COLLABORATIVE PRACTICE:

FROM ONE PERSON'S VISION TO WORLDWIDE CHANGE

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1. INTRODUCTION

Thank you for the opportunity to present information to the Court about collaborative practice. In considering how to approach this challenge, I decided to "write a paper" to provide detail and my perspective of this process against the backdrop of almost 40 years at the Bar. Many of the sections of this paper address topics about which essays and even books have been written. These sections are not intended to be exhaustive, however, I have attempted to capture the "essence" of each area addressed.

I have spent my career trying to help children and families. The last ten years have been dedicated to doing this through collaborative practice. These years have been, and continue to be both immensely challenging and emotionally the most satisfying portion of my career. Thank you for the privilege of inviting me to describe this good work at your luncheon program.

2. ORIGIN – EVOLUTION

January 1, 1990; Stu Webb, a family law lawyer in Minnesota began his collaborative family practice. He, like other family lawyers, felt that families facing separation and divorce were poorly served by the adversarial process. Unlike the rest, he envisioned radical change.

He soon realized that he could not engage in collaborative practice by himself and sought out other lawyers who would work with him in his model for dispute resolution. He started a collaborative practice institute with him being one of four members. Today, there are over 5,000 professionals in 24 countries who are members of the International Academy of Collaborative Professionals (IACP) and are engaged in part or full-time collaborative practice.

The IACP was formed in 1999. Stu Webb, now in his 80s, attends the Annual International Meeting where he is treated to seeing the ongoing evolution of his vision. He continues to share his experience and expertise both formally and informally. The annual keynote address, the Stu Webb Lecture, honours both Stu and the practice model which continues to develop. Speakers have included leaders and educators from various walks of life, each of whom has voiced enthusiasm, expertise and support for this "peace making" process.

3. WHAT IS COLLABORATIVE PRACTICE

Collaborative practice is truly a radically different approach to dispute resolution for parents and children. At its core is the Collaborative Law Participation Agreement, a copy of which is appended. The parties and their counsel must sign this Agreement, the highlights of which are as follows:

(a) The parties agree not to go or threaten to go to court;

(b) If impasse occurs and either party withdraws from the process, both counsel must withdraw;

(c) Negotiations are to be in good faith with complete transparency. Open, vulnerable discussion is encouraged, all of which is confidential, and only an agreement in writing, signed and witnessed, can be enforced;

(d) Counsel must withdraw if she/he knows the client is withholding any relevant information and the process must end;

(e) The parties, in one simple paragraph, agree to a "preservation order"; and

(f) Efficient retaining of neutral experts as needed.

The Participation Agreement is the centrepiece of collaborative practice. Absent a signed Participation Agreement, the matter does not qualify as a collaborative matter and will not have the elements of safety that are present with a signed Agreement.

Collaborative practice is a team-based approach to assisting parties and their children. It is multi-disciplinary involving lawyers, divorce coaches (mental health professionals), child specialists and financial neutrals. Depending on the matter, while lawyers are traditionally always involved, the construction of the team will usually be determined by the facts and issues to be resolved.

4. THE BEGINNING

Collaborative matters commence in various ways as follows:

(a) Both spouses retain collaborative counsel.

(b) One spouse retains collaborative counsel and informs the other of his or her choice regarding process. If the other spouse agrees, a second collaborative lawyer is retained.

(c) In the course of counselling of some kind, one or both spouses are informed of collaborative process and decide to engage in that process.

(d) After being retained, collaborative counsel provides information either directly to the unrepresented spouse or indirectly through the spouse who has already retained collaborative counsel.

Engaging the (other) spouse who has not met with a collaborative lawyer and has, perhaps, not even heard of collaborative practice is not a simple task. As stated, while there is a growing awareness of collaborative practice, and even if the other spouse knows of its existence, emotions including fear, anger, betrayal and others associated with separation and divorce often prevent the retaining of the second collaborative lawyer. While litigation is not a panacea that will automatically reward the party who does not want to collaborate, it is often chosen for various reasons unique to the client and the lawyer with whom he or she consults.

Ten years ago, in my experience, it was rare for a new client to request collaborative process. While much of the public is still unaware of the existence of collaborative practice, or confused as to how it works, it is no longer uncommon for new clients to specifically request

representation on a collaborative basis. The new *Family Law Act* should assist in the fostering of client awareness, especially given the altered responsibility of counsel. However, notwithstanding the foregoing, how counsel discharges that professional responsibility is still unknown, and engaging the "other" spouse remains one of the most significant challenges of collaborative practice.

5. HOW DOES IT WORK

Most of the work (involving lawyers) is conducted in four-party meetings known as "four-ways". At the initial meeting, a Collaborative Law Participation Agreement is signed by counsel and clients. Meetings are structured with agendas created by the parties and counsel. It is common at the first meeting to have a discussion regarding the use of divorce coaches who are routinely used in this jurisdiction.

They have their own Participation Agreement which is signed by both parties and the coach or coaches. In some cases, one coach is used (the "One Coach Model") while in most, two coaches are used (the "Two Coach Model"). Coaches are used specifically to assist the parties in communication, working through the matter of separation and divorce and, concretely to create a customized parenting plan.

While the process may need to be flexible in its format, the signing of the Participation Agreement, as stated, is not optional. A collaborative matter has, at its core, a signed Participation Agreement. This Agreement affords the safety needed for true, vulnerable, interest based discussion and the lawyers are precluded from ever becoming an adversary or advocate in the event of impasse.

Regarding impasse, the ("IACP") collects data from around the collaborative world and advises that approximately 90% of cases that start collaboratively resolve collaboratively. A successfully resolved case ends with a separation agreement signed by the parties and typically witnessed by their counsel. Interim agreements may also be made along the way. These are also reduced to writing, signed and witnessed. While the process leading up to the creation of agreements is confidential, the executed documents themselves, of course, are not.

The divorce coaches (in some jurisdictions known as "parenting coaches") are charged with the responsibility of assisting the parties in reaching a parenting plan that is also reduced to writing and signed by the parties. The parenting plan is usually referred to in the separation agreement and attached thereto as and when it is completed.

6. WHAT ARE THE LIMITS OF COLLABORATIVE PRACTICE

This question was asked at an international workshop at which I presented in 2009 in Minneapolis. Approximately 50 lawyers from around the collaborative world discussed that question at length with the conclusion of the group being that if the process was "exquisitely safe", with all that that means, there seemed to be little limitation. It was concluded that safety was a sturdy platform upon which to build resolution.

We are advised by court services that 97% of family cases that start litigiously settle. That, twinned with the IACP statistic that 90% of collaborative cases reach resolution collaboratively, this process, while not professed to be "one-size fits all" is of value to a substantial percentage of

restructuring families. Moreover, while there still appears to be a perception that collaborative practice is limited to being effective in "easy" cases, the reality is that the non-adversarial approach of the professionals coupled with the team based approach to problem solving has resulted in a process that can be effective in a full range of low to high conflict cases. Acknowledgement of the foregoing may be inferred by not only our new *Family Law Act* but also the *Uniform Collaborative Law Act* (US) which has been approved in six States and is pending in numerous others.

7. COSTS

Several years ago in British Columbia a survey revealed an average cost per spouse of approximately $8,500 exclusive of taxes and disbursements. Even if that cost has grown, there is little doubt that the average collaborative case is substantially less costly than the average matter which proceeds to litigation.

As is well-known, separation and divorce litigation can and often is grotesquely expensive. The reasons for this are usually multi-factoral. As stated above, in British Columbia, court services advises approximately 97% of cases that start litigiously settle somewhere after the commencement of litigation. The "fighting stage" is often open-endedly costly and ultimately of little or no value. Collaborative practice seeks to avoid this dynamic thereby allowing clients to use their "legal funds" towards exploring settlement options, learning new methods of communication and not simply fighting and thereby increasing the conflict. The result is that most collaborative cases are resolved with substantially less expense than litigation …. sometimes at less cost than one Chambers hearing.

8. COLLABORATION -- MEDIATION

The first difference is …. that there is no mediator. I have been involved in numerous mediations, sometimes as counsel and sometimes as mediator. The dynamic of mediation is vastly different from that of the collaborative room/process. While both are "alternate dispute resolution techniques", mediation remains adversarial and, in my view, is a first cousin to litigation not collaboration.

The typical mediation case involves a client being represented by their advocate in the usual positional way. If the mediation fails and litigation persists, counsel continues to act. Clients are less likely to "bare their souls" in mediation knowing full well that the "opposing counsel" will continue to be their adversary all the while gaining invaluable knowledge of the strengths and weaknesses of the opposition client and counsel.

The foregoing does not occur in collaboration as, due to the disqualification clause, clients never face "opposing counsel" if impasse occurs. As a result, collaboration lends itself to a much more open exploration of interests and potential options for resolution.

In addition, in the best collaborations both clients are supported by both counsel, a dynamic which is not part of the mediation process. Divorce coaches and financial neutrals (depending upon the makeup of the team) add further layers of support for collaborative clients.

Much has been written about mediation and, to a lesser extent, collaboration. Needless to say, both are valuable alternate dispute resolution tools that give family law clients access to a speedier resolution of their matters than might the litigation system. The core differences are as set out above, the principal one being that the adversarial process remains a part of mediation while it has no place in collaboration.

9. SECTION 15 REPORTS -- DIVORCE COACHES/PARENTING PLAN

When the current *Family Relations Act* came along in 1979, Section 15 was included to assist the court in matters of custody and access. Reports by experts were, initially at least, to be done quickly by on-site court personnel. The demand soon exceeded the ability to meet it and the private sector became involved. Today, to the best of my knowledge, Section 15 reports can take six months to a year (or more) to complete and often cost well in excess of $10,000. These reports are often stale-dated snapshots in time that are often of marginal value, bitterly critiqued and contested. As well, they have the potential to create divisiveness in families that lasts long after the litigation is concluded.

In collaborative practice, depending upon the clients and the level of conflict, one or two divorce coaches are employed to work with the clients to develop a parenting plan in the restructuring of their family. Resources (money) are spent on developing a plan through discussion and negotiation after identifying all of the relevant factors with respect to both children and their parents. Rather than looking backwards, as litigants often do in attempting to show the failings of their former partner, parenting plan work in the collaborative arena is forward looking with each client being emotionally supported by both coaches. The goal of this work is not only to arrive at an enduring parenting plan that includes the flexibility to change as life unfolds, but also to teach and expose separating spouses about how to communicate more respectfully and more effectively. It is not uncommon for both spouses to express profound appreciation to coaches and counsel at the conclusion of this work.

In summary, the work of the coaches to achieve an enduring parenting plan, together with the "education" afforded the parents in that endeavour is usually far less costly than the Section 15 snapshot assessment that may lead to consensus, but often argument and, in some cases further "expert evidence" into what is best for the children.

A further benefit obtained through the use of divorce coaches is that, long after the lawyers are hopefully no longer required, the coach or coaches remain available to assist the restructured family with matters or concerns that may arise over time.

10. VIEWS OF THE CHILD REPORT -- CHILD SPECIALIST

The Views of the Child Report is a relatively recent addition to the landscape in custody and access litigation. The Reports are uni-dimensional with the "reporter" (usually a mental-health professional or counsel) interviewing a child or children and repeating what is said. There are no recommendations or strategies to support the child. Rather, the child is placed in a position of responsibility for what he or she says, often feeling accountable for the consequences of the interview(s) which are usually conducted in a setting that is unfamiliar to the child.

In collaborative practice, the child specialist, usually working in concert with the divorce coaches, has a much deeper and, I would submit, more effective role. Rather than parrot a child's statements, the child specialist typically works with coaches, parents and sometimes even counsel in explaining where the children are emotionally and developmentally. The child specialist usually interviews the parents and works with the divorce coaches in building a parenting plan.

The child specialist is often one of the keys to achieving resolution as the parents gain perspective from a neutral source as to how the children are being affected by the parents' separation. Throughout the years that I have been involved in collaborative practice, the role of the child specialist has been respected and the child specialist's voice often resonates the loudest with parents as they gain insight and perspective with respect to their children.

The role of the child specialist is much broader and interactive compared to the limited scope of the Views of the Child Report.

11. FINANCIAL NEUTRALS

Lawyers have historically been prone to giving matrimonial clients a range of financial advice notwithstanding their lack of specific knowledge and training coupled with unsupportable costs associated with this advice. In collaborative practice, financial advisors, specifically trained in the collaborative method, are available to provide neutral, bilateral analysis and advice to separating spouses. They also have a Participation Agreement, which is signed by the financial neutral and the parties. Their abilities facilitate the clients receiving advice at a reasonable cost, analyzing both short-term and long-term sequelae to the various options that are available for settlement.

Their ability to provide projections adds to the safety of this process and provides both clients with valuable information with respect to the short and long-term implications of the options being considered. This information from a neutral source is invaluable for most clients as it is customary for one or both to be of limited financial ability, experience and vision. In addition, the lawyer is relieved of providing advice in an area where, while lawyers may attempt to tread, they are usually not qualified other than anecdotally in being a client with respect to their own resources.

12. BRITISH COLUMBIA COLLABORATIVE ROSTER SOCIETY

This Society was launched formally in the Law Courts in Vancouver on May 11, 2012. The Society was incorporated approximately two years before and is the culmination of the effort of a number of professionals from different communities in British Columbia and is consistent with the goals of IACP. It consists of a roster of lawyers, mental health professionals and financial neutrals all specifically trained and experienced in collaborative practice. It is designed to be a place which professionals will aspire to qualify to join, and to which the public and the profession can seek resources to help families and children transitioning through separation and divorce.

In creating this Society, professionals from Vancouver Island, the Lower Mainland of Vancouver and the Interior of British Columbia were consulted. Some assumed responsibilities as inaugural

Directors and Officers. The Roster is province-wide and contains criteria for membership that considers regional differences and challenges presented by our large and diverse province. While embracing that diversity, standards for membership and ongoing education are mandatory requirements for all members. While the Roster is in its infancy, its Board and Executive is comprised collectively of several decades of experience in collaborative practice and well over 100 years (collectively) of professional involvement in assisting separating/restructuring families.

13. FAMILY LAW ACT

The *Family Law Act* defines "family dispute resolution" as a "process used by parties to a family law dispute to attempt to resolve one or more of the disputed issues outside court", and includes collaborative family law in the definition. Part 2, entitled "Resolution of Family Law Disputes" encourages the use of out-of-court dispute resolution processes for family dispute resolution where appropriate. A family dispute resolution professional, when consulted by a party to a family law dispute must "discuss with the party the advisability of using various types of family dispute resolution to resolve the matter and inform the party of the facilities and other resources known to the family dispute resolution professional that may be available to assist in resolving a dispute."

Section 197(1) requires that a lawyer certify at the time of the proceeding is commenced that he or she has complied with the duties cast upon a family dispute resolution professional in Part 2 of the new Act.

All of the foregoing represents the evolution in our society of alternate dispute resolution techniques including, but certainly not limited to, collaborative practice. From a collaborative practice point of view, however, the new *Family Law Act* represents a ground-breaking recognition of the validity and effectiveness of this model for dispute resolution.

Also of note is Section 245 of the *Family Law Act* which authorizes the Lieutenant Governor in Council to make regulations respecting family dispute resolution. The British Columbia Collaborative Roster Society was incorporated and then launched in order to ensure not only the visibility of collaborative practice, but also, the reliability of the expertise which the Roster represents. As well, it is hoped that any future regulations made by the Lieutenant Governor in Council with respect to family dispute resolution will include collaborative practice.

14. CLOSING

Collaborative practice continues to evolve and expand. It has both passionate advocates and strident naysayers. This dynamic may actually be contributing to its cautious and thoughtful growth as its gatekeepers know that collaborative practice is constantly judged against a system that has been entrenched in our society for as long as we can remember. Notwithstanding that entrenchment, when properly and accurately presented to almost any audience, much of the feedback is positive and often accompanied with passion.

The fourth IACP international meeting was held in Vancouver in 2003. Madam Justice Martinson was the keynote speaker on the opening evening. She voiced her support for this model of dispute resolution and even opined that the Supreme Court of British Columbia had no

process that rivalled collaborative practice. Her comments were well received. Nine years later, the citizens of British Columbia have a new *Family Law Act* coming into force in 2013 that, at least in part, embraces the model that Madam Justice Martinson endorsed nine years ago and that thousands of families around the world have benefitted from since its conception in 1990.

Respectfully Submitted,

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