

James Pirrie

# Collaborative Practice

## A. Introduction

What I would like to talk to you about is collaborative practice, or, what is called in Austria 'kooperative Rechtsklärung' (see [www.avm.co.at](http://www.avm.co.at)).

It is a thing that changes as different cultures embrace it. I can't predict what role it will have here in Germany but I believe that the simplicity of the scheme means that it is highly adaptable and that it will have a role – or should have – even though at this stage we probably don't know why it will work differently from the way that it is working elsewhere. It is for someone in this audience to spot the need that exists here, to pull in this process, adapt it and create a new alternative process to resolve some of the conflict in this jurisdiction.

So what I will be talking about is:

1. What is it? What is this thing called collaborative practice? The principles of collaborative practice.
2. When would we use it? When would we prefer mediation?
3. How it has developed in UK and why it works there ...
4. Process options ... how should we help clients choose between them?
5. An illustration of the process.
6. What is next?

## B. What is it?

### I. A flexible structure

I want you to imagine a huge and beautiful bubble floating out across this hall and as it moves it changes shapes according to the currents of air that it encounters.

That, it seems to me is what I am presenting to you this morning. A thing that is wonderfully simple and a thing that is somehow miraculous and potentially potent and special to you. It will need to

change from what it has been in America, Canada, England and probably even Austria, but you should find in its simplicity something serviceable. It seems to me that there is a gap in all jurisdictions for this model. It is one that *enables clients to harness the usefulness of lawyers whilst excluding the risk of litigated process* and however different our cultures, that seems to be one common need at least.

## II. Some definitions

Just as there are almost as many definitions of mediation as there are mediators, so is collaborative process hard to pin down. Some of the following help to describe the area even if they don't provide a definition:

- ▶ An ethical negotiation driven by face-to-face meetings managed by the lawyers, addressing the issues raised by the clients.
- ▶ A particular agreement involving working together transparently, to improve outcomes for mutual benefit.
- ▶ A negotiation process between clients, who have agreed to exclude the court and work instead together to reach settlement with advice.
- ▶ A process founded on a participation agreement, which will
  - Require the lawyers to work to achieve higher values for both the clients
  - Prevent the lawyers from litigating the case for either client.
- ▶ A flexible process committed to bringing together relevant skills from different professions so as to help clients make better decisions.<sup>1</sup>

## III. Its aspiration

Collaborative process as it is practiced around the globe aims:

- To release clients from court process;
- To enable clients to make commitment to the principles **of the process** by which they will deal with their issues;
- By instructing their lawyers to police adherence to those commitments, the

clients can each gain confidence that these commitments will be kept; and

- In consequence trust can be generated which will assist the reaching of agreement (and where there are children, also build towards a better longer-term relationship for the greater benefit of the family).
- To release the clients into a process that will best enable them to pursue „interest-based“ rather than „court/rights-based“ outcomes.

- To offer clients the experience and protection of their chosen lawyer without exposing them to the risk of court process.

- To bring differences as to the partisan legal advice that each may be receiving and consider it transparently so as to promote better understanding for each client about their position (and in consequence

avoid over-commitment to rights-based advice – which surely will always be a matter of conjecture in a discretionary system).

## C. When would we use it?

### I. A pure conflict-resolution model

Once upon a time a group of survivors landed on an island. Miraculously there was a conference organiser there who got everyone into groups according to their specialism:

- He sent the producers and builders out to plan to meet the food and shelter needs of this new-formed community
- He sent those in government and finance and policing away to work out a way to run the community, the teachers to create new systems of learning, the doctors to source treatments for those who would become ill and so on
- Those he was left with who couldn't do anything useful were called lawyers and they were sent away to the foot of the island and told that they wouldn't be fed or housed till they had worked out a system for resolving the conflicts that were



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<sup>1</sup> This may, in particular include coaches or family consultants to support the individual through the process, a financial neutral to give joint guidance on the figures and a child specialist to assist parents identify best choices for the benefit of their children.

bound to crop up between those now on the island.

Of course what they came back with was a mediation process, saying *“It is surely sensible that conflicts are resolved according to the value systems of those involved and what mediation offers us is the purest version of that. It is a process of facilitating exchanges of views and by keeping those views managed but not influencing them, we achieve best outcomes for the islanders.”*

## II. The challenge of court process

Does mediation always meet the challenge of this ‘ATNA’ [=alternative to a negotiated agreement]?

The survivors’ solution might work perfectly well for a community without courts. But the reason why mediation is not the universally accepted conflict-resolution process is that there *are* courts. There is an alternative to reaching out to shake hands across the table and that is because there is an alternative system where we could take our chances. The other side might be more risk averse than you (and will offer ‘better’ terms) or you might, at the end of the day, secure from the judge an apparently improved outcome.

So, before we reach an agreement,

- (1) we are often likely to need to know whether this is a good deal set against our alternatives; and
- (2) we want to know what the law has to say. (*“Are there cultural norms there that should influence how I view this dispute?”*).

What is needed is something to make people realise that despite – or perhaps because of – the court-based alternative, that this option (the one that we have identified in mediation) should be adopted. But the way that our mediation works in England does not always do a good enough job in helping people understand this perspective and collaborative law is increasingly filling that gap in the UK.

It is useful to think about what has what appeared to have contributed to the success of the movement in England in case that resonates with why it might succeed here.

## D. Development of CP in England

Family law in England is characterised by the following:

- ▶ Our mediation has been a minority sport, used in perhaps 10 % of cases. Much is sole mediation by lawyers.

Much of the rest relates only to children. By and large our mediation is:

- facilitative (that is, we do not direct clients on outcome),
- advice-free, and
- carried out all at the table (shuttle or caucus is not the norm).

▶ We have a court process that is founded on discretion and which therefore makes outcome unpredictable.

▶ The wide-ranging investigation and extensive preparation behind many court cases, combined with high hourly charging rates (costs of almost € 800 an hour are now being encountered in one firm) creates really significant expense for clients. Cases in London will often cost € 100,000 between the parties and may cost ten times that or more.

▶ We have specialised and amazingly good judges. However, (amongst other things) our high cost and the inevitable poor professional image of divorce lawyers has created increasing numbers who run their own cases and that takes up vast amounts of court resources and queues at court are getting longer. Nine months from the start of a divorce process to its end is good – bigger cases in London will take eighteen months or more.

▶ Our lawyers are a profession of specialists: most family law work is carried out by lawyers who only do family law work.

▶ Ours is a *split* profession of specialists. On the one hand, there are ‘solicitors’ (who are the point of contact for the client), many of whom are trained as mediators. On the other there are ‘barristers’ (who are our advocacy specialists and who provide their services through solicitors). The crucial point here being that most clients have, as their primary point of contact a lawyer who is more negotiation-specialist and less front-line court-advocate.

▶ Our professional body has created ethical norms. Resolution, is a very influential, 5,000-strong, voluntary body to which almost all family law solicitors of any note belong. It was first created in 1981 behind a code of conduct that, through tireless work over the last 25 years, has been largely successful in generating a culture among professionals of child-focus and the constructive attempt to find settlement.

▶ A strong focus on options.

Some of these features will have strong parallels in German family law and others will be different.

## E. Process options and what do they do best?

### I. Options

So when we talk to clients about processes to resolve their issues, we tend to talk in terms of options that will best suit their needs.

We might see the following categories of option:

- (1) Relationship-based [stay in the relationship and manage to make it better, perhaps with the assistance of counselling support]
- (2) Essentially self-managed [but variants include having the assistance of family members/religious leaders and with or without legal advice]
- (3) Mediation
- (4) Collaborative process
- (5) Traditional process [many different variants but characterised by the concurrent running of court process or at least the likely court-generated outcome is a strong reference and the end point if resolution is not achieved].

### II. Considerations

Each client will have different challenges, but for example, if a client came to see you, you might hear some of the following, relating to the choice of their process.

- (1) Investigation; *“is the process capable of identifying the relevant data – ie getting to the bottom of the complexity of the situation or will he, for example, be able to hide assets?”*
- (2) Power balancing: *“this is a powerful man; I don’t want to be dealing with this on my own – will you be there to protect me – to be my advocate?”*
- (3) Fairness, *“I don’t want to feel ripped off – either now or looking back on this in 5 years’ time.”*
- (4) Experience – *“I want help to understand how to get the kids through this and I want to do the best that I can in the situation generally.”*
- (5) Cost – *“I don’t want it to cost the earth”*
- (6) Conclusion *“I just worry that he is going to fight and fight till someone stops him; is what you are suggesting capable of imposing closure?”*
- (7) Process pain – *“I don’t want it to take for ever nor involve steps that I will find harrowing.”*
- (8) Control – *“I want to be heard.”*  
And perhaps many other things, for example:
- (9) *“I want a principled process.”*

- (10) “I need this to be a completely private process.”

### III. How do the options measure up?

We might think through how this client’s needs are going to be met by the different process choices so as to narrow down what will be more effective for her.

- (1) So far as *investigation* is concerned, the kitchen table is unlikely to deliver what is wanted. If you are going to shake hands across the table, it is unlikely that you are going to have got very far towards identifying any information that is not actually volunteered. By contrast, the court process may do this very well ... extensive opportunity to ask questions, time to reflect, cross-examination in court and so on.
- (2) *Power-balancing*: this is often the item that puts my clients off the mediation services to which I can refer them. It is very difficult for some people who are anxious and perceive themselves to be innumerate, a poor negotiator and down-trodden in this relationship to gain sufficient reassurance by our mediation intake processes to embark on a process on her own with a very domineering man.
- (3) *Fairness*: this is the one that can be a challenge to mediation.
  - (a) Where we are dealing with parenting issues, then obviously we probably do not much care about what the court might do. Mediation will almost always be the process of choice in this situation.
  - (b) However, we *may* have difficulties in mediation where we are dealing with complex or novel financial situations and each client has taken separate legal advice and clients have no common view as to their respective rights. ... and so on. We could work through each of these items for each client and think through what was important. I have attached a tabulated version which sets this out in more detail.

If this is one of the rare families where privacy and media relations really matter then

<sup>2</sup> This is the crucial and difficult phase – only if the spouse will select a collaborative lawyer can this process advance. Early communities really struggle – too often there are not enough collaborative lawyers ... in England in 4 yrs we have about 20% of our membership trained – but they are in pockets. Some lawyers who wish to progress with collaborative work cannot do so because of the rarity of their spouse instructing another lawyer with the same training.

we need look no further than the differences between the Paul & Heather McCartney and the Disney divorces, which could not be more profound, as a quick search on Google makes clear.

### IV. The success of collaborative practice in England

Drawing the strands together, we can begin to see some of the reasons for its success:

- (1) Our litigation process is long and expensive. Its outcomes are hard to pre-



Auf dem Mediations-Kongress 2007

- dict. The “ATNA”s (= alternative to a negotiated agreement) are often not a great fit. Many clients have fears (some realistic, some not) as to whether mediation will provide protection, advocacy, effective investigation and fairness.
- (2) Our family lawyers are fairly homogeneous and, in particular in mid-sized communities, are likely to know each other. It becomes easy for a separating couple to both hear about the option and for the lawyers to be in a position to work together effectively.
- (3) There is a common ethical base of desire to see respectful and constructive process, leading to a child-focused settlement. These are values that are easy to import into the collaborative container (they are expressed on the face of our

participation agreement) and they are easier to promote in face-to-face discussion.

### F. An illustration of the process

How it might work for my clients is as follows (see diagram that follows):

- (1) First, as always, we will learn all we can about our client:
  - (a) what is her current situation?
  - (b) what matters most to her?
  - (c) what does she want things to look like in 18 months’ time?
  - (d) what is her spouse like? Is he capable of trying to make things better? How would it be trying to sort things out face to face with him?
  - (e) how are the children coping?
  - (f) (as well as all the usual concerns, such as personal safety, child protection, jurisdictional conflict etc.).
- (2) Then I will outline the principles and process with my client and consider the alternatives that she might have to this. Litigation may resonate for her or she may ask for a referral into mediation or plan, as a first step to take my input and try to negotiate matters directly with her husband.
- (3) The collaborative process will be considered very carefully. We have already seen that it is no easy process and I will try and give my client a real sense of what it will be like. Overselling any option makes the choice the responsibility of the professional. The reality is that all of the options are hard; it is a question of identifying the one that may be least hard in these circumstances. We may well prepare a grid such as that we have seen already for comparing processes.
- (4) I will then often send a letter out to the spouse outlining my view of their options. Alternatively, I may send a letter to my client, which she will share with her spouse. This is an unusual step to take – it is so startling in its transparency that it can be very effective in building trust.<sup>2</sup>
- (5) The spouse may contact me – but more usually what they do is pick up on my suggestion to contact one of a number of lawyers who then makes contact with

- me [of course in many cases, I will be the second lawyer contacted too.]
- (6) I will talk through with the lawyer whether we think that this case is truly appropriate for collaboration. From here it may branch off in any number of directions, but for instance:
- (7) will then go and do detailed preparation with my client and
- (a) One of the key things that I will do is work on their vision of what this would look like if they could have what they wanted [“... don't tell me the specifics of the deal that you would like to secure ... that is positional negotiation and doomed. No, I want to know the hallmarks of what a successful process might have involved and what a successful outcome would mean to each of the members of the family and enable you to do ...?”]
- (b) This is what will then provide the guide to us instead of our law principles. These are their interests – it is against these that the clients are going to gauge the outcome and towards this that I will guide my client.
- (c) [There will be a corresponding list from the other spouse – you will not be surprised to know that these are often broadly similar.]
- (8) We will then have our first meeting, which can often take place very quickly.
- (a) *Anchors*: the lawyers will clarify for the clients the commitments of the collaborative process. (We each will have done this in our separate meetings with our clients but it is the doing of it together that can create stronger buy in);
- (b) *Aspirations*: all being well, the clients may be at a point to describe why it is that they are drawn to collaborative process ... this is the start of the description of their shared values and hopes that will continue to act as a guide as we move ahead in our discussions.
- (c) *Realism about pragmatics*: The lawyers will share views on cost and timescale – ie trying to give the clients a shared view on what the process will involve so that if the choice is adopted, it will be committed choice.
- (d) We will sign agreement
- (e) If there is time then we will then start to identify
- (aa) the *issues*
- (bb) the *agenda or route map* by which they will all be addressed
- (cc) the *information* needs we have that will enable us to understand those is-
- sues so as to deal with them effectively, from which will come a to-do list.
- (9) Our second meeting will take place after the interval we need to bring together the information to assist us. Much of collaborative work currently concerns financial issues. So it may be a month before we meet again depending on what needs to be gathered in to take the next useful steps. By this time the lawyers will have exchanged the financial data that they have and this will probably have been reduced to a financial spreadsheet ... From here of course we can start to embark on the course that will be familiar to all mediators:
- (a) We will be clear about the clients interests and needs;
- (b) We will start to identify the various options they have for addressing their issues;
- (c) We will use the clients' responses to these options to refine our understanding of their interests and needs;
- (d) We will audit the options they have against their needs.
- (10) *Advice*:
- (a) As the process advances, one route is likely to become clear and then, in particular, as we start to consider its detail, the question of court alternative will crop up:
- (b) This might be because there will be differences between the clients as to the exact shares and they will start to address issues about what is fair and what the court would do.
- (c) This is often the point at which the lawyers are likely to need to share at the table in front of their clients their views as to the principles (as opposed to their views of entitlement and outcome) by which the court would address these issues:
- (d) Generally we say things that are broadly similar, because the principles are relatively clear, even if their exact application is not. Often we will be saying that both outcomes proposed by the clients are within the range of possible outcomes. More often we are pointing out that the point reached by the clients is already 1) better for each of them given their particular requirements and 2) not the sort of outcome that the court could offer. Legal outcomes can tend to be neutralised.
- (e) This approach is likely also to bring clients up uncomfortably against the reality of not reaching agreement and we are likely to return to the clients' values

and aspirational statements to provide any guide forwards ...

... For mediators, these stages and techniques will be so much business as usual.

## V. So what was so different from mediation?

The differences are likely to be the things that took clients into the process in the first place, for example:

- Worry that differences in advice outside the discussion process would derail the negotiations;
- Fear of going alone into a harrowing set of discussions;
- Wanting to have an advisor in the room to slow up discussions/share advice/reality test *in a partisan way* the things that are of concern.

## VI. Involving experts ... the “coach”

The collaborative process changes the roles of lawyers. Instead of being valued significantly as prophets of the likely level of court-imposed outcome, their skills are now being used much more as:

- ▶ Managers of the process
- ▶ Wise and experienced guides through the difficulties that may be encountered in the future if different options are adopted.

The moment that we are released from court-norms, we have the opportunity to buy in all sorts of other expertise, expertise that might or might not resonate with the court and be taken into account by the court. Putting it another way, as this is no longer purely a legal enterprise; we can therefore care for our client in a far more profound way.

We work on many of the cases with counselling and therapy support. Counselors are trained in the process to offer a particular form of support that meshes what is being offered by the lawyers and supports progress towards the agreed end. There are many, many ways in which this support is involved. Some operate a one coach model (one coach for the couple); some always have one coach for each client. Some have a coach each and a child specialist too.

Coaches may:

- carry out assessment of the client
- address parenting issues
- focus upon relationship and emotional recovery and access other services for the client to pursue this further

- 
- assist the clients to cope with the negotiations
  - work on helping the client to clarify needs and aspirations.

These issues are the subject of a course lasting days, so I will not spend further time on it, other than to say that it is a crucial part of the power of the scheme.

## **VII. Financial neutrals**

I am also likely to involve financial neutrals ... Traditionally, the lawyers would have obtained the financial data of the clients but in England, there is growing recognition of the savings that can be achieved by employing a neutral professional to undertake this task.

Many others will, routinely be involved in the process, for example, accountants, trust lawyers, valuers etc.

## **G. Are you interested?**

If I was able to ignite your interest for Collaborative Practice and you need further information, please visit the IACP website at [www.collaborativepractice.com](http://www.collaborativepractice.com) or the website of our Austrian friends at [www.avm.co.at](http://www.avm.co.at).

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