. Those provisions mandate that violations of disclosure requirements or a decision by the parties to engage in litigation results in the termination of the collaborative process.<sup>414</sup> This inevitably places cost pressures on clients, since the termination of the process results in people having to hire new lawyers, start at square one and absorb any costs incurred to date in the collaborative process. These provisions exist precisely with the intention of creating settlement pressure, which in the view of many collaborative lawyers is essential to ensure client commitment to the process. Client commitment is critical to the success of the collaborative process.

Because of this deeply held belief, sometimes collaborative lawyers can be unwitting, but active, participants in applying this pressure. One of the ways this information was gathered was to ask the lawyers what they do if clients resolve some issues but get stuck on an issue and decide to abandon the process. Some of their answers revealed that collaborative lawyers can sometimes give an unfavourable view of the alternative options available to clients once the process stalls. One lawyer notes that they sometimes say to clients “I know how tired you are. I know how frustrated you are. And what are your options? They're not great come back here and sit down.”<sup>415</sup> Another points out the potentially extreme costs of the court process in the event

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414 Collaborative Divorce Vancouver. *Vancouver Collaborative Law Participation Agreement*. *Supra* note 354 at Sections 5, 13, and 14.

415 Interview 5, Question 27.



that clients choose to go in that direction.<sup>416</sup> It is important to note that none of this is disingenuous, or misleading. The options available to clients in the event of collaborative process breakdown are not great, but these statements can function to subtly pressure clients into sticking with the collaborative process.

The fact that the process can be terminated because of one client's failure to abide by the disclosure requirements also effectively subjects both parties to this pressure. This makes informed consent regarding potential settlement pressure all the more critical for clients, since one client can indirectly hijack the process. All clients need to be aware, prior to choosing a dispute resolution process, that in order for the collaborative process to have its desired effects they need to be able to trust that their spouse is going to give full and fair disclosure. In particular, they should be informed that absent this, litigation and other legal proceedings to void any contracts created on the basis of incomplete disclosure may be necessary.

It should be noted that settlement pressures of varying forms occur in all dispute resolution processes. As well, collaborative lawyers do have methods to help ensure full and fair disclosure. There are also tactics collaborative lawyers are implementing to try to minimize settlement pressure and assist clients in the event of process breakdown. Some of the collaborative lawyers in the sample explicitly give clients the option to leave the process at any point if they become disenchanted.<sup>417</sup> Some of them also note that they take meaningful steps to help their clients in this regard. These include assisting clients with drafting and reaching partial agreements.<sup>418</sup> Other collaborative lawyers also advocate attaching a procedure for arbitration to the collaborative process, though this is the subject of much debate within the collaborative

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416 Interview 8, Question 18.

417 Interview 1, Question 38. Interview 2, Question 29. Interview 10, Question 30.

418 Interview 2, Question 29. Interview 8, Question 39. Interview 10, Question 30.

practice community.<sup>419</sup> Ultimately, prospective clients should have access to all information and diverse perspectives in order to make fully informed choices regarding their desired dispute resolution process.

### **Conclusion**

This chapter canvasses three key issues pertaining to the problem of how to best promote the suitability of clients with the collaborative process. The underpinning assumption of this analysis is that further research concerning ways to ensure matches between family client and their choice of legal process will lead to increases in positive client outcomes, and in collaborative law success rates. To that end, three key issues were examined in detail. These included exploring the client screening process for domestic violence or abuse implemented by collaborative practitioners, the screening process for potential disclosure problems, and the methods collaborative lawyers used to promote the advancement of informed consent for prospective clients. The next chapter will explore the views of collaborative lawyers on issues identified in the literature pertaining to the effective execution of the collaborative process.

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419 Interview 7, Question 30. Interview 8, Question 39.

## **Chapter 5: Interview Data on Execution of the Collaborative Process**

### **Issue 1: Collaborative Lawyer Training**

#### ***Key Sources of Training For Collaborative Lawyers***

This chapter explores the views and methods that Greater Vancouver collaborative lawyers offer about issues identified in the literature pertaining to the effective execution of the collaborative process.

The first of these is collaborative lawyer training, which is critical to the proper execution of the collaborative process. Of special interest is the training that collaborative lawyers perceive to be most important for their practice. In their responses, each lawyer in the sample addresses the question of which relevant training they feel most helps them meet clients' needs as collaborative practitioners. Nine of the ten collaborative lawyers in the sample emphasize interest based mediation training as being critical to their work. In particular for lawyers who have practiced litigation prior to engaging in collaborative practice, interest based mediation is prized because it provides them with “a different way of seeing things.”<sup>420</sup> One lawyer notes that mediation helps litigators at listening. He notes:

Lawyers tend not to listen, because they want to tell people what they are thinking... Mediation really does help your listening skills. Interest based negotiation helps in trying to identify why people want what they want, and what is important to them so you know how to address that.<sup>421</sup>

This makes sense, since the collaborative process is geared towards focusing clients on their needs and desires for their future, rather than their legal positions or entitlements. While many family law litigators regularly conduct negotiations and mediations as part of their practice, litigators tend to focus more heavily on the legal positions and entitlements of their

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420 Interview 2, Question 7.

421 Interview 6, Question 7.

clients as a basis for negotiation. While important, having too rigid an emphasis on legal positions and entitlements can sometimes act as an impediment to collaboration between parties. A shift in focus is therefore required by a lawyer who practices collaboratively. Interest based mediation training is regarded by collaborative lawyers as an important tool in enabling that shift in mentality.

Seven of the ten lawyers in the sample also highlight collaborative divorce training as being essential to their practice. In particular, they note the value of a British Columbia continuing legal education seminar entitled “Getting Started with Collaborative Practice,” as being integral in their training. The seminar is three days in duration. The completion of this seminar has been a requirement for aspiring collaborative lawyers wishing to join the Vancouver Collaborative Practice Group.<sup>422</sup> Lawyers who enrol in the seminar are taught about the collaborative process, the nature of the multi-disciplinary dynamic created by collaborative law, and how to assemble a multi-disciplinary team.<sup>423</sup> They are also engaged in discussions around client care, professional responsibility and ethics, and practice management.<sup>424</sup>

Four out of ten respondents in this sample identify family violence screening, as well as conflict and communication courses, as other critical components to collaborative training. In 2012, a task force with a mandate from the Ministry of Justice, and appointed by the Law Society of British Columbia, investigated whether family violence screening training should be mandatory, and released recommendations prior to the enactment of the *FLA*. They concluded that “rather than requiring lawyers acting in the traditional role of counsel to take courses in family violence screening, the Law Society should alert lawyers to the obligation to screen under

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422 Interview 4, Question 5.

423 The Continuing Legal Education Society of British Columbia. *Getting Started in Collaborative Practice*, online: <<http://www.cle.bc.ca/onlinestore/productdetails.aspx?cid=959>> accessed on 2 March 2016.

424 Ibid.

s. 8 of the *FLA* and in very strong terms encourage lawyers to ensure that they possess the proper skills, knowledge, and training to properly discharge their obligation.”<sup>425</sup> The rationale for this recommendation was the concern of the Task Force that “introducing mandatory violence screening training for all family dispute resolution professionals would place considerable strain on limited resources.”<sup>426</sup> This position of recognizing the importance of the training, while making it voluntary, furthers the possibility of inconsistent family violence screening skills among all lawyers.

With the introduction of the *FLA*, the assessment of the presence of family violence has become part of all lawyers' duties to their clients.<sup>427</sup> Yet because of the recommendation outlined above and the lack of specificity in the *FLA*, it is not entirely clear whether training on family violence screening is mandatory for practicing collaborative lawyers in British Columbia. The confusion stems from the fact that the *FLA* and its accompanying regulations clearly stipulate that this training is mandatory for mediators, and other “neutral” dispute resolution professionals such as arbitrators and parenting coordinators. However, there is no explicit mention of this requirement for traditional litigation lawyers, or collaborative lawyers. Collaborative law falls somewhere between the role of a mediator and the role of traditional counsel, as it involves individual advocacy from a more neutral perspective. Regardless, to promote consistency of practice and client service, it is arguable that some training on family violence screening should be mandatory for all practicing family lawyers in British Columbia, as well as those acting as mediators or other dispute resolution professionals.

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425 D. Munro., et al. “Qualifications for Lawyers Acting as Arbitrators, Mediators, and/or Parenting Coordinators in Family Law Matters” (Sept. 2012), Family Law Task Force, *The Law Society of British Columbia* at 44.

426 Ibid. at 44.

427 *Family Law Act*, SBC 2011, c. 25, s. 8 (1).

### *Lawyers' Perceptions of Successful Approaches to Collaborative Law*

The discussion with collaborative lawyers concerning training also highlights the approaches and type of lawyering that collaborative lawyers believe is conducive to the successful execution of their process. Training lawyers in these approaches and perspectives is regarded as critical to the continued success of the process. Some of these approaches, tactics and perspectives are canvassed in the previous chapter, but a quick refresher may be helpful here. The most commonly cited approach by lawyers in this study is that the focus of collaborative advocacy should incorporate both the law and a larger, family oriented perspective. To these lawyers, their advocacy “is not just about what the law is but what does this person need to move on.”<sup>428</sup> Another suggests “[collaborative lawyers] have to stop thinking of end results, and start thinking about managing conflict and finding solutions that address interests.”<sup>429</sup> The focus is more on problem solving and less on legal strategy.<sup>430</sup>

The net effect is that lawyers “are not looking to massage the information to make [their] client look as good as possible from a win lose perspective.”<sup>431</sup> The focus is on the family as a collective. One lawyer describes it as:

Looking at all of the players. You look at not just your client's story, but you look at how your client's story has been told within the context of this [family] system. When you are in litigation you just do not do that. You might pay lip service to the fact that you do it. But the nature of litigation is that you are vigorously advancing your client's best preferred outcome.<sup>432</sup>

It is important to note that litigators may be more likely to consider the family context when engaged in negotiation or mediation processes. However, in the minds of collaborative lawyers,

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428 Interview 1, Question 45.

429 Interview 3, Question 31.

430 Interview 3, Question 31. Interview 4, Question 34. Interview 7, Question 35

431 Interview 10, Question 36.

432 Interview 5, Question 32.

they are always committed to both their client, and the broader family. They see their role as protecting their own client's interests, without sacrificing the broader interests of the family as a whole.

This wider perspective and approach that collaborative lawyers believe in also influences the preferred tactics that they use with each other. As discussed in the previous chapter, lawyers highlight the need to work with the other lawyer through more personal, open conversations<sup>433</sup>, to trust the other lawyer<sup>434</sup>, and to have polite disagreements, rather than heated debates, when they are in four way meetings.<sup>435</sup> This behavioural modeling and open communication between lawyers is seen as essential to helping teach clients to communicate with each other post separation or divorce. The inference is that lawyers who have the most success collaboratively have the capacity to implement these tactics. This indicates that there might be certain types of lawyers who are suited to the collaborative process and others who are not. Those lawyers who operate with transparency<sup>436</sup>, continual curiosity<sup>437</sup> and less combative or rigid personalities<sup>438</sup> tend to do better according to the lawyers in this sample. As discussed in the previous chapter, another interesting point that is raised is the importance of self-awareness on the part of collaborative lawyers. Some study participants express the need for lawyers to know what biases and perceptions they are bringing to the negotiation, so that if necessary, they can prevent themselves from being impediments to potential agreement between the parties.<sup>439</sup>

The collaborative approach also requires that lawyers understand emotion and possess empathy towards clients involved in the process. The primary function of this skill is to provide

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433 See the use of the phone over e-mail, Interview 1, Question 45. Interview 7, Question 35. Also Interview 6, Question 14, Interview 10, Question 37 for characteristics of open conversations.

434 Interview 6, Question 14.

435 Interview 9, Question 40, Interview 10, Question 37.

436 Interview 2, Question 39.

437 Interview 2, Question 18. Interview 10, Question 20.

438 See example of difficult lawyer Interview 6, Question 14. Interview 8, Question 28.

439 Interview 2, Question 38. Interview 8, Question 20.

reassurance for emotional clients. The belief amongst collaborative lawyers is that it helps facilitate negotiation between the parties. One lawyer describes this as “trying to use [emotional intelligence] skills and neutral language and positive reinforcement to get both people to feel comfortable, to share what they have to share.”<sup>440</sup> Empathy and emotional intelligence facilitate the sort of contact between sides that is conducive to negotiation. For example, “you can reach over and put your hand on somebody's head and tell them you get it. And the other person sees that you are not a monster.”<sup>441</sup> These skills thus help to prevent the demonization of the other party and their lawyer that can sometimes occur in the litigation process. They also serves the purpose of lowering the emotional temperature of the dispute so that the parties can more productively negotiate the legal parameters of their divorce or separation.

There is also a difference in the language and tone used in drafting divorce or separation agreements. Training regarding this difference is seen as essential for collaborative lawyers. Collaborative agreements have to be within a legally appropriate range,<sup>442</sup> but they can be more creatively tailored to the needs of a particular family. Negotiations typically proceed at a more flexible pace, and agreements are arrived at in a calmer, less adversarial fashion.<sup>443</sup> The language contained within the agreement is also different. Agreements are “owned” by the clients and use the language of “we” and “us.”<sup>444</sup> The lawyers' operating theory is that this focus on people's emotions, client ownership of the process, and use of amicable language during drafting and negotiation ultimately leads to more lasting agreements. This is a potentially fruitful ground for future research.

In these ways, the broader approach of collaborative lawyers to a family conflict

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440 Interview 8, Question 22.

441 Interview 9, Question 14.

442 Interview 1, Question 47.

443 Interview 5, Question 32. Interview 8, Question 22.

444 Interview 1, Question 47.



represents a fundamental departure from the individual advocacy model. Despite this, it should be noted that the collaborative lawyers in this sample are careful to insist that this different approach does not change the information they seek in their intake meetings, nor their understanding of the law.<sup>445</sup> In some cases, lawyers indicate that they use the problem solving, and other more civil aspects of the collaborative approach in their litigation practices.<sup>446</sup> Thus, there is necessarily overlap between the training requirements for litigation and the training requirements for the collaborative process. In both cases, from the perspective of collaborative lawyers, one requires a basic knowledge of the law and a capacity to gather information from clients in order to practice effectively.

### ***The Larger Debate About Training: Is Litigation Experience Good for Collaborative Lawyers***

The lawyers' responses to question about their training also illuminate a larger debate about the usefulness of litigation experience in collaborative law practice, a topic of considerable philosophical debate within the Vancouver Collaborative Practice Group. There is currently a divide between the practitioners as to whether experience in litigation helps or hinders a lawyer's capacity to practice collaborative law. Some of the collaborative lawyers in this study sample feel that practicing litigation prior to practicing collaborative law is essential to proper training. These lawyers indicate that they learned lots through experience in litigation.<sup>447</sup> They believe that litigation experience is essential in training lawyers to fully understand the law and the legal issues facing families.<sup>448</sup>

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445 Interview 1, Question 45. Interview 8, Question 43. Interview 10, Questions 36 and 38.

446 Interview 7, Question 35. Interview 9, Question 40.

447 Interview 2, Question 7. Interview 4, Questions 4 and 5., Interview 7, Question 7.

448 Interview 2, Interview 10, Question 38.

There are others who think the strategic and positional mindset required for effective advocacy in litigation is antithetical to the collaborative and team oriented mindset required by lawyers operating within the collaborative process. The common belief among those who hold this position is that more aggressive litigation tactics, such as establishing hard bargaining positions<sup>449</sup> or writing aggressive letters to the other side, can be damaging to the success of the process.<sup>450</sup> One lawyer notes:

The people who have done litigation, I notice what they do in the collaborative process is they start to force and force and force. It ends up being a tremendous amount of pressure that is put on one person in the system, that ends up distorting and forcing things.<sup>451</sup>

In their view, effective collaborative lawyering requires that former litigators be deprogrammed of their learned litigation tactics.

Collaborative lawyers offer some additional solutions to this dilemma of how to provide the proper legal experience and perspectives for people who wish to practice collaborative family law. An overarching goal of the Vancouver Collaborative Practice Group is “to start to formulate a way to ensure that collaborative practitioners who have not done litigation are solid on the law.”<sup>452</sup> This could involve some form of annual mandatory legal education on the *Family Law Act* and any relevant new transformational cases that apply to major areas of family practice. Some of the lawyers in this study sample also mention their belief in the need to change traditional legal education concerning family law, to reflect that divorce is an emotional issue with legal elements, rather than a legal issue with emotional repercussions.<sup>453</sup> Others report that

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449 Interview 10, Question 38.

450 Interview 6, Question 35.

451 Interview 5, Question 32.

452 Interview 10, Question 38.

453 Interview 5, Question 33. Interview 10, Question 38.

training in psychology or child development studies is useful to collaborative practice.<sup>454</sup>

## **Issue 2: Ensuring Disclosure Once the Collaborative Process Starts**

As mentioned previously, disclosure is one of the key lynchpins of the collaborative process. The collaborative process is dependent upon full and fair disclosure in order to achieve its key objective, of providing clients with reasonable and lasting agreements that serve the interests of families. Without methods to ensure full and fair disclosure by participants, the collaborative process, like other alternative dispute resolution methods, becomes vulnerable to producing unjust or unsatisfactory outcomes. Such outcomes, if produced too often, undermine clients' interests and usually require further costly legal efforts to resolve. It is therefore incumbent on collaborative lawyers and researchers in the area to establish and explore ways to help ensure that disclosure occurs once the process gets underway.

The tactics and methods collaborative lawyers currently use in service of this objective are therefore worth examining. The most common tactic implemented by the lawyers in this sample is to remind their clients of the consequences of non-disclosure, sometimes repeatedly.<sup>455</sup> These consequences are usually outlined in the Participation Agreement as well.<sup>456</sup> They can include the suspension of the collaborative process<sup>457</sup>, additional legal costs that are incurred by clients when the collaborative process is dissolved and collaborative lawyers withdraw<sup>458</sup>, as

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454 Interview 8, Questions 8, 9 and 24. Interview 7, Question 7.

455 Eight of ten lawyers in the sample indicated that they do this. See Interview 1, Question 23. Interview 3, Question 16. Interview 4, Question 22. Interview 5, Question 20. Interview 6, Question 27. Interview 8, Question 31. Interview 9, Questions 22 and 27. Interview 10, Question 26.

456 Collaborative Divorce Vancouver. *Vancouver Collaborative Law Participation Agreement*. *Supra* note 354.

457 Interview 6, Question 27.

458 Interview 8, Question 31.

well as the voiding of any agreement created by that process.<sup>459</sup> Other consequences for non-disclosure which can be written into the agreement include the forfeiture of a percentage of assets by the offending party, and the assumption of liability for the other party's legal costs.<sup>460</sup> Severe financial penalties for failure to make financial disclosure are also set out in the *FLA*, which can be applied later in court.<sup>461</sup> In the minds of collaborative lawyers, these consequences serve as deterrents to hiding information.<sup>462</sup>

Because clients often enter the process from a litigious and guarded perspective, some collaborative lawyers note that to promote full and fair disclosure, they need to emphasize the broad scope of disclosure that is expected in their process. One lawyer tells clients:

Look if I'm going to be your lawyer and advocate for you, you have got to be honest and you have got to be forthright. I need to know. Even if you think some little detail is irrelevant, better to tell me and I will decide if it is relevant. But the more I know the more I can help you. If I don't know it I can't help you.<sup>463</sup>

Framing disclosure as being necessary for both the process and effective advocacy is a good idea, in that it removes the negative connotation some more suspicious clients may have of disclosure and promotes a more open dynamic.

Their questioning style when gathering information is integral to their success in this regard. When trying to uncover potentially sensitive information, whether it be financial or related to past abuse issues, a conversational tone is seen as very helpful.<sup>464</sup> Deep probing over repeated visits is another tactic that is used.<sup>465</sup> One lawyer also likes to ask neutral, open and inclusive questions, so that the client does not feel as though the lawyer is making a value

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459 Interview 1, Question 23.

460 Interview 3, Question 16.

461 Interview 4, Question 22. Interview 6, Question 27. See also *Family Law Act*, SBC 2011, c. 25, s. 213.

462 Three of the lawyers in the sample indicate that they don't believe non-disclosure is a common issue in their practice. See Interview 1, Question 23. Interview 6, Question 27. Interview 10, Question 25.

463 Interview 4, Question 17. See also Interview 5, Question 19 and Interview 8, Question 31.

464 Interview 3, Question 18.

465 Interview 4, Question 17.

judgement, and feels more encouraged to disclose the information.<sup>466</sup> Some lawyers like to use standard questions or tools that they have been given or developed,<sup>467</sup> others value flexibility and believe “nobody is the same, so there is no standard set of questions.”<sup>468</sup> One of the lawyers who values flexibility feels that it is important not to be too direct.

I ask roundabout questions. Sometimes you will start by asking the client, what did you guys both like doing together, to get a sense of their interests first and then the differences will come out. It just depends on the client.<sup>469</sup>

Continual curiosity throughout the process is also important.<sup>470</sup>

The overarching goal of their questioning style and communication with clients is to build trust with the client. Normalizing their client's “baggage”, as well as listening and responding in a non-judgmental fashion, are critical to their ability to elicit information. One of the keys here is to emphasize their role as a support for the client, while acknowledging and accepting the client's history as something they have seen before.<sup>471</sup> Some lawyers note that it is important to be up front with clients, to explain why you are asking questions of them, and to refrain from asking questions on sensitive issues that are not absolutely necessary.<sup>472</sup> Also central to the objective of building trust is reinforcing the confidentiality of the sensitive information clients provide.<sup>473</sup> There appears to be some variability in how this promised confidentiality is managed in practice. This is another key issue that will be discussed in more detail later in this chapter.

Another critical element to eliciting information from clients is to challenge them when their words do not match their behaviour, or there exists the suspicion that something pertinent to

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466 Interview 5, Question 19.

467 Interview 3, Question 18. Interview 5, Question 19.

468 Interview 9, Question 22.

469 Interview 9, Question 23.

470 Interview 10, Question 25, Interview 2, Question 18.

471 Interview 5, Question 19.

472 Interview 2, Question 18. Interview 5, Question 19.

473 Interview 5, Question 19, Interview 8, Question 31, Interview 9, Question 22.

the case may be hidden. One particularly effective way of challenging clients, rather than just expressing disbelief, is to say “if I am wondering these questions, you can better believe your spouse is wondering them. And you can better believe your spouses' lawyer is wondering them. So let's work it through because you have to satisfy me.”<sup>474</sup> The linkage between the dissemination of information to the client's own lawyer as being necessary to moving the process forward is a key incentive for clients.

Yet some lawyers also stress the importance of being careful when challenging the other party. Sometimes, speaking to the other lawyer first is the appropriate approach.<sup>475</sup> Additional approaches to challenging clients can also involve verbally identifying a client's body language to the client<sup>476</sup>, or explaining to them the big picture of how information will inevitably surface in the electronic age.<sup>477</sup> These last two approaches are particularly interesting. One involves amateur psychology in terms of reading body language and deciphering meaning, the other involves taking the client outside their own narrow perspective and forcing them to think about the larger big picture, namely how difficult it is to keep secrets in this era.

When attempting to get information from clients, the attitudes of collaborative lawyers and the relationship they have with each other also play an integral role. An interested and curious attitude on behalf of the lawyer can often be essential to maximizing disclosure.<sup>478</sup> Another tactic one lawyer uses is to have open discussions with the other lawyer concerning general issues and dynamics, then use that information to drill down with their own client.<sup>479</sup> Ideally, the relationship between lawyers is such that they can challenge each other to dig up

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474 Interview 5, Question 22.

475 Interview 8, Question 35.

476 Interview 4, Question 17. Interview 5, Question 19.

477 Interview 8, Question 31.

478 Interview 2, Question 18. Interview 10, Question 20.

479 Interview 2, Question 19.

information from their own clients until everybody is satisfied that everything is on the table. From these emphases one can infer that the ideal atmosphere in the collaborative process is one where both lawyers provide support and accountability to everyone involved. This type of environment provides optimal conditions for full and free disclosure, which is essential to production of lasting and valid agreements.

There are also elements built into the structure of the collaborative process that facilitate transparent disclosure by clients. These structural elements include characteristics of lawyer-client meetings, procedures governing disclosure requests, requiring that clients sign sworn disclosure statements<sup>480</sup>, and the existence of coaches to draw out potentially sensitive information on topics like domestic violence or abuse. Initial meetings with clients typically range in duration from thirty minutes to two hours depending on the lawyer, with the most common response being ninety minutes to two hours.<sup>481</sup> One lawyer's approach to initial four way meetings is to create a master list of all documentation needed. Disclosure requests are repeatedly ironed out until a deal is finalized.<sup>482</sup> The divorce coaches can also play an integral role in uncovering important information relative to the emotional dynamics of the relationship between the parties. Lawyers sometimes will learn of this type of information indirectly from coaches.<sup>483</sup> This raises interesting questions concerning information sharing between lawyers and coaches on a file, which will be discussed in greater detail later in the chapter.

A few of the lawyers also note that their approaches and the severe consequences of non-disclosure create an environment where disclosure is rarely a problem. The confidence the lawyers in this sample have in their process to elicit all pertinent information from their clients is

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480 Interview 1, Question 24. Interview 8, Question 31. Interview 9, Question 27.

481 Interview 4, Question 14. Interview 7, Question 21. Interview 8, Question 29. Interview 9, Question 22.

482 Interview 1, Question 32.

483 Interview 6, Question 21. Interview 9, Question 24.

noteworthy. The more experienced lawyers note their advanced level of analysis and capacity for teamwork to identify and fill in any gaps in information that do exist.<sup>484</sup> Also contributing to this perception is a perspective on the type of client likely to choose the collaborative process. One lawyer states “I don't think that somebody who wants to hide assets is probably coming to my office in the first place. Just from our firm and how we present what we do they are probably going to be looking for a different kind of lawyer.”<sup>485</sup> Another lawyer feels that to the extent that people neglect to provide proper disclosure, “usually it is more omission than commission. In other words, usually when they don't produce stuff or evidence it is because they are procrastinators, not because they are trying to hide anything.”<sup>486</sup>

While this perception likely has some validity, there exists the possibility that more opportunistic clients may seek to use the collaborative process as a tool to delay or avoid the more formal scrutiny of judicial processes. For the collaborative process itself to truly be a deterrent to improper or incomplete disclosure, lawyers will have to be especially vigilant in their methods and approaches as outlined above. Clients must consistently be forced to understand the consequences of attempts to skirt the disclosure requirements. In order to ensure maximum occurrence of full and fair disclosure, the penalty for engaging in improper or incomplete disclosure should be framed to clearly exceed the potential gains in the eyes of prospective clients. Whether current collaborative processes offer enough of a deterrent to this behaviour is an interesting topic for additional research.

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484 Interview 10, Question 25.

485 Interview 1, Question 23.

486 Interview 6, Question 27.



### **Issue 3: Once the Process Starts, Ensuring Client Capacity to Negotiate Agreements**

As mentioned previously, collaborative law is an alternative dispute resolution process wherein clients, with the assistance of collaboratively trained legal representation, engage in interest based negotiation with the goal of resolving the dispute. One of the key objectives for the collaborative process is to promote client capacity to negotiate lasting agreements and achieve legal self-determination. Clients of the collaborative process will often engage the legal dispute resolution process from different places emotionally. There can be a significant inequity in the ability of each party to carry out negotiations. This inequity can result from emotional instability caused by the separation, prior abuse or severe power imbalances in the relationship, a lack of financial knowledge, or a concern for their safety. In order for the collaborative process to most effectively serve its clients and promote lasting agreements, it is arguable that the process should endeavour to provide clients with as equal a footing as possible from which to conduct negotiations.

#### ***Assessing Emotional Preparedness of Clients***

An initial task of any collaborative lawyer in this regard is to assess the emotional preparedness of their client to begin negotiations. One collaborative lawyer operates from the assumption that “everybody is pretty much nowhere near emotionally ready to deal with a separation.”<sup>487</sup> This assumption is helpful in ensuring a readiness on the part of a lawyer to provide assistance and address the problem. Another lawyer notes:

I haven't had instances where [clients] haven't been ready [to negotiate] because I think part of my job is to make sure that they are. Part of my job as a family lawyer is to find the right process for each person. So if they're not ready for collaborative law, I am not going to suggest it to them and I won't start a process with them.<sup>488</sup>

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487 Interview 9, Question 24.

488 Interview 3, Question 19.

Assessing client readiness is sometimes going to be very difficult. Robert Emery notes that the emotional journey of divorce or separation is similar to a washing machine.<sup>489</sup> The emotional experiences of people involved in the divorce or separation process are often cyclical. People can fluctuate back and forth between emotional stability and instability throughout a negotiation period, as well as depending on their environment.<sup>490</sup> How one measures emotional readiness to negotiate is therefore an interesting question, because it undoubtedly somewhat variable from person to person. It is unlikely to ever become an exact science.

However, the collaborative lawyers in the study sample provide some key indicators that they can look for when assessing client readiness to negotiate. Body language cues such as a client rubbing their hands together, starting to sweat, a trembling voice, can tip lawyers off that clients may not be emotionally ready to begin the collaborative process.<sup>491</sup> Evidence of anxiety, tears, and the continued presence of anger or shutting down can also indicate a lack of readiness to negotiate.<sup>492</sup> One lawyer is careful to note that emotional responses can be “reflective of something that is not going well in the process, or that someone is not being heard, or that there is a fear.”<sup>493</sup> This lawyer focuses on determining “what is going on in the environment or in the discussion that is impacting on the client's ability to participate.”<sup>494</sup> Lawyers often have to rely on experience to determine the difference between an emotion that is temporary and not overarching, and one which will influence the capacity of the client to engage in productive negotiations.<sup>495</sup> The overall measure is “[the client's] ability to articulate their position in a four

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489 R.E. Emery. *The Truth About Children and Divorce*. (New York: Penguin Group, 2004).

490 Ibid.

491 Interview 3, Question 24.

492 Interview 6, Question 24.

493 Interview 7, Question 28.

494 Interview 7, Question 28.

495 Interview 8, Question 32.

way meeting,” since that is where the bulk of collaborative negotiations take place.<sup>496</sup> Looking for these factors with this objective in mind ensures that the lawyers are not put in a position where they are speaking for their client during the negotiations.<sup>497</sup> This avoids the potential pitfall of lawyers interjecting their own positions and values into the process.

### ***The Importance of Lawyer to Lawyer Communication***

When one party's emotion is inhibiting negotiations, or they do not appear able to properly articulate and advocate for their interests, effective communication between their lawyers becomes extremely important. Lawyers note that when a problem in this area arises, communication with each other “is the first step.”<sup>498</sup> Both collaborative lawyers need to communicate with each other openly to ensure that both clients are feeling comfortable and empowered to voice their positions. This communication must serve a dual purpose. It must allow them gather and share information, and to construct processes that might help the parties overcome any emotional roadblocks to negotiation. The types of information shared between lawyers typically include relationship power dynamics<sup>499</sup>, the key issues between the clients<sup>500</sup>, any serious fears or concerns of clients that need to be managed in the room<sup>501</sup>, and other facts that may facilitate moving the process forward. The information that is gathered is then used to select appropriate procedural courses of action for clients, which will enhance their negotiating capacity and promote negotiation progress.<sup>502</sup> The emphasis on teamwork between lawyers allows them to tailor the process to suit the specific needs of both clients, and thus provides the

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496 Interview 7, Question 22.

497 Interview 10, Question 22.

498 Interview 5, Question 26.

499 Interview 3, Question 14. Interview 5, Question 15.

500 Interview 6, Question 15.

501 Interview 8, Question 34.

502 Interview 3, Question 14.

opportunity for client empowerment. However, it also has some interesting implications for confidentiality and client safety that will be discussed further later in this chapter.

Effective communication between lawyers is not always easy to attain. The mentality and personalities of the collaborative lawyers on a file can influence the effectiveness of the collaborative team. Some lawyers highlight the importance of collaborative lawyers “making the shift” to the collaborative mentality. Communicating and managing imbalances in the room “is very difficult when you are dealing with a lawyer on the other side who thinks they know what they are doing, and who doesn't pick up on the language, and doesn't take their client to task. I will sometimes pull them aside and take [the lawyer] to task.”<sup>503</sup> Experience dealing with collaborative files is a frequently mentioned antidote to this problem.<sup>504</sup> This perspective indicates that files with significant power imbalances are likely to be better handled by more experienced practitioners. One obvious recommendation is that clients may benefit from having more inexperienced collaborative practitioners paired with more senior collaborative lawyers in cases where significant power imbalance is evident. In an ideal situation, the more experienced collaborative practitioner would be retained by the more vulnerable party. This would enable the education of junior collaborative practitioners through exposure to power imbalance issues, as well as protect the interests of vulnerable clients who need more collaborative expertise to properly conduct fair negotiations. Further attention to the practical facilitation of this recommendation by collaborative groups would arguably be beneficial.

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503 Interview 6, Question 15.

504 Interview 8, Question 23.

### *Managing Power Imbalances*

The importance of a team approach is heightened where there is a power imbalance.<sup>505</sup> Ideally, such power dynamics are screened for and discussed among the lawyers ahead of the four way meetings, so that a plan is already in place if something happens during a meeting.<sup>506</sup> For the more vulnerable clients, the lawyers approach the situation from the belief that “you can actually work with the [other] professionals to change the balance of power so that somebody is being invited into the conversation, rather than forced in or silenced.”<sup>507</sup> If one party is not ready to negotiate, a typical tactic would be for one lawyer to pull the other lawyer aside and say “look my guy is not there yet. We can't do this. We need to slow it down and take baby steps and only deal with [this issue] right now.”<sup>508</sup>

Lawyers will also discuss with each other how to protect the more vulnerable client after having discussions with their own client about what they feel comfortable with.<sup>509</sup> If the more vulnerable client does not feel that they can say to their partner what they feel comfortable saying to the lawyer, lawyers will “constantly check up with that client. Remember when you said to me x?”<sup>510</sup> The goal is apparently to remind the more vulnerable client of their position or interest, which can sometimes get lost amidst the emotions they are feeling during the negotiation. Other common techniques include equipping vulnerable clients with knowledge, or help them understand that they can ask for their needs to be met.<sup>511</sup> Lawyers will also prepare them well in advance for upcoming conversations. This includes informing them who will talk,

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505 Interview 1, Question 18. Interview 4, Question 15.  
506 Interview 8, Question 34. Interview 3, Question 14.  
507 Interview 5, Question 15.  
508 Interview 9, Question 31.  
509 Interview 1, Question 18.  
510 Interview 10, Question 19.  
511 Interview 5, Question 15.

and what to expect in the room.<sup>512</sup>

In order to create a constructive negotiating environment, lawyers also have to manage the more powerful client. Often, the lawyer working with the more powerful client “will work really hard to make sure that power imbalance doesn't manifest itself.”<sup>513</sup> Lawyers play an essential role in controlling and managing the personalities of their own clients so as to neutralize the power imbalance and promote a fair negotiation.<sup>514</sup> Both clients are also reminded of the broader goals and interests they set in their first session, and lawyers will ask “do you remember in our first session this is what you said was important to you? Is what is happening right now supporting it or working against it?”<sup>515</sup> Reality checking both more vulnerable clients and more powerful clients helps them see beyond their fears, hesitations, and aggravations. It brings them back to their broader objectives.

One of the more interesting aspects of this discussion is how collaborative lawyers choose to address these situations. The comments above emphasize flexibility for the lawyers in choosing a course of action when managing power imbalances. A great deal of situational awareness on the part of the lawyers is required to implement the correct process. It is clear that some lawyers prefer to address situations openly in the four way meetings. One lawyer notes that in one file, where one of the clients has a controlling personality she tries:

To address that with the person at the table, with them both at the table by saying look there seems to be an issue here, and this is a process that involves both of you. Not just the lawyers. And [the other party's] voice is important and what she's saying is important and we need to figure out a way to address that.<sup>516</sup>

The strategy here appears to be to openly inform the more dominant party of the importance of

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512 Interview 5, Question 15. Interview 8, Question 23. Interview 9, Question 16.

513 Interview 7, Question 17.

514 Interview 1, Question 18. Interview 3, Question 14. Interview 5, Question 16.

515 Interview 10, Question 19.

516 Interview 9, Question 15.

listening to the other side's perspective during negotiation, while allowing the more vulnerable party to hear someone advocate that their voice is important. Lawyers need to be careful that they do not escalate the conflict, because one party perceives they are taking sides. In these situations, care must also be taken to ensure that where abusive dynamics exist, more vulnerable parties are not placed in a more difficult position as a result of this direct style of addressing the situation. Some situations may call for a more private, less direct approach away from the setting of the four way meeting. Lawyers should exercise their discretion carefully on a case by case basis.

### ***Procedural Checks for Power Imbalances in the Collaborative Process***

Effective lawyer to lawyer communication is also crucial to ensuring the proper implementation of the procedural methods built into the collaborative process, which help minimize power imbalances and promote client negotiating capacity. One of the most commonly used procedural methods by collaborative lawyers is giving more vulnerable clients more time or taking breaks.<sup>517</sup> A primary purpose of this method is to allow people adequate time to make reasoned decisions.<sup>518</sup> Sometimes, emotions in the room will make a decision very difficult for some people. The slowing down or break from the process functions as an emotional cooling period that better promotes rational and intelligent decision making.<sup>519</sup> This is sometimes facilitated by having each client check in with their lawyer to understand the root of their difficulties.<sup>520</sup> Breaks from negotiation can also involve visits with divorce coaches to calm

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517 This was expressly mentioned by 9 of the 10 lawyers interviewed as a frequent tactic. Often it's executed by one lawyer telling the other that their client "needs a day or two to think about things." Interview 1, Question 37.

518 Interview 1, Question 36. Interview 2, Question 28.

519 Interview 2, Question 28.

520 Interview 4, Question 18.

clients.<sup>521</sup>

Another important element to the collaborative process is the creation of a safe room. The first step for lawyers in the creation of a safe room is preparing their clients. Client preparation involves asking questions of clients around their preferred room space, their impression of what the dynamic will feel like for them, and how lawyers can help them.<sup>522</sup> Taking a barometer of client's emotional health is a key element of these questions.<sup>523</sup> It typically also involves strategizing with clients about any potentially difficult parts of the conversation with the other party.<sup>524</sup> Sometimes, clients also need to be conditioned not to focus on the past. One lawyer in particular notes that far from being cathartic, letting clients discuss how they got to this situation “just makes them mad and lets them vent. And it's not good. So now we don't let them look back at all.”<sup>525</sup> The same lawyer does make exceptions for things like property contributions and price evaluations. The focus is on avoiding allowing clients to assign blame to each other.<sup>526</sup> Collaborative lawyers should still be cognizant of the fact that abuse issues or dynamics must not be ignored in this effort to focus on the future. While it may be that the legal negotiating table is not the optimal venue to address past allegations of abusive behaviour between parties, care must be taken to ensure that abuse is considered and not ignored by the parties.

In general, focusing clients on the future seems to be a sound idea from a legal perspective. The discussion around past events, including those that are potentially abusive, is arguably best conducted with the presence of divorce coaches or counselors who know how to help clients acknowledge the past and release their emotions constructively. At the negotiating

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521 Interview 6, Question 32. Interview 10, Question 23.

522 Interview 1, Question 18. Interview 10, Question 19.

523 Interview 9, Question 16.

524 Interview 5, Question 15.

525 Interview 6, Question 19.

526 Interview 6, Question 19.



table, too much emphasis on exploring the past and assigning prior blame distracts from problem solving the legal issues, and can conceivably lead clients into intractable positions. To prevent this, several lawyers also note that it is important to prepare clients on appropriate language when addressing each other.<sup>527</sup> It may also be a good idea in practice to encourage clients to schedule meetings with divorce coaches or private counselors prior to commencing legal negotiations.

The second aspect of creating a safe room concerns the design of the physical space where negotiations are to be conducted. These designs are created in consultation with the clients.<sup>528</sup> For one lawyer, the structure of the room is dependent on the personalities of the clients.<sup>529</sup> Bigger rooms or round versus square tables are a couple of important considerations.<sup>530</sup> Round tables represent an alternative to the sometimes adversarial optics of having each side sit on opposite sides of a square table. They also allow everyone to see each other and enable lawyers to pick up on body language cues and other dynamics that may be pertinent to negotiations, or may indicate that someone is uncomfortable. In addition to the seating arrangement and the tables, it is important that the room provide an opportunity for an out strategy, in the event one client gets uncomfortable.<sup>531</sup> One way to do this is to position the parties so that either can exit the room in relative privacy without having to move closer to the other person.

The mentality of lawyers in the room is also crucial to creating a safe room. Lawyers note the need to bring a collaborative mindset into the room. Part of this mindset is that they cannot be seen to be pulling the clients further apart. Some collaborative lawyers believe that lawyers

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527 Interview 6, Question 19. Interview 9, Question 15. Interview 10, Question 19.

528 Interview 9, Question 24.

529 Interview 6, Question 19.

530 Interview 6, Question 19.

531 Interview 2, Question 20.

with a litigation mindset who are not trained collaboratively “don't know how to create a safe room at all, so people are still taking shots.”<sup>532</sup> A safe room for negotiation endeavours to create a constructive, non-threatening environment for both parties to negotiate. Lawyers also need to be mindful of particular sensitivities clients may have, and be paying attention to the clients' body language, as well as to the impact of their own words.<sup>533</sup> One lawyer describes the appropriate mindset as “being conscious and thoughtful.... I'm always thinking what am I saying? What are the impact of my words? Watching the non-verbal language, making sure everyone has a chance to talk, not cutting people off.”<sup>534</sup> This type of mindfulness on the part of the lawyer is a key cog in the empowerment of clients and in the creation of a safe room. Based on these statements, it is arguable that some training in psychology and picking up cues would be helpful for collaborative lawyers.

Sometimes, the dynamics between parties are so severe that creating a safe room with everyone present is difficult. In these instances, collaborative lawyers will sometimes utilize caucusing to ensure clients feel safe and can maximize their negotiating capacity. Similar to shuttle mediation, the tactic is used to allow parties to make decisions without experiencing emotions related to directly witnessing the reactions of the other party.<sup>535</sup> In the collaborative setting, one lawyer describes this as “trying to engage both lawyers to work with each client separately. Obviously that has some expense connotations associated with it.”<sup>536</sup> This is arguably similar to lawyer assisted negotiation processes, excepting that because the lawyers are trained in the collaborative method, they are more likely to focus on the concerns of both parties while advancing their own client's legal goals. Another idea is “having coaches involved in the four

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532 Interview 6, Question 18.

533 Interview 8, Question 20.

534 Interview 8, Question 20.

535 Interview 8, Question 34.

536 Interview 7, Question 24.

way meetings.”<sup>537</sup> Each of the above methods are an acknowledgment of the role that environmental and personal triggers can play in inhibiting someone's capacity to continue negotiating. Some of them are particularly important where there is an abusive dynamic or extreme power imbalance in the relationship.

### ***The Role of Divorce Coaches in Managing Clients' Emotions and Power Imbalances***

The direct involvement of divorce coaches in the legal dispute resolution process is a unique characteristic of collaborative law. When it comes to ensuring client negotiating capacity, the impressions that collaborative lawyers have concerning the critical role of divorce coaches in their files are also relevant. Divorce coaches are repeatedly mentioned by collaborative lawyers as a key resource in emotional balancing and client empowerment. They can also play an integral role in managing power imbalances. The frequency of the involvement of divorce coaches in collaborative files varies among the collaborative lawyers in the sample. Four of the ten lawyers in the sample indicate that they use divorce coaches on approximately fifty to sixty percent of their files.<sup>538</sup> Three of the ten lawyers state that they use them most of the time, defined as between sixty and eighty percent of the time.<sup>539</sup> Two lawyers note that they use them nearly all or ninety percent of the time.<sup>540</sup> One lawyer says that he has used them on every file to date.<sup>541</sup>

Several lawyers also point out whether or not they are ultimately utilized on a file is up to the client, but that they always recommend coaches,<sup>542</sup> particularly where there are children involved in the file. The overall perception among collaborative lawyers in this sample is that

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537 Interview 7, Question 24.

538 Interview 1, Question 7. Interview 5, Question 8. Interview 6, Question 8. Interview 7, Question 9.

539 Interview 2, Question 9. Interview 8, Question 10. Interview 9, Question 6.

540 Interview 4, Question 6. Interview 10, Question 9.

541 Interview 3, Question 6.

542 Interview 4, Question 6. Interview 6, Question 8. Interview 8, Question 10. Interview 10, Question 9.

divorce coaches involved with them are extremely useful in bringing about dispute resolution, and overwhelmingly positive for families. The fact that they are used at a minimum on half the collaborative files speaks to this view of divorce coaches' utility. This is especially true given the additional up front cost to clients required to retain their services, though it is possible that their use saves money over the long term. This is a potentially fruitful area for future research.

The interviews in this sample also reveal a great deal about when and why divorce coaches are used in the collaborative process. The most common response from collaborative lawyers is that they are utilized whenever inconsistent views of the separation or divorce impacts the capacity of one party to negotiate productively. These inconsistent views typically occur where one party wants the separation and the other does not, or is having difficulty adjusting to that reality.<sup>543</sup> This can result in the parties being on “different emotional timelines” that can give them different goals and approaches to negotiations.<sup>544</sup> As a result, their communication suffers. Communication issues are the second most commonly articulated reason for the use of divorce coaches. In addressing communication issues between the parties, the coach is focused on both the present and the future.<sup>545</sup> The purpose of this from one lawyer’s perspective is to help avoid the need for future litigation or negotiation, promote more equitable negotiations, and facilitate better parenting relationships post-divorce.<sup>546</sup> Constructive communication between parties both during negotiation and post agreement is essential to the achievement of each of these objectives. As one lawyer notes:

People come apart because they stop communicating. Assuming you have kids particularly, you are going to have to communicate the rest of your life. We [lawyers] are not particularly well trained in that, so the coaches are how you help rebuild your family

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543 Interview 1, Question 9.

544 Interview 3, Question 7.

545 Interview 1, Question 9.

546 Interview 1, Question 36.

or at least not destroy it.<sup>547</sup>

From this perspective, “there is a difference between a resolution [to a dispute] and peace. We think we can do that [for people] and the coaches are fundamental in that.”<sup>548</sup> This is perhaps the most important role for divorce coaches and is one of the key talents underpinning their importance to the collaborative process. Without their involvement, it is arguable that collaborative law would be much less effective as a dispute resolution process.<sup>549</sup>

Divorce coaches are also used when clients are bringing their emotion with them to the negotiating table in a way that inhibits negotiations or their legal self-determination. One of the overarching themes in this study is the role that emotion has in negatively influencing someone's ability to advocate and make legal decisions. Collaborative lawyers echo this repeatedly. They laud the role of the coaches in providing clients with emotional support during negotiations and while they are making legal decisions.<sup>550</sup> As noted above, this emotion can come from many places. One party may have not adjusted to the separation or divorce. There may be an “emotional change to the dynamic of parenting” where one party meets a new partner.<sup>551</sup> They may just need to “vent out the emotional side of why the breakup [is] happening.”<sup>552</sup> There may also be leftover unresolved emotional issues from the relationship<sup>553</sup>, or fear and anger resulting from a power imbalance.<sup>554</sup>

Often, this unresolved emotion leads to a higher conflict level, which can make negotiations very difficult. To the collaborative lawyers, divorce coaches are invaluable when

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547 Interview 6, Question 9.

548 Interview 6, Question 9.

549 This perspective is supported by some collaborative lawyers who note the absence of divorce coaches as a main cause of process breakdown. See Interview 6, Question 30. Interview 8, Question 38.

550 Interview 1, Questions 36 and 37. Interview 6, Questions 24 and 32. Interview 7, Question 29. Interview 9, Question 31.

551 Interview 8, Question 10.

552 Interview 8, Question 10.

553 Interview 9, Question 8.

554 Interview 6, Question 24.

one client is punishing the other, stuck in their anger, and “unable to move forward on even basic issues.”<sup>555</sup> The coaches help parties process their emotions and release them constructively so as to improve communication and promote future focused negotiating. They also allow each party, in motivated circumstances, to understand and take ownership of their past and the consequences and effects of their actions. Just acknowledging this in the presence of the other party, separate from the legal discussions between the parties, can sometimes move negotiations forward.<sup>556</sup>

The importance of the role of the divorce coach is magnified when the prior relationship between the parties contained significant power imbalances. In these instances, often times coaches will be deployed in the four way meetings.<sup>557</sup> Coaches for both parties can be present in what function as six way meetings so as to make everyone comfortable and provide full support to both sides.<sup>558</sup> In more severe cases, the meetings with the coaches can be done separately and individually.<sup>559</sup> When handling cases with domestic violence, at least one lawyer expresses the belief that divorce coaches should be mandatory.<sup>560</sup> This is done to give the more vulnerable parties a greater comfort in articulating their positions and provide an emotional safety net.<sup>561</sup> Collaborative lawyers are aware that “coaches are trained to deal with all those emotional issues that underlie power imbalances.”<sup>562</sup> This is insightful, in that it recognizes that one of the keys to providing parties with an equitable footing during negotiations is facilitating their emotional stability and safe expression of these emotions.

Collaborative lawyers in this sample indicate three common stages of the process where they usually enlist the services of divorce coaches or child specialists. The first two have been

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555 Interview 9, Question 7 and 8., Interview 1, Question 9. Interview 5, Question 9.

556 Interview 8, Question 33.

557 Interview 7, Question 24.

558 Interview 9, Question 16.

559 Interview 8, Question 26.

560 Interview 10, Question 24.

561 Interview 5, Question 15.

562 Interview 4, Question 15.

discussed at length above. Coaches are primarily either brought in prior to the process commencing, to help parties address their emotions and to detect power imbalances<sup>563</sup>, or during the four way meetings, to provide immediate emotional support.<sup>564</sup> Another common stage of the process where coaches and child specialists get involved is to assist the parties in devising and properly implementing parenting plans.<sup>565</sup>

This is a key potential benefit to the collaborative process, that it does not neglect the emotional aspects of family dispute resolution. For clients, the option of divorce coaches and child specialists means that they do not assume sole responsibility for their own emotional health during legal negotiations. When clients opt to use these resources, they are supported emotionally to the extent necessary to help them make the most rational decisions possible for themselves and their families. Some of the collaborative lawyers also make the argument that the presence of divorce coaches can reduce overall negotiating costs and thus save clients' money.<sup>566</sup> This claim is based on the logic that coaches have lower hourly rates than lawyers who sometimes become their client's therapists during the divorce process.<sup>567</sup> Determining the accuracy of this belief is an important area for future research. If true, the use of these specialists represents a potential avenue for lowering legal costs in all types of family dispute resolution.

#### **Issue 4: Ensuring the Child's Perspective Safely Enters the Process**

Ensuring that the perspective of children can safely be integrated into a dispute resolution process is another critical element to providing effective legal services to families. The lawyers in this study sample indicate that the perspective of any children is brought into the process

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563 Interview 2, Questions 15 and 16. Interview 6, Question 16. Interview 1, Question 36.

564 Interview 2, Question 15. Interview 7, Question 24. Interview 8, Question 12. Interview 1, Question 36.

565 Interview 1, Question 9. Interview 6, Question 9. Interview 8, Question 12. Interview 9, Question 5.

566 Interview 6, Question 9. Interview 9, Question 24.

567 Interview 6, Question 9. Interview 9, Question 24.

primarily through three avenues. These avenues include the parents themselves, where there is agreement between them,<sup>568</sup> or when there is disagreement, through divorce coaches<sup>569</sup> or child specialists who are part of the collaborative process and are jointly paid for by the clients.<sup>570</sup>

The collaborative lawyers in the study sample mainly see their role in this area as facilitating the connection between clients and the appropriate resources. The most commonly articulated role for the collaborative lawyer is in explaining the role of the child specialist to clients.<sup>571</sup> For some lawyers, the primary source of referral of clients to child specialists is instead through the divorce coaches, who from their perspectives are arguably more effective at triaging and identifying the family's needs in this area.<sup>572</sup> The potential for more frequent use of the child specialist to advocate for children in a legal dispute resolution process involving their parents is a special feature of the collaborative process. Exploring the parameters concerning when and how child specialists are being recommended and utilized within the collaborative process is therefore a useful exercise examining how collaborative law functions in pursuit of the objectives of child advocacy and child safety.

The first step in the discussion around the specialized function of the child specialist concerns the circumstances where collaborative lawyers will recommend child specialists to clients, and how that referral occurs. The most common reasons provided by the lawyers in the interview sample for referring their clients to a child specialist include communication difficulties between parents about children's issues<sup>573</sup>, or dysfunctional parenting arrangements

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568 Interview 4, Question 9. Interview 5, Question 12.

569 Interview 3, Question 11. Interview 4, Question 9. Interview 6, Question 12. Interview 10, Question 13.

570 Interview 1, Question 15. Interview 2, Question 10. Interview 4, Question 9. Interview 5, Question 12. Interview 6, Question 12. Interview 7, Question 13. Interview 8, Question 19. Interview 9, Question 13. Interview 10, Question 13.

571 Interview 1, Question 13. Interview 5, Question 12. Interview 10, Question 10.

572 Interview 5, Question 12. Interview 6, Question 12. Interview 10, Question 13.

573 Interview 4, Question 7. Interview 6, Question 9. Interview 5, Question 12.



during the separation process, which often result from different parenting styles.<sup>574</sup> This typically manifests itself to collaborative lawyer through the fact that the parties cannot agree on matters involving their children.<sup>575</sup> They also refer parents to child specialists when the parties seem to have a poorer understanding of child development<sup>576</sup>, or where there are parental alienation or child behaviour issues.<sup>577</sup> Child specialists are primarily utilized to help parents communicate with their children and each other around children's issues.<sup>578</sup> For an additional cost, they provide a safe way for children who are capable to voice their concerns and goals for their future with their separating or divorcing parents.

The specific role that child specialists serve deserves some further examination. The most frequent response from collaborative lawyers in the sample regarding the role of the child specialist is that they help lawyers and clients uncover the truth regarding the children, in particular concerning parties' parenting styles and the dynamic of the family. The lawyers note that often “when a child is caught in the middle they are going to tell each parent what they want to hear.”<sup>579</sup> Parents may have different perspectives on how a child is managing their separation based solely on this fact alone. As one lawyer puts it:

The impact that divorce or separation has on the child is difficult sometimes for the parents themselves to see, because kids will act the way they think is necessary in order to appease each parent. So naively, a parent might just not have that level of discernment to be able to see past the facade that kids put on, and maybe they don't want to sometimes.<sup>580</sup>

Child specialists help bring the child's true perspective to light by providing a safe, neutral place

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574 Interview 4, Question 9. Interview 7, Question 10. Interview 8, Question 12. Interview 8, Question 13.

575 Interview 4, Question 9. Interview 5, Question 12, Interview 6, Question 9.

576 Interview 7, Question 10. Interview 9, Question 13.

577 Interview 2, Question 10. Interview 10, Question 14.

578 Interview 6, Question 9.

579 Interview 9, Question 13. See also Interview 2, Question 10.

580 Interview 10, Question 10.

for children to voice their opinions.<sup>581</sup> With their unique training, they are “able to get to know these kids, make them part of the process, without the child feeling like they are making a decision that may reflect badly on them and have a long term negative impact.”<sup>582</sup> These comments reveal that child specialists function as a necessary bulwark between children and their parent's potentially negative reactions toward their own child's perspective. This is all the more true when parents are having difficulty processing or handling their own emotions around the divorce or separation, since these can cloud their perception of their children. In such circumstances, as is highlighted in the literature review, children can become vulnerable targets for their parents while they are engaged in their dispute with each other.

The timing in which child specialists are used within the collaborative process is also an important area for analysis. Where there are divorce coaches present, often the child specialist will meet with the coaches and clients in a five way meeting.<sup>583</sup> If divorce coaches are not part of a particular process, the child specialist “will come into the lawyer's meeting with clients and give the report from meeting with the kids.”<sup>584</sup> Some lawyers emphasize that they prefer to get the coaches and specialists involved at the beginning of the process.<sup>585</sup> From a child centred perspective, though it may be more expensive, this is positive for families who can afford it, as it is desirable to get the child's viewpoints involved in the process as quickly as possible, so that they are emphasized during negotiations. Other lawyers are also emphatic that children are never involved directly or present in the negotiating room.<sup>586</sup> This is important, because the primary goal of involving a child specialist is to provide the child with a safe avenue to disclose the truth

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581 Interview 1, Question 14. Interview 5, Question 12. Interview 10, Question 10. Interview 9, Question 13.

582 Interview 9, Question 13.

583 Interview 1, Question 14. Interview 8, Question 13.

584 Interview 1, Question 13.

585 Interview 7, Question 13. Interview 8, Question 13.

586 Interview 2, Question 12. Interview 3, Question 11. Interview 8, Question 19.

regarding their post-separation wishes, as well as the relationship dynamics with their parents. Where children are old enough to properly articulate their preferences, the safe introduction of their perspective is essential to the accuracy of information used during negotiations. This is necessary to enable the parties to negotiate a parenting plan that optimally serves the interests of their children. The challenge is to find ways to maximize the affordability of the child specialist for prospective clients.

### **Issue 5: Client Confidentiality and Information Sharing Between Collaborative Professionals**

The traditional professional arrangement between a lawyer and a client necessitates that a client's disclosures to their own lawyer remain confidential between them, unless the client expressly waives this privilege and chooses to disclose the information to either the other party, or a third party. A key assumption underpinning traditional legal privilege is that confidentiality concerning lawyer and client communications is essential to the preservation of an individual's legal rights. In this traditional model, the role of the lawyer is to assert and advocate for their client's legal rights as against the other party.

Because collaborative law represents a more holistic and cooperative advocacy process, this traditional concept of legal privilege appears to be altered somewhat for those clients choosing it to resolve their disputes. There are often several professionals involved in a collaborative file, who will frequently share information amongst each other. Collaborative lawyers believe that information sharing among professionals is essential in order for a collaborative team, comprised of collaborative lawyers, financial specialists, and mental health of professionals, to function effectively and promote cooperative negotiations between clients.

As noted in Chapter Three of this thesis, the broader question of how collaborative lawyers manage the necessity of sharing information with the team, while preserving lawyer client privilege as necessary, has been an important topic of debate in the literature.<sup>587</sup>

### ***Open Nature of the Collaborative Process and the Role of the Participation Agreement***

Nearly every lawyer in this study sample notes that while working on a file, they will discuss it openly with the other lawyers and professionals.<sup>588</sup> The sharing of information among collaborative professionals is typically governed by participation agreements, which are encouraged to be standardized within the Vancouver Collaborative Practice Group.<sup>589</sup> These participation agreements are read and signed by all parties prior to the commencement of the collaborative process.<sup>590</sup> Participants in the process who use divorce coaches will also sign a coaches' participation agreement in which it is "understood and implicit that whoever the professionals are working on a file with will be communicating with each other."<sup>591</sup> Usually "the lawyers try to sign that before we have any conversations [between sides] so that those conversations [between professionals] are covered."<sup>592</sup> The goal behind this is that the clients are informed about the open nature of discussions between professionals involved on the file, prior to consenting to utilize the collaborative process. The participation agreement is thus the primary vehicle through which clients are informed about open disclosure between collaborative

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587 J. Macfarlane. *Supra* note 94 at 68.

588 All 10 lawyers highlight the free nature of discussions between them and the other lawyer, as well as other professionals. 3 of the 10 note unprompted that they place limitations on open discussions in certain circumstances, such as where abuse may be present or the information is particularly sensitive.

589 Interview 8, Question 17. See also *Vancouver Collaborative Law Participation Agreement*. *Supra* note 354 at sections 8 and 14.

590 Interview 3, Question 22. Interview 4, Question 23. Interview 5, Question 24. Interview 8, Question 36. Interview 9, Question 28.

591 Interview 4, Question 23.

592 Interview 4, Question 23.

professionals on a file.

One lawyer describes the participation agreement as creating a confidentiality bubble. In her view:

The bubble will start with the first set of relationships. Be it the two coaches and their clients or the two lawyers and their clients. And then the bubble gets bigger when you bring in the other experts. But the idea is to make sure that clients understand that that confidentiality bubble brings in whoever it is that we are working with..... that is sufficient for the process to carry on. It's kind of a need to know basis. The team members have a lot of conversations about their clients to make sure that we're supporting or seeing the dynamic properly.<sup>593</sup>

From this view, information is freely shared as necessary within the team during the collaborative process in order to advance its execution. This conception of confidentiality within a broader information sharing bubble allows the team to adjust the process in accordance with clients' negotiating needs, which can be different depending on the relationship dynamic in each case. It also however, arguably highlights the need for a more thorough discussion and analysis concerning appropriate parameters for sharing potentially sensitive information within the team.

The use of a confidentiality bubble is an attempt to ensure that lawyer-client confidentiality is contained within the collaborative process as a whole, to prevent the process from influencing any future litigation. Participation agreements contain provisions that ensure that discussions during the course of the collaborative process are subject to confidentiality outside the process. This prevents information disseminated during the discussion from being used in future litigation if the process collapses.<sup>594</sup> This is seen as essential “because often times disclosure will be a fight in the litigation system. So you don't want to give everybody disclosure and then they go off and use the litigation system to their advantage.”<sup>595</sup> This recognition by

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593 Interview 10, Question 27.

594 Interview 5, Question 24. Interview 9, Question 28.

595 Interview 5, Question 24.

collaborative lawyers in their participation agreements is important, because it acknowledges a desire to prevent the collaborative process from being exploited by a party in an attempt to gain the upper hand in future litigation. It may however be difficult in practice to prevent discussions from any alternative dispute resolution model from being carried over to litigation. There remains the possibility that discussions from a failed collaborative process could provide fertile ground for potential litigation fishing expeditions. The extent to which this is happening, and ways to prevent it, is a potential topic for future research.

### *Information Sharing Between Lawyers Within the Collaborative Process*

Within the parameters provided to them by the participation agreement, nine of the ten collaborative lawyers in the interview sample highlight the role of the lawyer as a primary gatekeeper in determining when and how information is shared amongst the team.<sup>596</sup> Lawyers have a tremendous amount of power over clients within this process because the hiding of information is considered to be something that creates impediments to dispute resolution. One lawyer notes that “if somebody wants something, I’ll make my client give it to them. Because if [my client] is hiding it, then there is an issue.”<sup>597</sup> Sometimes clients are required to provide enough disclosure “to satisfy the other lawyer.”<sup>598</sup> These comments are primarily focused on financial and asset disclosure, but they make the question of the process around information sharing between collaborative professionals more pertinent, because they highlight the potential vulnerability of collaborative clients to the dissemination of sensitive information.

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596 All except for Interview 7 made an express note of their role in deciding which information gets shared amongst the team. They had varying standards in terms of how they executed this role. Some felt they reserved the right to disclose even when clients voice objections, so long as the client is made aware of this prior to entering into the process – see Interview 3, Question 22. Interview 6, Question 28, Interview 4, Question 24. See also Interview 8, Question 37.

597 Interview 9, Question 28.

598 Interview 5, Question 24.

Collaborative lawyers in this sample have varying approaches that they use when disclosing information to other lawyers or to divorce coaches. One approach is to have very few meetings with the clients apart from the four way meetings with both parties and lawyers present. The net effect of this approach is that “everything is discussed with everybody there.”<sup>599</sup> This serves the purpose of preventing surprises and ensuring that both parties are aware of which information is being disseminated to the other side. It arguably gives the parties a greater sense of control over the process, but does risk the non-disclosure of more sensitive issues. One remedy to this problem might be to have more screening meetings when clients are initially retained, and then following the first four way meeting, utilize this approach.

Disclosure of information between lawyers and coaches is more precarious, since it often includes particularly emotionally sensitive information. The primary information that coaches frequently share with lawyers concerns problems in the relationship dynamic between the parties, as well as the issues between them that require managing in the negotiating room.<sup>600</sup> This information is sometimes shared in “four way conference calls with the coaches that the parents are not involved in. Those tend to be pretty frank about the assumptions that everybody is making, and those are really helpful.”<sup>601</sup> One lawyer notes that restraints on information sharing do exist, such that “I will get more disclosure from my own client's coach than I would get from the coach of the other client.... it's kind of a need to know basis.”<sup>602</sup> This comment indicates that some collaborative lawyers and other collaborative professionals are acutely aware of the potential sensitive nature of the information they are sharing, and attempt to find the appropriate balance between disclosure which moves the process forward, and preservation of client

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599 Interview 2, Question 26.

600 Interview 6, Question 16. Interview 10, Question 27.

601 Interview 7, Question 26. See also Interview 9, Question 29 for information about conference calls between lawyers and coaches concerning disclosure of information

602 Interview 10, Question 27.

confidentiality to the extent possible.

### *Limitations on Open Information Sharing*

As such, many of the lawyers in this interview sample do demonstrate an awareness of the situational need for limitations on the openness of disclosure between collaborative professionals. Within the collaborative process bubble, the client can express a desire that certain information be kept confidential from other professionals.<sup>603</sup> One lawyer notes that “if I got input from a client that for good reason I was not to share with the other lawyer, and did not feel it undermined the process or amount to material none disclosure, I would certainly consider [not disclosing] in that context.”<sup>604</sup> Some lawyers note, however, that this could trigger the suspension of the process if the lawyer deems that a lack of disclosure to other team members would inhibit their ability to carry out the process.<sup>605</sup> Thus, if that request is made by a client, a determination is made by the lawyers about whether they can proceed with the process without disclosing that information, or whether they will have to discontinue the process unless it is shared amongst the team.<sup>606</sup> This eventuality and its potential consequences will be examined further later in this chapter.

The key factors identified by the lawyers in the sample that affect their decisions around which information to share amongst the collaborative team include: client safety, the level of trust between lawyers, and the importance of disclosing the information to the team's ability assist in resolving the file. From a client safety standpoint, disclosures to lawyers of dynamics involving potential violence or abuse are especially worthy of this protection. Some collaborative

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603 Interview 1, Question 28. Interview 2, Question 25. Interview 4, Question 24. Interview 6, Question 28. Interview 7, Question 26. Interview 8, Question 37.

604 Interview 7, Question 26.

605 Interview 4, Question 24. Interview 7, Question 26. Interview 8, Question 31.

606 Interview 8, Question 37.



family lawyers keep screening for violence confidential from other members of the team.<sup>607</sup> If it is disclosed, one lawyer recommends that the issue is addressed broadly and indirectly through process slowdowns or other measures with an eye to rebalancing power and protecting participants.<sup>608</sup> The key question is “how do you actually create a safe process that does not risk somebody's safety?”<sup>609</sup> It is clear from these comments that some collaborative lawyers emphasize client safety when making these decisions, and have begun to think in depth about how best to manage these situations.

As mentioned above, because the disclosure of this information to other members of the team is often at the lawyers' discretion, the importance of trust between lawyers becomes critical. Several lawyers within the interview sample highlight trusting the other lawyer as being paramount to their decision to disclose information to the other side. A couple of the lawyers in the sample note that they are fully open and honest with each other as long as they have a positive working history, and an established working relationship.<sup>610</sup> In their view, when trust is present between the lawyers, disclosure of information is primarily done for the purpose of allowing the collaborative team to be aware of assumptions the parties are making about each other, and facilitate negotiations in a way that is optimal to the safety and negotiating capacity of both parties.<sup>611</sup> Disclosure among professionals is also seen as essential to creating an atmosphere of more open negotiation in general.<sup>612</sup> Clients are made aware that this is part of the process prior to disclosures being made.<sup>613</sup> Ultimately, the decision to disclose more sensitive information within the team does come down to trusting other collaborative lawyers to act

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607 Interview 1, Question 28. Interview 5, Question 21. Interview 8, Question 31.

608 Interview 5, Question 21.

609 Interview 5, Question 21. See also Interview 6, Question 26.

610 Interview 6, Question 28. Interview 8, Question 36.

611 Interview 3, Question 22. Interview 7, Question 26. Interview 8, Question 36. Interview 9, Question 29. Interview 10 Question 27.

612 Interview 6, Question 28. Interview 8, Question 37.

613 Interview 3, Question 22. Interview 4, Question 25. Interview 6, Question 28. Interview 10, Question 27.

appropriately with this information. Developing a more standardized procedure in this area to the extent possible is arguably a desirable objective.

In the context of the all or nothing dichotomy created by much of the discussion around disclosure of information, collaborative law appears to be attempting to adopt a more contextual, situation specific approach to the dissemination of information. The theory is that approach will allow negotiations to proceed more smoothly, and the collaborative process to function more effectively in the interest of families. On its face, there is merit to this idea, since such an approach has the potential to assist in building trust between parties and promoting more effective, constructive negotiations and lasting agreements.

But collaborative lawyers must always be mindful of the dangers of exposing their client's potentially sensitive information. Client safety must always be weighed against the desire to facilitate negotiations. Lawyers' capacity to determine which other lawyers they can trust with their client's sensitive information in service of this objective will also be paramount. Lawyers should be careful not to apply too much pressure to clients to share information that could compromise client safety. They should also consider implementing measures to help prevent the use of any information gleaned from the collaborative process to fuel potential future fishing expeditions in the litigation arena. To the extent that they can achieve these objectives, the collaborative team model appears to have tremendous potential to both protect individual clients, and promote the interests of the broader family, by encouraging a more holistic and cooperative negotiation atmosphere.

## **Issue 6: Causes of Process Breakdown and its Potential Consequences for Clients**

Process breakdown is one of the major hurdles collaborative law faces in its attempts to help families. The estimates of collaborative lawyers in this sample indicate that anywhere between five and twenty percent of their files are terminated prior to a conclusion, with more estimates towards the lower end of that range.<sup>614</sup> As participation in the collaborative process increases, it is therefore important to explore collaborative lawyers' perspectives on what causes process breakdown in greater detail. This is especially true when one considers that under the terms of a collaborative participation agreement, if the process breaks down, parties are forced to hire new lawyers and begin the litigation process anew at considerable additional cost and delay to them. Gathering information on potential causes of process breakdown, and providing a discussion on its potential consequences for clients, will hopefully assist in ultimately developing a fuller understanding of ways in which instances of process breakdown and its effects on families can be minimized.

### ***Suitability of Clients to the Collaborative Process***

Of the five most common reasons cited by lawyers in the interview sample as causing a breakdown of the collaborative process, three concerned the suitability of the client to the process. Factors affecting the suitability of the client to the process include: the emotional or psychological state of the clients at the time of the process, and the presence of potential personality or addiction disorders. Both these factors are each noted by at least half the interview sample as key blockages to process effectiveness. These factors can overlap with each other. For example, volatile emotional or psychological states can sometimes be the result of

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614 Interview 1, Question 34. Interview 2, Question 27. Interview 5, Question 25. Interview 6, Question 29. Interview 8, Question 38. Interview 9, Question 30. Interview 10, Question 29.

personality disorders. These often manifest themselves in the basic inability or unwillingness of one spouse to participate or commit to the process.

The most commonly discussed reason by collaborative lawyers in this sample for process breakdown is the emotional or psychological state of clients as they enter the process. Several lawyers note that the process can break down because people are not ready to negotiate.<sup>615</sup> As discussed earlier, psychological and emotional readiness to negotiate is defined by the level of control people have over their emotions when engaging in negotiations, such that they do not interfere with that person's capacity to advocate for their interests or negotiate in good faith with the other party. To some collaborative lawyers, a lack of readiness manifests itself in the emotion around a particular issue acting as an impediment to participation in the process.<sup>616</sup> This can impede the effectiveness of the collaborative process either because a party's emotional baggage around the relationship and the separation has not been properly addressed by lawyers<sup>617</sup>, or they feel like they cannot be heard by the other party.<sup>618</sup>

In these cases, the divorce coaches can have a critical role to play in preventing process breakdown, because they have a unique skill set enabling them to identify and address emotional issues in a dispute. Several collaborative lawyers highlight the unwillingness of parties to see divorce coaches prior to or concurrent with the collaborative process as being a central reason why the process breaks down.<sup>619</sup> Lawyers also have a role to play in terms of addressing any emotional responses by clients and identifying where it is coming from, what it is based on, and whether they can do anything within the process to address the circumstances that are creating

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615 Interview 2, Question 27. Interview 3, Question 23.

616 Interview 4, Question 28. Interview 6, Question 30. Interview 9, Question 30.

617 Interview 8, Question 38.

618 Interview 7, Question 28.

619 Interview 6, Question 30. Interview 8, Question 38. Interview 9, Question 30.

the problem.<sup>620</sup> In these cases, the techniques used by collaborative lawyers to resolve impasse and help resolve power imbalances that are discussed earlier in this thesis can also be very important.

Another key reason the process breaks down, and a contributor to the issue discussed above, is the presence of personality disorders in either one or both of the parties. Personality disorders can manifest themselves in clients trying to create chaos by splitting the collaborative team.<sup>621</sup> They can also be evident where [both parties] have “drawn a line in the sand and they are only about twenty bucks a month apart,”<sup>622</sup> either party possesses extreme anger that leads to bullying during negotiations<sup>623</sup>, or if either party declares they have various mental health disorders or addictions.<sup>624</sup> These each require different strategies and resources in order to manage them. These resources and strategies can include mental health professionals or creative negotiation procedures, which a collaborative team seems better positioned to provide. The issue however, is that by their very nature, these sorts of personality disorders threaten any collaborative process. They can lead to intractable conflicts and sometimes irrational behaviour that would seemingly render the idea of collaborative negotiations very difficult if not impossible.

The challenge for collaborative law and the professionals involved in the practice is to find a way to identify these personality disorders or mental health issues at an early stage of the process, and refer clients to the necessary resources that will enable legal negotiations to proceed productively. Admittedly, without the capacity to convince parties to utilize these resources, this may not by itself solve the problem. It is arguable that some form of centralized triage procedure,

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620 Interview 7, Question 29.  
621 Interview 5, Question 28.  
622 Interview 6, Question 32.  
623 Interview 9, Question 30.  
624 Interview 10, Question 29.

similar to those utilized in a hospital emergency room to direct patients to necessary care options, would help in providing clients with these disorders the tools and resources to effectively engage with the collaborative process. This idea is a potential ground for future research and will be explored further in the conclusions section of this thesis.

### ***Poor Execution and Cost of the Collaborative Process***

Another primary reason for process breakdown is an adversarial approach by lawyers involved with the process. According to collaborative lawyers, one reason for this is a lack of collaborative experience.<sup>625</sup> Some lawyers, particularly early in their collaborative careers, have a difficult time adapting their thinking and practices to the collaborative method. Others may just be unskilled or have personalities that are better suited to litigation.<sup>626</sup> They may also fail to recognize the need for coaches in some instances.<sup>627</sup> The end result is that people get entrenched in their positions and are unable to move. Lawyers who are inexperienced, unskilled or naturally more adversarial may further entrench the parties with their tactics, which can lead to process breakdown.<sup>628</sup> This also raises questions regarding how some lawyers juggle both litigation and collaborative roles in their legal practices. As one lawyer notes “the whole mindset is different. When you are in court, there is supposed to be those blinkers on and you are only focused on your client's story.”<sup>629</sup> The collaborative process requires lawyers to focus on both parties' needs and interests for the future in order to help parties find the common ground for an agreement. The existence of lawyers with combined practices, and how this affects the delivery of legal services is worth examining in more detail, and could be a topic for future research.

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625 Interview 1, Question 35.

626 Interview 5, Question 25. Interview 8, Question 38.

627 Interview 8, Question 38.

628 Interview 4, Question 27.

629 Interview 9, Question 38.

The fifth most commonly mentioned cause of process breakdown is the cost of the collaborative process. Four of the ten lawyers in the sample cite cost as a cause of process breakdown in their practice.<sup>630</sup> One lawyer notes:

I've had a couple cases where the client has been really interested and they have started really well until they get to the first bill. And then they go "ok well we better wrap this up at the next meeting because I can't do a third meeting."<sup>631</sup>

This scenario impedes the effectiveness of the collaborative process because the focus of the collaborative process is to provide clients with the space and environment to achieve legal self-determination. This process, which has to be nuanced and flexible to the needs to each individual client, does not appear to be one which lends itself to forced or unduly quick agreements. It is logical to assume that cost pressure on clients could lead to unsatisfactory agreements for parties. Parties who try collaborative law and quit because of cost, or arrive at resolution earlier than is optimal because of cost pressure, are arguably more likely to require additional legal proceedings to achieve a final outcome after engaging with the collaborative process. This highlights the need for maximizing transparency and predictability regarding the cost structure for the collaborative process. Prospective clients must be made aware at the outset of how much the process is likely to cost them, within a reasonable range, so that they will be able to make an educated decision on whether they can afford the process. Such an approach would ultimately save families money and reduce the likelihood of recidivism.

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630 Interview 2, Question 27. Interview 3, Question 23. Interview 5, Question 25. Interview 9, Question 30.

631 Interview 3, Question 23.

### *Management of Process Breakdown and Implications for Clients*

In addition to the causes of process breakdown referenced by collaborative lawyers in this study sample, there is also a need for a discussion concerning the circumstances that could trigger the withdrawal of a collaborative lawyer from the process. The number one reason cited for collaborative lawyer withdrawal by the lawyers in this sample is non-disclosure of relevant information by clients. Six of the ten lawyers in the sample cite this as a circumstance in which they would feel compelled to withdraw.<sup>632</sup> Stipulations requiring this disclosure are included in many participation agreements, as well as the *Family Law Act*.<sup>633</sup> The second most commonly mentioned circumstance that could trigger lawyer withdrawal from the collaborative process is a breakdown in the relationship between the lawyer and client. According to collaborative lawyers in this sample, this breakdown can occur because there is not a fit personality wise between lawyer and client,<sup>634</sup> clients fail to follow the advice of the lawyer because they are intent on splitting the collaborative team,<sup>635</sup> or if the lawyer feels the process is not meeting the client's needs.<sup>636</sup> The third most common reason for lawyer withdrawal is if the client is focused on punishing the other party, or wishing to engage in dishonest or unethical behaviour.<sup>637</sup>

In some ways, this discussion overlaps with the factors causing process breakdown outlined above, since a client's psychological state, behaviour, personality disorder or suitability to the process can impact their behaviour that leads to lawyer withdrawal. Failure to disclose important financial information as required by law, a breakdown in the lawyer-client relationship, or unethical behaviour on the part of clients, are all circumstances which could

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632 Interview 1, Question 39. Interview 4, Question 31. Interview 7, Question 31. Interview 8, Question 40. Interview 9, Questions 28 and 33. Interview 10, Question 31.

633 Interview 1, Question 39. Interview 7, Question 31. Interview 8, Question 40. See also *Family Law Act*, SBC 2011, c. 25, s.5.

634 Interview 1, Question 40. Interview 10, Question 31.

635 Interview 5, Question 28.

636 Interview 7, Question 31.

637 Interview 4, Question 31. Interview 9, Question 33. Interview 10, Question 31.



occur because of those factors.

This discussion also raises some interesting points regarding the discretion collaborative lawyers appear to have in affecting their withdrawal from the process. It may be that the optimal outcome for all clients of family dispute resolution is that they are matched with lawyers who fit their personality, as well as their legal and familial goals and objectives. But lawyers should attempt to arrive at a consensus with their client regarding the withdrawal except in the case where it is done because of some irreconcilable or unethical procedural violation. The potential of collaborative lawyers withdrawing unilaterally because they feel their personality does not match their client's, without the client's consent, could undermine access to justice and make it more difficult for some people to find appropriate legal representation. Withdrawal for reasons other than those affecting the integrity of the collaborative process should be exercised judiciously. Where possible, it is also advisable for lawyers to provide a list of referral options that could potentially better suit client's needs.

Another critical issue, from a client services perspective, is how the files are transferred to litigation lawyers, presuming the process breaks down. This process has an impact on the nature of future proceedings between the parties. Preventing fishing expeditions through preserving client confidentiality is paramount. To that end, several lawyers highlight the importance that what is transferred to outside lawyers consist primarily of general information concerning things like relationship dynamic, background, or emotional issues.<sup>638</sup> In the words of one lawyer, this means that they “might comment on what the dynamics were between clients, but I will never ever disclose the settlement or what they were talking about.”<sup>639</sup> Another lawyer notes that “what I could not pass along are things that are created as part of the collaborative

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638 Interview 2, Question 33. Interview 4, Questions 32 and 33. Interview 5, Question 30. Interview 9, Question 34.

639 Interview 5, Question 30.

process. Minutes from four way meetings or draft agreements, that sort of thing.”<sup>640</sup> Six of the ten lawyers in the interview sample expressly emphasize the confidentiality of any negotiations, verbal or written, as well as settlement discussions between the parties.<sup>641</sup> Lawyer notes and drafts of agreements are kept completely confidential.<sup>642</sup> These are not in any way revealed to future litigation lawyers involved with the parties. This is important, because it shows that collaborative lawyers have given considerable thought to this problem, of preventing their client's legal rights from being compromised as a result of their prior involvement in the collaborative process, if that process breaks down.

In terms of what they will transfer to outside lawyers, one lawyer notes that:

The participation agreement sets out that if there are any signed written agreements [between the parties], that can go to a litigation lawyer. Like interim agreements. Anything that is compellable by court in terms of documentation, or sworn financial statements [can be transferred].<sup>643</sup>

Collaborative lawyers will pass on their own client's documents to their client's future litigation lawyer.<sup>644</sup> Parties can also write terms into the participation agreement that allow for the carryover of any “experts” into the litigation process.<sup>645</sup> One common guideline to the problem of what to disclose to litigation lawyers is that the parties must agree to what is provided to the litigation lawyers.<sup>646</sup> Two lawyers mention that once the decision to withdraw from the process is made, there is a thirty day notice requirement and moratorium on the legal process to allow for wrapping up of paper work, a cooling off period, and to allow the parties to find new lawyers.<sup>647</sup>

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640 Interview 4, Question 33.

641 Interview 1, Question 41. Interview 4, Question 33. Interview 5, Question 30. Interview 8, Question 41. Interview 9, Question 35. Interview 10, Question 33.

642 Ibid.

643 Interview 1, Question 41.

644 Interview 4, Question 33. Interview 5, Question 30.

645 Interview 1, Question 41.

646 Interview 1, Question 31. Interview 2, Question 31. Interview 3, Question 27. Interview 10, Question 30.

647 Interview 3, Question 27. Interview 8, Question 41.

The other major issue posed by process breakdown, which is discussed briefly in the previous subsection, is what the termination of the collaborative process means for legal costs and options available to clients. As to the incidence of collaborative process breakdown affecting clients' ability to pay for future legal services, three of the ten lawyers in the interview sample indicate that they are either not aware, or have not yet encountered scenarios where clients terminate the collaborate process and are unable to afford subsequent legal representation.<sup>648</sup> This could be because those clients who engage the collaborative process are typically in a better position to be able to afford legal representation if the process breaks down. It could also indicate that lawyers are not following up with clients who fall out of process, or that clients are not communicating their inability to afford future legal representation.

Yet, on balance, collaborative lawyers appear to be very aware of the potential financial problems posed to clients by process breakdown. Seven of the ten lawyers in the interview sample acknowledge in their responses that access to the legal system in general is prohibitively costly for lower income clients.<sup>649</sup> Two lawyers in the sample provide cost estimates of their services and note that while it is often cheaper than the lengthy litigation, it still costs a considerable amount. One more junior lawyer notes that for "the average file that I do, each side might be looking at ten thousand dollars."<sup>650</sup> A more experienced lawyer estimates that the average cost to his clients is approximately five thousand six hundred for a file that takes between four to six months to resolve.<sup>651</sup>

Lawyers note that the only real options for the client if the collaborative process breaks

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648 Interview 1, Question 42. Interview 2, Question 34. Interview 3, Question 28. Interview 9, Question 36. Interview 10, Question 34.

649 Interview 1, Question 43. Interview 2, Question 35. Interview 3, Question 29. Interview 6, Question 34. Interview 7, Question 34. Interview 9, Question 37. Interview 10, Question 34.

650 Interview 3, Question 30.

651 Interview 8, Question 42.

down and they cannot afford to pay litigation lawyers include legal aid or duty counsel<sup>652</sup>, finding a lawyer willing to do the work pro bono,<sup>653</sup> or self-representation.<sup>654</sup> Because of this, half the interview sample notes that they try to incorporate cost ranges or payment flexibility into their retainer agreements so that they can tailor to client's financial needs.<sup>655</sup> This strategy could be utilized more broadly to improve access for clients. It also reinforces the need for informing clients as accurately as possible on the potential costs they face in using the collaborative process, as well as what could happen to them if the process breaks down. It also highlights the fact that collaborative lawyers should try to help minimize any settlement pressures clients may feel as a result of the fear of future costs.

Another particularly interesting suggestion by some collaborative lawyers to the cost problem is that one primary goal for lawmakers should be to change the compensation structure associated with legal services. The argument is that “lawyers in family files are compensated on an hourly basis. The only way you can earn money is by the amount of conflict. So it is an inherent conflict of interest that I get paid if there is more conflict.”<sup>656</sup> From this view, the billable hour pay structure encourages conflict which can “bleed families dry.”<sup>657</sup> Fixed rates for legal tasks as well as other negotiated flexible pay structures that move off the billable hour might help resolve this problem. This interesting idea should be examined further.

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652 Interview 1, Question 43. Interview 2, Question 36. Interview 9, Question 37.

653 Interview 1, Question 43, Interview 7, Question 34.

654 Interview 2, Question 36. Interview 7, Question 34. Interview 9, Question 37. Interview 10, Question 34.

655 Interview 1, Question 44. Interview 2, Question 37.

656 Interview 5, Question 33.

657 Interview 10, Question 37.

## **Conclusion**

The effective execution of the collaborative process is critical to the capacity of the process to help clients and their children. This chapter provides a discussion of several key issues that are pertinent to the matter of process execution, and illuminates the perspectives of collaborative lawyers concerning these key issues. Through this discussion various methods of addressing these issues are provided. The analysis contained therein will hopefully be helpful in assisting collaborative lawyers in their practices. It also demonstrates the belief among many collaborative lawyers in this interview sample, that divorce coaches and child specialists have an important role to play in the success of the process. The extent to which their presence on a file would raise or lower ultimate costs to clients is something worthy of additional research. The next chapter will discuss further conclusions and areas for future research.

## **Chapter 6: Conclusions and Areas for Future Research**

### **Thesis Overview**

Divorce and separation are a constant part of life in North American society. The event of divorce or separation represents a substantial life shift for the parties involved, and for their children. As explored earlier in the first chapter of this thesis, that event can have a dramatic impact on the growth and development of children well into adulthood. Divorce and separation are not only legal events. They are significantly fuelled by emotion and psychological considerations. Research shows that uncontrolled emotion between parents during the divorce or separation process is a frequent impediment to rational negotiation between them.<sup>658</sup> During this time, the presence of uncontrolled, and yet completely natural, emotions between parents can exacerbate family conflict, which is detrimental to children's health and development.<sup>659</sup> The law has an important role to play in affecting the impact of divorce or separation in people's lives, particularly in the area of dispute resolution. It is therefore incumbent on legal researchers and practitioners to explore novel methods and tactics that might produce dispute resolution outcomes that are more beneficial to families. The goal for family dispute resolution procedures should be to help clients conduct constructive negotiations, while minimizing potential negative effects of divorce and separation on parties and their children.

Collaborative family law arguably represents a holistic, unique approach to alternative dispute resolution. Using collaborative law as a case study, this thesis explored the perspectives of collaborative lawyers and their methods in greater detail, to lead to a better understanding and analysis of the practice of collaborative law. The hope was that when combined with existing

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658 L. Elrod. *Supra* note 28 at 499. See also R.E. Emery. *Supra* note 23.

659 Refer to chapter 1.

literature around the effects of divorce on children and families, the interview data analysis could contribute to a discussion that promotes and facilitates the development of best practices. The thought was that some of the ideas discussed within might also have broader application in other areas of family dispute resolution.

In order to achieve this objective, it was first essential to embark on a review of the literature around the effects of high levels of family conflict, as well as divorce and separation, on children. This review, found in Chapter One, provided the necessary context and rationale for continuing to explore ways to improve our family dispute resolution practices. This context also highlighted the need for further background exploration of major themes and overriding objectives that influence the daily practice of family dispute resolution in general. The goal for Chapter Two was to examine the literature around the transition that divorce or separation represents to a family, and explore how to best manage that transition. Collaborative family law emerged as an interesting and unique approach to family dispute resolution, because it appeared to attempt to address many of the themes that the literature review has identified as being important to healthy family transitions.

In particular, collaborative law literature canvassed in Chapter Three focuses on the promotion of client empowerment during the negotiation process. It also recognizes the need to address the emotional component of divorce and separation in order to achieve this, and to promote productive legal negotiations between parents, as well as provide a means for children's perspectives to enter the process safely. From a child centred perspective, collaborative law thus appears to hold some promise at minimizing family conflict during the divorce or separation process, one of the major causes of negative effects on children. However, literature critical of the collaborative process also identifies several concerns with collaborative law.

I conducted semi-structured interviews of ten collaborative lawyers within the Vancouver Collaborative Practice Group to further explore how they went about their practice. These interviews sought to explore their perspectives on those criticisms, as well as other major themes, issues and ideas prevalent in collaborative practice. The interviews also served the purpose of helping to identify any interesting ideas or methods of practice that may represent solutions to the difficult situations all collaborative lawyers face on a daily basis. The result of the interview study is a comprehensive discussion of the major issues and themes involved in the practice of collaborative law. The discussion can be found in Chapters Four and Five.

### **Overview of Findings: Matching Prospective Clients with CFL**

Ultimately, the literature identifies nine important issues that the interviews sought to further explore with collaborative lawyers. Three of these issues pertain to ensuring the suitability of prospective clients to the collaborative process. The three critical issues in this area include: the screening process collaborative lawyers use for domestic violence and abuse, as well as lawyer's perceptions of the viability of the collaborative process in these cases, how collaborative lawyers assess a prospective client's willingness to honestly follow the disclosure requirements that are the lynchpin for the collaborative process, and how collaborative lawyers ensure that clients who select their process do so fully informed of its unique nature and requirements for effective participation. Exploring these issues in further detail and drilling down on collaborative lawyers' perspectives hopefully helps promote practices that better match clients with the collaborative dispute resolution process.



### *Screening Process for Domestic Violence and Abuse*

One of the more interesting things that the questions around screening for domestic violence and abuse unearthed is the diverse criteria utilized by collaborative lawyers, in determining whether or not such abuse precludes them from recommending the collaborative process to clients. There seems to be a split within the interview sample on the point at which potential clients become unsuited for the process. This divide is seemingly based on different viewpoints and perspectives concerning the capacity of the collaborative process to assist clients involved in abusive relationships.

There is some consistency in terms of how the practitioners interviewed evaluate the presence or existence of abuse in their client's relationship. Many lawyers use similar cues, questions, tactics and criteria when attempting to discern whether violence or abuse is present. As a group, collaborative lawyers demonstrate awareness of the role violence and abuse can play in influencing negotiations between their clients. However, collaborative law in general could benefit from having continued discussions amongst practitioners, that would assist in developing a broader consensus concerning the capacity of the collaborative process to handle cases involving violence or abuse, as well as identifying any limitations in this capacity and possible ways to rectify them. Such discussions would also be beneficial in promoting awareness and providing a common learning experience for members of the Vancouver Collaborative Practice Group.

### ***Screening For Potential Dishonest Disclosure***

Full and fair disclosure is one the key lynchpins of a successful collaborative process. Identifying clients who may potentially violate that disclosure requirement is arguably a very important skill for collaborative lawyers to develop. The lawyers in the interviews seem to have a fairly well developed and consistent approach to this problem, particularly as it concerns financial disclosure. They certainly possess tremendous confidence in their ability to work together to uncover inconsistencies in disclosure by the parties. They also demonstrate creativity and understanding of human behaviour in terms of the tactics they use to promote disclosure by the parties. Financially inexperienced parties might, however, benefit from being matched with more financially experienced collaborative lawyers. The reasoning for this recommendation is that those collaborative family lawyers with less financial experience will logically rely on more financially experienced clients to assist them in identifying red flags in the other party's disclosure. The risk exists that if a relatively inexperienced collaborative lawyer is paired with a more financially vulnerable client, some potentially important information could get missed. This information gap could have a significant impact on negotiations, as well as the final agreement between the parties.

### ***Ensuring Informed Consent***

The interviews conducted during this study reveal that one of the most important factors contributing to effective dispute resolution is the proper match between participants and the dispute resolution process. In order to ensure complete buy-in and effective participation in the process, the dispute resolution process in question must suit the needs, objectives, and expectations of the client who seeks to utilize it. In order for prospective clients to be able to

appropriately choose the optimal family dispute resolution process for them and their families, transparency is essential. This is particularly true concerning the nature of the process, and the requirements that the process demands of clients. Because collaborative law represents a unique approach to dispute resolution, to maximize the likelihood of successful outcomes, collaborative lawyers should pay close attention to informing clients of the differences with other available processes.

The questions asked of the interview sample focus on the unique nature of the collaborative process, the specialized role and approach of the collaborative lawyer to negotiations, and the potential for any settlement pressure on clients that may arise during the process. Regarding the unique nature of the collaborative process, the interview data reveals that lawyers in this sample rely heavily on a walkthrough of the participation agreement to inform clients about the process. There is some variation between practitioners in the sample concerning the timing of this walkthrough, although all professed to go through the participation agreement with clients prior to them committing to the process. Other important features that collaborative lawyers in this sample indicate they discuss with clients, as part of ensuring informed consent include: the number and type of meetings, the cost of the collaborative process, the relatively broad nature of disclosure requirements, and the characteristics of the collaborative process as compared to other processes. These discussions are essential to ensuring that the potential for sudden or unanticipated settlement pressure on clients is minimized.

The responses of many of the lawyers in the sample also indicate that they tend to present collaborative law in positive terms relative to other available dispute resolution processes, with a couple indicating that they virtually always recommend collaborative law to their clients. This is natural, given their faith in their process and their belief in its positive potential for helping

clients. However, it does highlight one potential risk facing clients when choosing dispute resolution processes. That risk is that lawyers of any stripe are more likely to be partial to the methods that they practice. The reliance that the family law system under the *FLA* places on lawyers to inform prospective clients of all available options to them, and the risk of each, is flawed by nature, since it is only natural for practitioners of a particular method to recommend their own assistance to prospective clients.

That said, the responses of the lawyers in this sample indicate that they are primarily honest and fair in their descriptions of the different process options to their clients. However, when pressed for a recommendation by clients, they do seem more inclined to highlight the benefits of and recommend their own method. In terms of the unique role of the lawyer in the collaborative process, collaborative lawyers appear to be very adept and focused on explaining these differences, the values underpinning them, and their implications for clients, so that there are no surprises. This is encouraging because it indicates that collaborative lawyers are focused on ensuring that match between process and client that is essential to effective dispute resolution.

### **Overview of Findings - Execution of the Collaborative Process**

Six of the issues explored in the interviews pertained to the successful execution of the collaborative process. These included collaborative lawyer training, how collaborative lawyers promote open and full disclosure once the process begins, how collaborative lawyers help ensure client capacity to effectively negotiate legal agreements, how the collaborative process promotes the safe introduction of the child's perspective into legal negotiations, how the collaborative process affects client confidentiality and existing practices around the sharing of information between collaborative professionals, and the causes of collaborative process breakdown and its

potential consequences for clients. The interviews attempted to drill down in greater detail on practitioner methods and perspectives on each of these key issues. Hopefully, collaborative lawyers are able to use the information and analysis in the literature review in Chapters One to Three, as well as the data from the interviews, and apply it constructively to enhance their own practices.

### *Collaborative Lawyer Training*

One interesting observation to come out of the questions concerning collaborative lawyer training is the prevailing importance of mediation training to executing the collaborative method. The vast majority of collaborative lawyers in the interview sample highlight mediation training as critical to their practice. The manner in which this training promotes the development of active listening skills and shifts the focus of negotiations to future interests, is considered to be especially important.<sup>660</sup> This future focused approach that is taught in mediation training extends to the fact that collaborative lawyers seem to place emphasis on the future needs of the entire family, instead of just focusing on the goals of their individual client.

To that end, the focus is more on helping problem solve the dispute between the two parties, rather than pursuing advantageous legal strategies for their client's benefit. Collaborative lawyers appear to walk the fine line between effective individual rights based legal advocacy, and thinking similarly to mediators, who are typically tasked with getting parties to a place of mutually agreeable settlement. This raises valid questions about whether they can effectively meet the legal needs of clients with this approach. Sometimes, future focused and mediation based dispute resolution approaches can risk ignoring past violence that may not have ended upon separation. However, as long as they advocate for the needs of their clients by insisting that

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660 Interview 2, Question 7. Interview 6, Question 7.

agreements be within acceptable ranges under the law, it is clear that the collaborative approach taken by lawyers has the potential to contribute to a less adversarial and acrimonious dispute resolution process, with improved long term outcomes for families.

This delicate balance between legal advocate and mediator that collaborative lawyers must strike also necessitates further debate around what is appropriate education and training for future collaborative family lawyers. The interviews conducted in the study suggest that collaborative lawyers have already begun to turn their minds to this problem. The existing divide within the sample, between those who believe that litigation experience is necessary and useful to collaborative practice, and those who believe litigation experience can inhibit a lawyer's ability to think and behave collaboratively on a file, highlights the complexity of this issue. One broad solution to the problem which might have promise is to provide aspiring collaborative lawyers with proper exposure to the law and legal issues, through a brief internship with litigators combined with mandatory continuing legal education in family law, while placing more emphasis in law school on mediation and collaborative divorce specific practical training. The idea is to promote the development of a sound grasp of family law and the legal concerns facing families and clients, while at the same time ensuring that collaborative lawyers develop an interest based and future focused perspective to bring to negotiations.

### ***Promoting Full and Fair Disclosure Once the Process Begins***

Without ensuring full and fair disclosure by both parties, the collaborative process, as well as some other forms of alternative dispute resolution, risk being hijacked by manipulative or deceitful parties who are seeking to gain an advantage. This is possible because alternative dispute resolution methods such as collaborative family law lack judicial protections, such as

rigorous cross examination, which can assist in preventing resolutions that are unfair or unjust. It is therefore very important for collaborative lawyers to be cognizant of the possibility that some parties may attempt to skirt their disclosure requirements, and to be adept at identifying when this might occur so that they may take appropriate action to resolve the situation.

The majority of the interview sample in this study demonstrated an awareness of the potential of this problem. Those lawyers who are aware of the issue point to several different strategies to help ensure disclosure. These include having a curious, open and empathetic attitude towards clients to develop trust and elicit more information, reading body language and paying attention to other cues, challenging clients when there are discrepancies with documents or behaviour, and reminding them of the serious consequences under the Participation Agreement if improper disclosure is discovered. Several additional structural elements of the collaborative process are also seen to facilitate full and fair disclosure. These include the presence of divorce coaches to analyze relationship dynamics, the nature of lawyer client meetings, the signing of sworn financial statements, and other procedures governing disclosure requests such as requiring a broader scope of disclosure and definition of relevancy from clients.

A small minority of the lawyers in the interview sample do demonstrate some naivety in their approach to this issue. Within the sample the perception does exist that clients looking to be deceitful or incomplete in their disclosure are unlikely to choose the collaborative process. This perception seems to be based in part on the belief that the broader disclosure requirements of the process, combined with the collaborative focus of the lawyers, will discourage the participation of clients wishing to be less than forthcoming in this area. There is certainly the possibility that those clients wishing to hide things may choose the litigious route, which arguably offers more zealous and self-interested advocacy. However, it is at least equally plausible that such clients

may choose to exploit collaborative law and other alternative dispute resolution processes in order to speed up the resolution process, or avoid discovery and cross-examination on a witness stand. This would be a good area for future research.

### *Ensuring Client Capacity to Effectively Negotiate Agreements Collaboratively*

Another critical element to the effectiveness of the collaborative process for clients is its capacity to place clients in the proper mindset prior to and during negotiations, so that they may effectively advocate for themselves. As mentioned above, in cases where there is domestic violence or abuse present in the relationship dynamic, this may be more difficult. Assessing and promoting the development of client emotional preparedness, effective lawyer to lawyer communication regarding the management of complex relationship dynamics, and the management of power imbalances to promote equality of negotiating power, are all critical tasks facing collaborative lawyers to ensure achievement of this objective. At first glance, many elements of the collaborative approach and the process itself would seem to lend themselves to client empowerment. Collaborative lawyers highlight structural flexibility regarding the makeup of the negotiating room, and the frequent use or presence of divorce coaches, as unique characteristics of the process that can function as additional resources for clients, though they can add to client costs.

One of the most common themes to be gleaned from the lawyers in the interview sample is their acute awareness of the need and importance of balancing power in the negotiating room. In order to do this, one must be able to accurately assess the emotional state of their client, as well as discern the source of any disempowering emotions or circumstances that may be present, in order to resolve them. Collaborative lawyers most frequently point to reading body language



cues, the presence or absence of anxiety or anger, and communicating with the other lawyers to understand relationship dynamics, as methods they use to solve these problems. Effective communication between lawyers can be impeded where one of the lawyers has not made the shift to a collaborative negotiating mindset. Barriers to sharing of information can be impediments to establishing a safe and empowering negotiating environment for both clients. Conversely, lawyers must also be careful not to share information with each other in a way that endangers the safety of either client. This is a delicate balance to walk and indeed requires discretion and prudence from collaborative lawyers.

Flexibility regarding the presence of divorce coaches and the set-up of the negotiation room is also important. Lawyers should be mindful of identifying clients where coaches may be extra helpful either within or outside the negotiating room. In these cases, they should strongly encourage these clients to take advantage of that resource available to them. Where there are potentially vulnerable parties, coaches are arguably one of the most effective tools in the collaborative process for facilitating emotional readiness to negotiate. Despite their front end cost, they may also help bring costs down where they assist in reducing lawyers' billable hours or the length of the negotiation process.<sup>661</sup>

### ***Ensuring the Child's Perspective Safely Enters the Process***

In the collaborative process, the interview data reveals that the child's perspective is entered into negotiations primarily through three avenues. Where the parents agree on the child's perspective, it is sometimes introduced by the parents themselves. Where there is disagreement between the parents, the collaborative process makes use of the expertise of divorce coaches and child specialists to ensure that the child can safely provide their point of view. The primary job of

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661 More research is needed here. See future research section.

the collaborative lawyer in this area is to explain the purposes of these professionals to clients and put them in touch with the appropriate resources. As it pertains to assisting with the provision of the child's perspective, divorce coaches are most commonly brought in when there are communication difficulties between the parents concerning parenting issues.

Child specialists are most commonly used when there are discrepancies between the parents' perspectives concerning parenting issues, existing dysfunctional parenting arrangements, parental alienation or behaviour issues, or the parents have a poor understanding of child development. Child specialists utilize their specialized training to get to know children and provide a safe place for them to give their perspective. This information is then relayed to the parents and their collaborative lawyers in a way that protects children and minimizes potential conflict resulting from children's disclosures. The use of these professionals to assist with children's issues is a key element of the collaborative process. Future research should be done on their effectiveness, and on whether the expertise of divorce coaches and child specialists can be more frequently and consistently applied to other dispute resolution processes as well.

### ***Client Confidentiality and Information Sharing Between Collaborative Professionals***

The idea that collaborative family law does not protect client confidentiality is perhaps one of the sharpest criticisms of the collaborative process present in the literature. This criticism most often comes from those who view family separations and divorces as adversarial, from the perspective of one party against the other, and who value the protection of an individual's legal rights as sacrosanct. Collaborative law, through its open information sharing policy among team professionals, seems to view family disputes through an entirely different lens. The data indicates that the focus of a collaborative team is arguably on producing outcomes that are future focused

and positive for the entire family, as opposed to providing legal justice for one party or the other to a dispute. On an individual level, the process seeks to empower clients themselves to negotiate their legal rights from a future focused and interest based focus, rather than focusing solely on their legal entitlements. Collaborative lawyers seek to preserve an individual's legal rights “within an acceptable range”, while focusing on managing the relationship dynamic in the room so that the negotiations produce the best possible outcomes for both parties. In order to effectively manage the relationship dynamic and empower their clients, they will frequently share information amongst professionals that will facilitate this goal and the ultimate resolution of the conflict.

Because of the difference in their approach to sharing potentially sensitive information amongst each other, three things become paramount from reviewing the interview data. One, collaborative lawyers must be sure that clients are informed prior to choosing the process about the more open sharing of information that can take place. Informed consent is critical because clients are sometimes giving up their right to privilege, usually where collaborative professionals feel that divulging that information is essential to move the process forward or facilitate resolution. Based upon the interview data, collaborative lawyers do appear to take this very seriously. Secondly, collaborative lawyers must take care to prevent any sensitive information gleaned from their process from being used as substance for future litigation fishing expeditions or to prejudice one party in any future litigation forum. Thirdly, collaborative professionals must ensure that in sharing their information, they do not endanger the safety of any of the process participants by leaving them vulnerable to abuse or violence. Collaborative lawyers seem to be largely aware of these potential pitfalls, and have taken some measures to address them. More research should be done into whether any clients engage with the collaborative process as a

means of gathering information to assist them in future litigation, and what could be done to help prevent that practice.

### *Causes of Process Breakdown and Implications for Clients*

As noted in the previous chapter, the collaborative practitioners in the interview sample indicate that process breakdown affects approximately five to twenty percent of their files, with most expressing estimates towards the lower end of that range. This number is significant, given the potential emotional and financial costs of process breakdown for clients. Three of the five most common reasons associated with process breakdown according to the interview data concerned the suitability of the particular client with the collaborative process. According to this data, the suitability of a particular client to the collaborative process is most often affected by their emotional and psychological state, as well as the presence of personality or other mental health disorders. This indicates that in order to minimize the occurrence of process breakdown, priority must be given to stabilizing the emotional states of the parties prior to or in conjunction with commencement of the collaborative process. Emphasis must also be placed on identifying those clients that are unsuitable for the collaborative process as early as possible, and on helping them find dispute resolution processes that are better suited to their objectives, personality types and emotional states.

The data also reveals two other main causes of process breakdown. From the perspective of collaborative lawyers, poor execution of the process, as well as the overall cost of the process, can also be obstacles to parties reaching final agreement. Several collaborative lawyers indicate the importance of lawyers having the proper mentality as collaborative lawyers. This requires them to be self-aware enough to identify when their own behaviour is operating as an

impediment to negotiations between their clients, and to be able to take steps as necessary to ensure that they are engaging effectively as advocates while behaving in a collaborative manner. Ensuring that the lawyers who practice collaboratively buy in to the team approach to dispute resolution is therefore essential to minimizing costs to clients.

The fact that collaborative lawyers acknowledge the cost of the collaborative process, and indeed other court based dispute resolution processes, as being prohibitive to some prospective clientele highlights an access to justice problem. These costs can be further exacerbated if the process breaks down, as clients are forced to begin again and pursue other dispute resolution avenues to reach agreement. This issue demonstrates clients are better served if cost estimates are articulated to them early and as accurately as possible. This allows them to properly budget and decide on the appropriateness of the process for them before they begin spending money, which should ultimately help reduce the cost burden on families. More research also needs to be done to determine more cost effective ways to bring the delivery of legal services to families. For those clients for whom collaborative law would be most beneficial, perhaps government subsidies to assist with the cost of these services may be an advisable course.

### **Areas for Future Research**

The interview data highlights many potentially important areas for future research. Arguably the most important area in promoting the effectiveness of the collaborative process is ensuring the suitability of a particular client to the collaborative process as a dispute resolution method. A key area for further research is developing criteria around what constitutes a suitable client for the collaborative process. In particular in this area, more research also needs to be done into whether the collaborative process is more beneficial than court based processes to clients

who have experienced domestic violence. The development of exclusionary criteria for unsuitability, or an effective “screening process” by collaborative practitioners would be most useful in ensuring maximum effectiveness of the process, and in helping clients avoid incurring unnecessary legal costs. As well, it may also be important for collaborative practitioners and researchers to investigate further how to adapt their process to address the needs and objectives of the broadest range of clients.

In terms of the execution of the collaborative process, the discussion of the interview data also gives rise to potentially fruitful areas for future research. One key area for future research is whether the collaborative process produces longer lasting agreements than other dispute resolution processes. This will be difficult to measure, given that the level of acrimony each family brings to a dispute will vary. Results will have to be adjusted to account for this possibility. Another important area for future research is whether or not the collaborative process effectively deters dishonest or incomplete disclosure. There is certainly the possibility that those clients wishing to hide things may choose the litigious route, which arguably offers more zealous and self-interested advocacy. However, it is also plausible that such clients may choose to exploit collaborative law and other alternative dispute resolution processes because they lack certain protections afforded by the court process.

The use of mental health professionals such as divorce coaches and child specialists to assist with children's issues is a key element of the collaborative process. Future research should be done on their effectiveness, and on whether the expertise of divorce coaches and child specialists can be more frequently and consistently applied to other dispute resolution processes as well. In addition, the effect of divorce coaches on reducing overall costs of the collaborative process for clients, even as they represent an initial expense, is another theory propagated by

some collaborative lawyers. Investigating the accuracy of this theory could be helpful in finding ways to lower legal costs for clients. Finally, investigating the extent to which the collaborative process is vulnerable to being used for future litigation fishing expeditions is also important. It may be that the procedures and structures already in place are sufficient to prevent this from occurring, but it is in the client's interests for society to have more definitive data on the number of times this occurs, both with collaborative and other alternative dispute resolution methods.

### **Final Thought**

Both the literature review, and the interview data gathered in this study highlight the fact that family dispute resolution currently operates primarily with two goals in mind: preserving the legal self-determination of the client, and providing effective resolution to family disputes. These are both very worthy and important goals that, for the good of clients and their families, should be primary objectives of any dispute resolution process. However, this study also demonstrates the importance of acknowledging that during the divorce or separation process, clients may not always be in a position to make choices in support of either their own or their child's interests. Emotion over the divorce or separation, and in more extreme cases, patterns of abuse in the dissolving relationship, can impede both objectives, and cloud a person's capacity to choose the best dispute resolution processes for them, or impair their ability to engage in productive negotiations to benefit themselves and their children.

As a society, we should be focused on reforming our dispute resolution system and methods to better assist parties in these goals. A goal of dispute resolution should also be to help put people in the best position to make choices for themselves and their families. This initiative involves both helping them identify and choose the process that is best for their needs, goals and

objectives, and helping them utilize that process effectively in pursuit of their own legal self-determination.

It may also be the case that the practices and methods of collaborative lawyers could have some broader application to legal practice in general. The willingness of collaborative lawyers to utilize and recommend mental health professionals as part of their process may also be usefully adapted to other contexts. The use of these professionals has promise in terms of helping clients identify and engage in the most effective dispute resolution process for them. Finding ways to facilitate the engagement of suitable clients with the collaborative process would also arguably be beneficial to the public. A key for future research and initiatives will be to find ways to minimize costs to average families, so that a larger number of suitable clients with children can take advantage of the unique potential offered by a well-executed collaborative process.



## **Bibliography**

### ***Legislation***

*Divorce Act*, RSC 1985, c. 3.

*Family Law Act*, SA 2003, c. F-4.5.

*Family Law Act*, SBC 2011, c. 25.

### ***Jurisprudence***

*Kassel v. Louie* (2000), 11 RFL (5<sup>th</sup>) 144 (BCSC).

*Van De Perre v. Edwards*, [2001] S.C.J. No. 60.

### ***Secondary Material***

Amato, P.R. “The Impact of Family Formation Change on the Cognitive, Social and Emotional Well-Being of the Next Generation” (2005) 15:2 *Future of Children*, 75-96.

Asgeirsdottir, B.B., et al. “Associations Between Sexual Abuse and Family Conflict/Violence Self-Injurious Behaviour, and Substance Use: The Mediating Role of Depressed Mood and Anger” (2011) 35:3 *Child Abuse and Neglect* 210.

Bandes, S. and Blumenthal, J. “Emotion and the Law” (2012) 8 Annual Review of Law and Social Science 161.

BC Collaborative Roster Society. *Pro Bono Collaborative Divorce Project*, online: <<http://www.bccollaborativerostersociety.com/practice/probono/>>, accessed 10 December 2016.

BC Legal Services Society. *Family Law in British Columbia: Collaborative Family Lawyers* online: <[http://www.familylaw.lss.bc.ca/help/who\\_CollaborativeFamilyLawyers.php](http://www.familylaw.lss.bc.ca/help/who_CollaborativeFamilyLawyers.php)>, accessed 10 December 2016.

Birnbaum, R. *The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review*. Research Report to the Department of Justice, Canada, 2009.

Boyd, S. and Ledger, M. “British Columbia's New Family Law on Guardianship, Relocation and Family Violence: The First Year of Judicial Interpretation” (October 2014) 33:3 *Canadian Family Law Quarterly* 317.

Brooks, S.L. "Family Systems Paradigm for Legal Decision Making Affecting Child Custody" (1996) 6 *Cornell Journal of Law & Pub. Policy* 1.

Brown, J.H., & Bledsoe, L., et. al. "PACT: A Collaborative Team Model for Treating High Conflict Families in Family Court" (2009) 60:2 *Juvenile and Family Court Journal* 49.

Buchanan, C.M., Maccoby, E., and Dornbusch, S. "Caught Between Parents: Adolescents' Experience in Divorced Homes" (1991) 62:5 *Child Development* 1008 at 1026-1027.

Cameron, N.J. *Collaborative Practice: Deepening the Dialogue* (Continuing Legal Education Society of British Columbia, 2004).

Carbone, J. *From Partners to Parents: The Second Revolution in Family Law*. New York: Columbia University Press, 2000.

Collaborative Divorce Vancouver, online: <[www.collaborativedivorcebc.com](http://www.collaborativedivorcebc.com)>.

Collaborative Divorce Vancouver. *2015-2016 CDV Membership Application Form*, online: <<http://www.collaborativedivorcebc.com/docs/2015-2016-CDVMembershipApplicationForm-Lawyers.pdf>> accessed July 2016.

Collaborative Divorce Vancouver. *Vancouver Collaborative Law Participation Agreement*, online: <<http://www.collaborativedivorcebc.com/docs/Participation-Agreement-Lawyer.pdf>> accessed 30 July 2016.

Continuing Legal Education Society of British Columbia. *Getting Started in Collaborative Practice*, online: <<http://www.cle.bc.ca/onlinestore/productdetails.aspx?cid=959>>.

Cox, G.G. and Matlock, R.J. "The Case for Collaborative Law" (2004-2005) 11 *Tex. Wesleyan L. Rev.* 45.

Cummings, E.M., Davies, P. "Effects of Marital Conflict on Children: Recent Advances and Emerging Themes in Process Oriented Research" (2002) 43:1 *Journal of Child Psychology and Psychiatry*, 31.

Degoldi, B. "Lawyers Experiences of Collaborative Family Law" (April 2007) L.L.M Thesis, *UBC Graduate Studies* at 60.

Difonzo, J. H. "A Vision for Collaborative Practice: The Final Report of the Hofstra Collaborative Law Conference" (2009) 38 *Hofstra Law Review* 569 at 597.

Dunn, J., Davies, L., O'Connor, T., & Sturgess, W. "Family Lives and Friendships: The Perspectives of Children in Step, Single Parent, and Nonstop Families" (2001) 15:2 *Journal of Family Psychology* 272-287.

- Ebling, R., Pruett, K.D., Pruett, M.K. "Get Over It: Perspectives on Divorce From Young Children" (2009) 47:4 *Family Court Review* 665.
- Elrod, L. "Reforming the System to Protect Children in High Conflict Custody Cases" (2001) 28:2 *Wm. Mitchell L. Rev.* 495.
- Emery, R.E. *The Truth About Children and Divorce*. New York: Penguin Group, 2004.
- Firestone, G and Weinstein, J. "In the Best Interests of Children: A Proposal to Transform the Adversarial System" (2004) 42:2 *Family Court Review*, 203.
- Fisher, L., & Brandon, M. *Mediating with Families: Making The Difference* (Prentice Hall, 2002).
- Gamache, S. "Collaborative Practice: A New Opportunity to Address Children's Best Interest in Divorce" (2004-2005) 65 *La. L. Rev.* 1455 at 1458.
- Geasler, M.G., & Blaisure, K.R. "Nationwide Survey of Court Connected Divorce Education Programs" (1998) 37:1 *Family and Conciliation Courts Review* 36.
- Goeke-Morey, M., Cummings, E.M., Harold, G.T. & Shelton, K.H. "Categories and continua of destructive and constructive marital conflict tactics from the perspective of US and Welsh children" (2003) 17:3 *Journal of Family Psychology*, 327–338.
- Grimes, A. and McIntosh, J. "Emerging Practice Issues in Child-Inclusive Divorce Mediation" (2004) 10:1 *Journal of Family Studies* 113.
- Grossi, R. "Understanding Law and Emotion" (January 2015) 7:1 *Emotion Review* 55.
- Huntington, C. "Repairing Family Law" (2008) 57:5 *Duke Law Journal* 1245.
- International Academy of Collaborative Professionals. *Standards and Ethics*, (Sept. 2015) online: <[https://www.collaborativepractice.com/media/114222/IACP\\_Standards\\_\\_Ethics\\_\\_Sep\\_2015\\_.pdf](https://www.collaborativepractice.com/media/114222/IACP_Standards__Ethics__Sep_2015_.pdf)> accessed November 2016.
- Johnston, J.R. "Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce" (2003) 31 *Journal of the American Academy of Psychiatry and the Law* 158.
- Jolivet, K.R. "The Psychological Impact of Divorce on Children: What is a Family Lawyer to Do?" (2012) 25:4 *American Journal of Family Law* 175.
- Keet, M. Wieggers, W., and Morrison, M. "Client Engagement Inside Collaborative Law" (2008) 24 *Can. J. Fam. L.* 145.

- Kelly, J.B. and Emery, R.E. "Children's Adjustment Following Divorce: Risk and Resilience Perspectives" (2003) 52:4 *Family Relations* 352.
- Kelly, J.B. And Johnston, J.R. "The Alienated Child: A Reformulation of Parental Alienation Syndrome" *Family Court Review* (2001) 39, 249.
- Lande, J., Herman, G. "Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases" (2004) 42:2 *Family Court Review*, 280.
- Lewicki, R.J. and Wiethoff, C. *Trust, Trust Development, and Trust Repair: The Handbook of Conflict Resolution: Theory and Practice*. San Francisco: Jossey-Bass, 2000.
- Macfarlane, J. "The Emerging Phenomenon of Collaborative Family Law: A Qualitative Study of CFL Cases" (2005) *Department of Justice Canada Research Report 2005-FCY-1E*.
- Macfarlane, J. "Experiences of Collaborative Law" (2004) *Journal of Dispute Resolution* 179.
- Mack, N. Woodsong, C.M., Macqueen, K.M., Guest, G., and Namey, E. "Qualitative Research Methods: A Data Collector's Field Guide" (2005) *Research Triangle Park: NC Family Health International*, at 3. See Module 1. Table 1.
- Mitcham-Smith, M., Henry, W.J. "High Conflict Divorce Solutions: Parenting Coordination as an Innovative CoParenting Intervention" (October 2007) 15:4 *The Family Journal: Counseling and Therapy for Couples and Families*, 368.
- Neff, R., and Cooper, K. "Parental Conflict Resolution: Six, Twelve, and Fifteen Month Follow Ups of a High Conflict Program" (2004) 42:1 *Family Court Review*, 99.
- Pedro-Carroll, J., Nakhnikian E., Montes, G. "Assisting Children Through Transition: Helping Parents Protect Their Children From The Toxic Effects of Ongoing Conflict in the Aftermath of Divorce" (2001) 39:4 *Family Court Review* 377.
- Pence, E. and Paymar, M. *Domestic Violence Information Manual: The Duluth Domestic Abuse Intervention Project* (1993) online:  
<[http://www.eurowrc.org/05.education/education\\_en/12.edu\\_en.htm](http://www.eurowrc.org/05.education/education_en/12.edu_en.htm)> accessed 27 November 2012.
- Pruett, M.K., & Jackson, T.D. "Perspectives on the Divorce Process: Parental Perceptions of the Legal System and its Impact on Family Relations" (2000) 29 *J. Am. Acad. Psyc. & L.* 18.
- Reynolds, J., Coleman, L., Houlston, C., Harold, G.T. *Parental Conflict: Outcomes and Interventions for Children and Families: Executive Summary*, (Bristol: Policy Press, 2014).
- Schwab, W. H. "Collaborative Lawyering: A Closer Look at Emerging Practice" (2003-2004) 4:3 *Pepperdine Journal of Dispute Resolution* 351.

- Semple, N. "Whose Best Interests: Custody and Access Law and Procedure" (2010) 48 Osgoode Hall L.J. 287.
- Sigal, A. et al. "Do Parent Education Programs Promote Healthy Post-divorce Parenting? Critical Distinctions and a Review of the Evidence" (2011) 49:1 *Family Court Review* 120.
- Sinha, M. "Spotlight on Canadians: Results from the General Social Survey on Parenting and Child Support After Separation or Divorce" *Statistics Canada*, Catalogue no. 89-652-X – No. 001, ISBN 978-1-100-23114-3, February 2014.
- Smith, L.M. "An Exploratory Study of the Role of the Child Specialist in Family Law" (2014) Doctoral Dissertation, *Oregon State University*, Presented Feb. 27, 2014.
- Spain, L.R. "Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated Into the Practice of Law" (2004) 56:1 *Baylor Law Review* 141.
- Stallman, H.M., Ohan, J.L. "Parenting Style, Parental Adjustment, and Co-Parental Conflict: Differential Predictors of Child Psychosocial Adjustment Following Divorce" (2016) 33:2 *Journal of Behaviour Change* 112.
- Statistics Canada. *Divorce and Other Family Breakdown Cases Involving a Single Issue By Average Number of Events Over the Length of a Case*. Table 6. 2009-2010, online: <<http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11423/tbl/tbl06-eng.htm>>.
- Statistics Canada. *Divorce and Other Family Breakdown Cases Involving a Single Issue By Elapsed Time From Case Initiation to First Disposition*", Table 6. 2009-2010, online: <<http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11423/tbl/tbl06-eng.htm>>.
- Statistics Canada. *Estimates of Population, Canada, Provinces and Territories, Quarterly (Persons)*, Table 051-005, online: <<http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=510005>> accessed 26 April 2017.
- Taylor, R.J. "Listening to the Children" (2001) 35:1 *Journal of Divorce and Remarriage* (2001) 147.
- Tesler, P.H. "Collaborative Law: A New Paradigm For Divorce Lawyers" (2000) 5 *Psychology, Public Policy & Law* 967.
- Tesler, P. "Collaborative Family Law" (2003-2004) 4 *Pepp. Disp. Resol. L.J.* 317.
- Tesler, P.H. and Thompson, P. *Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move on with Your Life*. New York, NY: Harper, 2006.

- Tesler, P. "Collaborative Family Law, The New Lawyer, and a Deep Resolution of Divorce-Related Conflicts" (2008) *Journal of Dispute Resolution* 83.
- Thompson, A. "The Use of Alternative Dispute Resolution in Civil Litigation in Kansas" (2002-2003) 12 *Kansas Journal of Law & Public Policy* 351.
- Trochim, W. *The Qualitative Debate*. Web Center For Social Research Methods: Research Methods Knowledge Base, 2006, online:  
<<http://www.socialresearchmethods.net/kb/qualdeb.php>> accessed 10 October 2011.
- University of Bristol. *Qualitative Methodologies*, online:  
<<http://www.bris.ac.uk/Depts/DeafStudiesTeaching/dissert/Qualitative%20Methodologies.html>> accessed 15 May 2012.
- Ver Steegh, N. "Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process" (2008) 42:3 *Family Law Quarterly* 659.
- Ver Steegh, N. "The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non-Collaborative) Lawyers" (2009) 38:2 *Hofstra Law Review* 699.
- Voegele, G.L. and Wray, L et al. "Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes" (2007) 33:3 *William Mitchell Law Review* 971.
- Wallerstein, J.S. & Lewis, J.M. "The Unexpected Legacy of Divorce: Report of a 25-Year Study" (2004) 21:3 *Psychoanalytic Psychology* 353.
- Wallerstein, J.S. and Kelly, J.B. *Surviving the Breakup: How Children and Parents Cope with Divorce*. New York: Basic Books, 1980.
- Webb, S. "Collaborative Law: A Practitioner's Perspective on its History and Current Practice" (2008) 21 *Journal of American Academy of Matrimonial Lawyers* 155.
- Wieggers, W. and Keet, M. "Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities" (2008) 46 *Osgoode Hall L.J.* 733.

## APPENDIX A

### E-Mail to Prospective Participants

Hi,

My name is Matthew Ledger and I am an L.L.M Candidate at the University of British Columbia. I have great interest in collaborative family law, particularly in its potential benefits for children, and I wish to explore the practices of collaborative family lawyers in the Vancouver area. The goal of my study is to gather information concerning how you, in your capacity as collaborative family lawyers, address difficult situations in your practice. This study will provide you with the opportunity to respond to critiques of collaborative practice, while at the same time consolidating the knowledge of collaborative practitioners in the area, with an eye to further advancing best practices.

In order to gather data for this study, I am interviewing collaborative family lawyers in the Vancouver area. The interviews will take approximately 1-1.5 hours to complete. All personal information, including your identity, will be kept confidential. If you would like to participate please respond to this e-mail and let me know. The interview can be scheduled at your convenience. I'm looking to conduct interviews from mid-january through to april or may if necessary. Should you wish to participate, prior to the interview I will send you a more detailed consent letter, which you will need to sign prior to our meeting.

Thank you very much for your time!

Sincerely,

Matt Ledger

## APPENDIX B – Consent Letter

### **Informed Consent by Research Subjects to Participate in a Research Project Project Title: An Investigation of Collaborative Family Lawyers' Perspectives and Methods Concerning Key Issues Facing Collaborative Family Law**

The University of British Columbia and the researchers on this project are committed to doing research in ethical and respectful ways. We want to be sure that you, as a research participant, understand how and why the research is being conducted; and we want you to feel comfortable while you are taking part in it.

The objective of this project is to study how collaborative family lawyers deal with challenging situations in their practice. Collaborative law is promising in terms of its capacity to better serve clients and their children's interests. However, the literature has identified some areas of concern with collaborative family practice, that some feel could affect its capacity to meet clients' needs. Since many of the criticisms of the collaborative process that are present in the literature come from those outside the practice group, I believe it would contribute greatly to the debate to obtain your perspectives on how you handle potentially difficult situations, and why you handle them in a particular manner. Your participation will allow for a richer discussion of ideas to enhance the practice of collaborative family law, and perhaps family law generally as it concerns children. It will also offer you the opportunity to provide your perspective on some of the critical issues facing collaborative practice, as well as consolidate the knowledge of collaborative practitioners in the area, with an eye to advancing best practices.

This research is being done for the purposes of a graduate degree. The results will be disseminated in a thesis. The study will consist of one, sixty to ninety minute interview with each participant. Any information you provide during these interviews will not be publicly attributed to you. Identities of study participants will be kept confidential and will not be disclosed in the thesis when it is published. Anonymity of each individual participant will be protected, both to each other and to the broader public.

Some of the questions asked in relation to practice methods may seem personal. You do not have to answer if you wish. However, a goal of this project is to consolidate knowledge in the area and understand each collaborative lawyer's different responses to difficult situations. In this way, any answers provided could be helpful to the community of collaborative practitioners.

The only people who will have access to the information are the principal and co-investigators for the study. The principal investigator is Susan Boyd, UBC Faculty of Law. She can be reached at [boyd@law.ubc.ca](mailto:boyd@law.ubc.ca). The co-investigator for the interview component of this project is: Matthew Ledger, University of British Columbia, Faculty of Law, L.L.M. Candidate (tel: 604-362-8302; email: [ledgerm@hotmail.com](mailto:ledgerm@hotmail.com)) You can contact him at the telephone number or email address above to discuss any questions about the interview.

We are asking you to sign *this* form to indicate that you understand the following:

- (1) I have been informed about the goals and procedures for the project on “collaborative family lawyers' perspectives”, and I understand them.



- (2) I understand that I am being asked to participate in an interview and that my participation in this research is entirely voluntary.
- (3) I understand that the interview will be approximately one hour to ninety minutes in length and will focus on my methods and experiences in collaborative family practice.
- (4) I understand that the interview will be digitally recorded and will be transcribed into typewritten form.
- (5) I understand that I may request and receive a copy of the typed transcript of my interview.
- (6) I understand that I may stop the interview at any time for any reason and/or withdraw from the interview at any time.
- (7) I understand that to ensure confidentiality my name and/or other identifying features will not be recorded or divulged in the digital records and transcripts, and that my name will appear only on this consent form.
- (8) I understand that research materials such as digital recordings and transcripts will be held in a secure and/or password protected location, will not be publicly accessible, and that when data analysis is completed and project findings presented, the recordings and transcripts will be erased or shredded.
- (9) I understand that I may register any concerns about the way this research is being conducted by contacting the Research Subject Information Line in the UBC Office of Research Services at Tel: 604-822-8598 or by email at [RSIL@ors.ubc.ca](mailto:RSIL@ors.ubc.ca).
- (10) I understand that if I have any questions about the larger study and/or wish to obtain a copy of the results of this research, upon its completion, I should contact: Professor Susan Boyd, University of British Columbia, Faculty of Law (tel: 604-822-6459; email: [boyd@law.ubc.ca](mailto:boyd@law.ubc.ca),

I agree to participate in this research by granting an interview to the researchers identified above, and to use of the information for the purposes stated above. I also acknowledge receipt of a copy of the consent form.

Name:

Signature:

Date:

Signature of Researcher(s): \_\_\_\_\_

## **APPENDIX C – Interview Schedule**

### **An Investigation of Collaborative Family Lawyers' Perspectives and Methods Concerning Key Issues Facing Collaborative Family Law**

#### **Part 1: General Background Questions**

1. What type of firm are you in?
2. What types of law does your firm practice?
3. How many years of family law have you practiced?
4. Does your family law practice combine collaborative and court-based files?
5. What relevant training did you receive before practicing collaborative family law?  
How do you feel the training has helped you meet clients' needs?

#### **Part 2: Process Questions**

6. How frequently do you use other collaborative professionals such as divorce coaches, child specialists or financial experts?
7. When do you recommend or encourage the use of these professionals?
8. How do you prepare your clients for the collaborative process?
9. What steps do you take to ensure that you get the informed consent of clients?
10. Where clients have children, do you involve them in the process? If so, how? If not, how does their perspective get into the process?
11. How is trust fostered between collaborative lawyers and clients during the process?
12. When you detect it, how do you deal with power imbalances between parties?

#### **Part 3: Client Screening**

13. What factors or indicators are you looking for in clients when deciding whether to recommend the collaborative process?
14. Who does the intake interview?
15. How do you get at information that people are more likely to hide or reluctant to share? (eg problems with kids, past abuse etc....)
16. How do you measure a client's emotional readiness to negotiate prior to commencing the process?

17. What do you do if you or one of the other professionals becomes aware of allegations of domestic violence or child abuse?

**Part 4: Disclosure of Information/Confidentiality**

18. What steps do you take to ensure the full and complete disclosure of information by clients to each other?
19. What are some types of things that have indicated to you that clients are being less than forthcoming with relevant information or documents material to the dispute?
20. What do you do when this occurs?
21. How do you regulate the disclosure of information between each client's lawyer and any other collaborative professional? Is this client driven or do you have a set of rules governing this that you inform the client of beforehand?

**Part 5: Managing Process Breakdown**

22. In your estimation what percentage of files terminate prematurely? What are some of the reasons they do?
23. If clients become overly emotional and it's affecting their decision making, what steps do you take to help move the process forward?
24. If clients resolve some issues, but during the discussion of another issue things break down and the clients decide to abandon the process, what do you do?
25. Under what circumstances would you feel compelled to withdraw your representation from a client? How would you do this?
26. How does the transfer of a file to another lawyer occur if the process breaks down?
27. What do you do when a client terminates the file with you but is unable to afford subsequent legal representation?

**Part 6: Questions for those with Combined Practices**

28. How do you approach and strategize the collaborative process compared to a court-based file?
29. Have you noticed a difference in the nature of the settlement between collaborative and court based processes? If so, what is it?