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COLLABORATIVE LAW: THINKING ABOUT THE ALTERNATIVES

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By HILARY A. LINTON, B.J., LL.B., LL.M. (ADR), of Riverdale Mediation. Ms. Linton is a Toronto lawyer, accredited family mediator (OAFM) and arbitrator.

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When an intimate relationship ends, the parties often seek to negotiate an agreement on how to dissolve the partnership. There are many ways to do this, including direct talk, negotiation through lawyers, mediation, and collaborative family law. If these negotiations break down, parties usually pursue an adjudicative process such as litigation or arbitration.

Much of the literature about collaborative law compares the process with litigation. But collaborative law is a process of negotiation, not adjudication, and it should be compared to the other forms of negotiation.

Without denying that collaborative law is meeting a growing demand for less adversarial lawyering, this paper raises questions that suggest further reflection among its practitioners is required.

The thesis of this paper is that the key elements of the collaborative negotiation process – the removal of the “litigation threat”, the restriction on the parties’ ability to use of a full range of negotiation strategies, and the imposition of the high cost of retaining new counsel if the negotiation fails – distort negotiations in a way that should be understood by clients before they agree to use the process. These distortions not only deprive both parties of essential negotiation tools; they also could disadvantage the person with the stronger legal case.

Inside

Recent Cases

Adoptive Mothers Not Discriminated Against . . .	8
Passage of Time Not a Material Change in Circumstances	9
Revocation of Election Under <i>Family Law Act</i> Allowed	9
Pregnancy Not a Material Change in Circumstances	10
Legislative Update	11

The American Bar Association's Ethics Committee has recently ruled that the "limited retainer" element of collaborative law is not unethical, with this important caveat: that the parties sign on with informed consent.

The purpose of this paper is to highlight the issues that lawyers should discuss with their clients when advising them about their negotiation process options, particularly where there are significant differences in the merits of the parties' legal positions, their economic resources and their power derived from their "best alternative to a negotiated agreement" ("BATNA").

Negotiation and Alternatives

What is the goal of negotiation? For each party it is the same: to convince the other party to reach an agreement that each of them considers to be at least as good, and hopefully better, than his or her alternative to a negotiated agreement.¹

Contemporary negotiation literature encourages "effective" negotiators to prepare thoroughly and to know

their options and, most importantly, their BATNA, and also to know or predict the BATNA of the other party to the negotiation. Such preparation and understanding of all of the implications of one's BATNA is crucial in domestic disputes where litigation, often prolonged, bitter and costly, may be the BATNA of both parties.

How does one determine and define his or her alternative to a negotiated agreement? This is a complicated, subjective and time-consuming process. Each person must consider what is important to him or her, procedurally and substantively, and rank their negotiation priorities. Each, often with the assistance of counsel, must realistically evaluate alternative outcomes and their potential economic and emotional costs.²

Let us consider a father whose employment commitments have kept him away from his young children for much of their lives. The father is a good provider and a person of good character, but has had limited involvement in the raising of his children.

Upon separation, dad feels that he would like to be more significantly involved in the lives of his children, and therefore seeks to share custody and have equal parenting time. His wife, who opposes his proposal, wishes to have a negotiation. How will the father determine his alternatives and his strategy for a "successful" negotiation? He may consult the internet; talk with friends who have had similar experiences; and seek out a family lawyer. He will need to know his alternatives. Is it better to try to resolve the dispute informally, through collaborative negotiation and/or mediation; to bring an application for interim custody; or to propose arbitration? What are the most likely outcomes of each process, and what are the likely costs, both financial and emotional, of each?

He will probably also assess his wife's alternative, and the cost to her of pursuing that. Perhaps, notwithstanding the superior legal merits of her position, she has a low tolerance for conflict, or he controls all of the money. Perhaps he has abused her and she is afraid of disagreeing with him. Or perhaps she is well financed by her family and will litigate as long as it takes.

By engaging in this careful analysis, each party is able to design a negotiation strategy to achieve an outcome that is at least as good as his or her alternative, and hopefully better.

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For CCH Canadian Limited

GINETTE FISHER, B.A. (Hons.), LL.B., LLL, Senior Editor
(416) 224-2224, ext. 6245
e-mail: Ginette.Fisher@wolterskluwer.com

TAMMY BURNS, B.A. (Hons.), Editor
(416) 224-2224, ext. 6438
e-mail: Tammy.Burns@wolterskluwer.com

CHERYL FINCH, B.A., LL.B., Director of Editorial
Legal and Business Markets
(416) 228-6128
e-mail: Cheryl.Finch@wolterskluwer.com

FARIDA KARIM, B.A., Marketing Manager
(416) 228-6138
e-mail: Farida.Karim@wolterskluwer.com

Editorial Board

ELIZABETH JOLLIMORE, B.A., M.A., LL.B.
(Stewart McKelvey)

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90 Sheppard Ave. East, Suite 300
Toronto, Ontario M2N 6X1

Negotiation and Power

It is not uncommon for one or both parties to try to wield their power in a way that will help them achieve what they want. One party may take advantage of the other's low tolerance for conflict, or may be more skilled at manipulating the other's emotions. One may be better able to afford a more experienced lawyer or to engage in protracted litigation, using financial power to his or her advantage. Or one's employment arrangements may make it easier for him or her to take time off for negotiations. Perhaps one is more comfortable in the negotiation environment and able to function more effectively. And one may have a superior legal case and use the threat of litigation as a means of trying to achieve the best possible outcome.

To what extent should a negotiation process interfere with the ability of the parties to use their power? And how does one decide which sources of power should be allowed? This is the crucial question this paper asks: because collaborative law, unlike other negotiation processes, has chosen to eliminate the parties' right to utilize an important determinant of power: the litigation threat.³ Why is this source of power so important? Consider the situation where a negotiation reaches an impasse because one or both parties insist on an outcome that is perceived by the other to be worse than his or her alternative.

The parties will quite appropriately refer to their alternatives in deciding what to do. Assume that, in the scenario above, the father continues to insist on nothing less than 50-50 parenting. Assume as well that the father is a bully and the mother has a low tolerance for conflict. However, she knows that she has a stronger legal position and also that her family will support her emotionally and financially. In this case, the father's proposal is likely worse for her than her alternative, and she will advise him that if he does not negotiate differently, she and her lawyer will terminate the negotiation and litigate.

Power and Alternatives

What this paper has suggested so far is that negotiation power is derived from the strength of one's alternative to a negotiated agreement.⁴ Power is the ability to say with credibility *give me what I want or I will get it somehow else*.

Relative bargaining power stems entirely from the negotiator's ability to, explicitly or implicitly, make a single threat credibly: I will walk away from the negotiating table without agreeing to a deal if you do not give me what I demand. The source of the ability to make such a threat, and therefore the source of bargaining power, is the ability to project that he has a desirable alternative to reaching an agreement.⁵

This is not always "fair". But we must recognize that real imbalances exist, and that in many negotiations, the person with more negotiation power will achieve an outcome that is closer to his or her best alternative to a negotiated agreement.

Process: Comparing Collaborative Law and Mediation

The hallmarks of mediation and collaborative law are similar.⁶

interest-based, problem-solving styles of negotiation; confidentiality; voluntary exchange of information; joint retention of experts and respectful communications.⁷

However, on closer examination, the two processes have some fundamental differences.

Parties in a collaborative law process engage in negotiations that are described, exclusively, as "interest-based",⁸ generally by way of four-way meetings. The basic ground-rule of collaborative law is this: if the parties do not settle within the collaborative framework, and one or both seek to litigate (or arbitrate), they must retain new lawyers and any other advisors (accountants, evaluators, coaches etc.) and begin the dispute resolution process anew. The rationale for this rule is described as follows:

By placing the clients in this "container" where they are free from the threat of litigation, collaborative lawyers claim they can resolve disputes cheaper, faster, and fairer than the litigation alternative – at least for family law disputes.⁹

The process is governed by the terms of a Participation Agreement to which the parties and their lawyers are all bound. It is a breach of a standard participation agreement to threaten to go to court.¹⁰

The principle underlying collaborative law is that litigation is harmful; the threat of litigation is harmful; and that the only constructive form of negotiation is interest-based bargaining, or "value-creation". "Value claiming"¹¹ especially if competitive tactics are used, is discouraged. Collaborative law practitioners seek to remove these presumed harmful elements from the negotiation, either by banning them outright or increasing the costs of utilizing them. The assumption appears to be that in doing so, they will empower the parties to focus exclusively on meeting their individual and collective interests for the purpose of reaching agreements.

In mediation, negotiations are facilitated by a third-party neutral. The theory supporting mediation is that parties should be empowered to utilize their respective sources of negotiation leverage, including the strength of their alternative to a negotiated agreement, to seek the most optimal outcome for themselves, however they might individually define "optimal." Parties agree to refrain from making illegitimate threats or using intimidation tac-

tics designed to coerce settlement; but threatening to pursue legal options such as litigation, as a means of seeking a desired outcome, is permitted. Although most mediation focuses heavily on interest-based negotiation, the process permits distributive negotiation.¹² Indeed, this writer would underline that creating value and claiming value are both essential and are intertwined elements of successful negotiation. And, if the negotiation fails, the parties simply move on to another process, litigation or otherwise, with the same lawyers.

Much has been written about the potential ethical challenges of collaborative law practice.¹³ However, the focus of this paper is on the procedural constraints that are imposed by the “container” of the collaborative law process.¹⁴

Research Data

There is no study available comparing the use, effectiveness, efficiency and client satisfaction of the different negotiation processes. It would be practically impossible to do, given the variables that would have to be taken into consideration for the research to be meaningful. The existing research is useful however to understand more about some of the process differences and similarities.

(a) Collaborative Law

There is limited empirical research about collaborative law. We do have the benefit of one small independent study (only 16 cases, 4 of which did not complete all the interviews)¹⁵ in which about 60% of the cases reached agreements within 15 months; the remaining 40% had either not settled or had “failed”.¹⁶ The MacFarlane study noted the capacity of the process to achieve creative settlements that are durable, realistic and are seen by the parties to be fair, and further that the outcomes seemed to be comparable to what might be expected from litigation.¹⁷ The study also noted the limitations of collaborative lawyering, including that it took longer and cost more than some clients expected, and some clients did not understand the process and its implications.¹⁸

Also available is the data from the International Academy of Collaborative Professionals.¹⁹ Because this data is not independently collected, it is difficult to determine its reliability. Based on self-reporting in 377 American cases, practitioners rated almost one quarter of their cases as “easy” or “very easy”; 37% were considered to be “moderate” difficulty; another quarter were found to be “difficult” and 15% were “very difficult”.²⁰ (These terms are not defined.) In these cases, it achieved high settlement rates (86%)²¹ within reasonably short time frames (67% by 7-8 months and 83% within a year)²². The “average total cost of average cases” was just under \$18,000; the average

total cost in “difficult” or “very difficult” cases was \$28,535.²³

Where cases were found by the reporting professionals to be “difficult” or “very difficult”, or where the process was terminated, the professionals were asked to provide reasons. The most significant source of difficulty in the “Professional Behaviour” category was “professionals with different approaches/styles of advocacy” (17%).²⁴

The greatest source of difficulty in the “Client/Family Dynamics” category was “client(s) lack of trust” (53%), followed by “cooperation between clients impossible” (39%), “power imbalance between clients” (39%),²⁵ “client(s) lack of empathy” (38%), and “client(s) see little value in other’s contribution” (38%).²⁶

The main causes of difficulty in substantive law were property valuation, property division and property characterization (30%, 29%, and 23% respectively), and spousal support (44%).²⁷

A recent study from Boston compared the costs and settlement rates for mediation, collaborative law, lawyer negotiation and litigation.²⁸ It found that mediation, collaborative law and litigation all produced high settlement rates. Mediation was by far the cheapest, with a median cost of \$6600, compared to \$19,723 for collaborative law, \$26,830 for lawyer-negotiated settlements and \$77,746 for litigated cases.²⁹ It is difficult to interpret this comparison data. All dispute resolution process choices are self-selected by the parties and it is reasonable to suggest that litigation is inherently more costly because the people who choose to litigate are “more difficult” than people who choose to negotiate.

(b) Mediation

Extensive research supports mediation as an effective intervention to resolve conflicts and empower litigants to find meaningful and satisfying resolutions outside of the courtroom. Settlement rates, client satisfaction and likelihood of reaching enduring agreements in a cost-effective manner are well-supported by many independent studies over many years, both in Canada and in the US.³⁰

Ontario’s Ministry of the Attorney General recently evaluated the mediation services at five Family Court branches of the Ontario Superior Court of Justice.³¹ Participants included judges, lawyers, court staff, and other stakeholders; clients were not included in the study.³² The qualities used to describe mediation were: accessible; well-trained, competent personnel; cost-effective and efficient.³³ The perceived effectiveness of the mediation services varied widely among the participants and also based on location.³⁴ On-site mediation services were seen as able to deal with less complex issues quickly; off-site mediation was seen as more useful for complex disputes that required individualized solutions. Recommendations were

made to better incorporate mediation as an “essential step” in the family court process for appropriate cases.³⁵

One other research conclusion is worth noting. It has been found that one of the strongest determinants of the likelihood of settlement in mediation is the degree to which the parties have been exposed to lawyers and the legal process. Clients who mediate with little or no exposure to court settle at a higher rate than those who come to mediation highly entrenched in litigation.³⁶ This factor does not appear to be measured in relation to collaborative law.

Mediation, Collaborative Law and Negotiation Power

Collaborative law appears to be premised on the assumption that negotiation is “cheaper, faster and fairer” if the deemed undesirable elements of the process – the litigation threat; competitive bargaining and easy access to litigation – are eliminated.

This paper makes the argument that (a) this assumption is not valid and (b) lawyers engaging in or recommending collaborative law should take the concerns raised in this paper into consideration when advising clients on the merits and risks of the practice.

(i) The “Litigation Threat”

Parties in mediation contract for a referee in the event that one of them becomes abusive or uses manifestly, objectively unfair tactics to gain an advantage.³⁷ Otherwise, the parties can utilize whatever strategies and tactics they and their lawyers feel will be effective, knowing that if they have a strong alternative they can use it to their advantage.

So, for instance, if the father in our example insists in mediation on nothing less than shared custody and equal parenting time, the mother (assuming she still believes this would be contrary to the best interests of the children) can credibly and, it is suggested, appropriately, say to him: “If you do not agree to have the children reside primarily with me, I shall take you to court and obtain primary residence of the children and possibly even sole custody.”

This reliance on the established legal standard is a legitimate source of negotiation power. At some point, the mother’s alternative to a negotiated agreement – adjudication – is a better alternative for her than a negotiated agreement on the husband’s terms. The collaborative law process however would not allow the mother to use her superior legal position to gain leverage in the negotiation.³⁸

(ii) Negotiation Tactics

Few would cavil at the suggestion that parties in negotiation should be able to use the most effective and ethi-

cally neutral negotiation strategies and tactics to achieve the best outcome they can. The time comes in almost every negotiation where the “pie” must be divided. Mediation permits clients and their lawyers to utilize which ever method of distribution – competitive or cooperative – they feel will be most useful to them in advancing their interests.

There are many circumstances in negotiation where “claiming” is an appropriate strategy. Assume the sole remaining issue involves who gets which pieces of furniture; or the parties both want to buy the other’s interest in a jointly owned asset. Perhaps one party is being asked to move out of the family home and wishes to use his or her willingness to do so to gain something in return. In each case, the negotiator who scrupulously follows the injunctions of collaborative lawyering will find herself at an arbitrary and unjustifiable (from a client’s perspective) disadvantage.³⁹

Participation Agreements, which zealously avoid the use of any rights-based terminology, authorize a lawyer to terminate the process if the other lawyer’s client merely violates the “spirit” of the agreement⁴⁰ (which would presumably include competitive bargaining). The effect of this limitation on negotiation strategy and tactics could be to leave one or both clients in a position where they are being asked to make concessions unilaterally, without being able to ask for equivalent concessions in return. It also leaves parties vulnerable to exploitation by a skilled negotiator.

Separating couples who have a high degree of trust and whose legal alternatives are approximately equal might well be agreeable to such limits on their negotiation options. It does not appear however from any of the literature on the various collaborative law websites that the risks of the process are explained.⁴¹

(iii) Access to Adjudication

Although collaborative law does not prevent clients from accessing adjudicative processes, it puts a significant and unjustifiable barrier in the way of doing so. One of the benefits of mediation is that parties can “try out” negotiation at minimal risk and cost. If the negotiation is not producing desirable results, the process can be terminated and the parties can seek to have the matter adjudicated using the same lawyers. This is not the case in the collaborative law process, where the collaborative lawyers are extensively involved throughout, and all of the value of their work is lost if the process ends without settlement.

Observations

This paper suggests that the collaborative law process deprives parties of effective negotiation tools, and that it can serve to put the party with the better alternative at a disadvantage. Collaborative law requires that person to make significant procedural concessions at the outset of the negotiation, without getting anything in return, other than the promise of good faith bargaining.

Can it credibly be argued that benefits of the collaborative law “container” outweigh the costs in all – or even most – cases? Or, does collaborative law, in weakening the power of the alternative for the client with the stronger legal case, unintentionally empower the bully with the bad case?⁴²

Assume that, in our hypothetical case, the father continues to insist on shared custody and 50-50 parenting, against the mother’s very firm views that this would not be best for the children. Assume that she is right; but also that she has utilized her limited resources in paying her collaborative lawyer.

As the collaborative process progresses, her negotiation power decreases. She knows that even if she would succeed in court or arbitration, she now cannot afford to pay a new lawyer to start all over again. She cannot even make the threat without being in breach of the agreement. Her husband holds all the negotiation cards, because both parties know that he can force her to hire a new lawyer, simply by terminating the process.

The restrictions of the collaborative law “container” have worked, it is suggested, to her detriment. Rather than achieve its intended purpose of a “cheaper, faster and fairer” settlement, it has disadvantaged her by curtailing her ability to utilize her main source of bargaining power: her alternative.

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Notes:

- ¹ This is what Fisher and Ury, in *Getting to Yes: Negotiating Agreement Without Giving In*, refer to as BATNA; one’s best alternative to a negotiated agreement.
- ² As Michael Coyle notes in his chapter on “Power in Negotiation” in Hancyz, Farrow and Zemans (2007) *The Theory and Practice of Representative Negotiation*, the task of helping a client determine and articulate his or her alternatives to a negotiated agreement is not easy, often requiring careful discussion with the client about his or her preferences and priorities among different alternatives (p. 168).
- ³ Mediation and collaborative law processes also seek to eliminate abuse, violence, threats unrelated to BATNA, and deception as sources of power.
- ⁴ There are other theories of negotiation power. For a fuller discussion, see Coyle, *supra* note 2, and Robert Adler and Elliot Silverstein “When David Meets Goliath: Dealing with Power Differentials in Negotiation”, where power is defined broadly as “one’s ability to have one’s way.”

- ⁵ Russell Korobkin, “On Bargaining Power”, in *The Negotiator’s Fieldbook: The Desk Reference for the Experienced Negotiator*, at p. 251.
- ⁶ The detailed “Process Guidelines” of Ontario’s Collaborative Law Network, for example, are virtually identical to those of the mediation process except for one: “not threaten the use of a litigation process.”
- ⁷ David A. Hoffman, “Exploring the Boundaries and Terrain of ADR Practice: Mediation, Arbitration and Collaborative Law” *Dispute Resolution Magazine* (Fall 2007), p. 2.
- ⁸ The term “interest-based negotiation” (also referred to as “integrative bargaining” and “value creating”), refers to a process that focuses on the parties’ interests – their needs, desires, hopes and fears – rather than their positions, for the purpose of revealing and generating the maximum value possible. Once that value has been maximized, it must be divided between them, which occurs in the “distributive bargaining” (or “value claiming”) phase of the negotiation. Both the competitive and cooperative elements of negotiation are inextricably intertwined. See David A. Lax and James K. Sebenius, “The Negotiator’s Dilemma: Creating and Claiming Value”, in Lax & Sebenius (1986) *Negotiators may use tactics that are more competitive or more cooperative in the value-claiming phase of a negotiation, but the goal is the same regardless of tactics: to distribute the value in the negotiation in the most optimal way for your own client.* See: Colleen Hancyz, “Introduction to the Negotiation Process Model”, p. 45–59; and “Strategic Negotiation: Moving Through the Stages,” p. 91, in Hancyz, Farrow and Zemans (2007), *The Theory and Practice of Representative Negotiation*.
- ⁹ Christopher M. Fairman, *A Proposed Model for Collaborative Law*, 21 Ohio St. Journal of Dispute Resolution 73 (2005).
- ¹⁰ For example, one of the principles of the standard Collaborative Law Network Participation Agreement reads: “... no person will use threats of abandoning the Collaborative Family Law Process or of proceedings with litigation as a means of coercing a concession or a settlement”. The Brant Haldimand Norfolk Participation Agreement goes further: “Neither of us nor our lawyers will use the threat to withdraw from the process or to go to court as a means of achieving a desired outcome ...” Although the Collaborative Law Network agreement at least allows the participants to “discuss” the likely litigated outcome, their inability to threaten to obtain that likely outcome in court, if they cannot obtain it in negotiation, makes the discussion of alternatives rather powerless.
- ¹¹ See note 8, *supra*, for definitions of value creating and value claiming.
- ¹² See note 8, *supra*, for definitions.
- ¹³ The American Bar Association’s Standing Committee on Ethics and Professional Responsibility issued an opinion in August 2007 that the limited scope retainer of collaborative law does not create an inherent conflict of interest for its practitioners as long as clients provide “informed consent”. This requires lawyers to fully explain the costs and benefits of the process to prospective clients. See: <http://www.abanet.org/cpr/pubs/ethicopinions.html>.
This opinion is however narrowly limited to the question of whether the limited-scope retainer of the collaborative agreement creates a responsibility to a third party that conflicts with the lawyer’s duty to his or her own client.
There are other potential ethical risks for lawyers that are not addressed by this opinion. The Participation Agreement is signed by both parties and their lawyers, creating legal rights and obligations between Lawyer A and Lawyer B’s client that arguably blur traditional concepts of privilege and confidentiality. For instance, each client has a duty to provide disclosure to all participants, not just to his or her own lawyer. The role of the lawyer is not restricted to advocacy for his or her client; each lawyer also has a duty to help *both* parties reach agreements. The agreement requires disclosure of all “important information which may affect any of the choices either of us has to make ...” (from the Collaborative Law Network agreement), rather than the usual legal standard of relevance and materiality. And the process arguably undermines the traditional concept of “zealous” lawyer advocacy; for instance, the word “rights” is conspicuously absent from all Participation Agreements. All of these elements raise potentially troubling questions for lawyers. For a good discussion of some of these concerns, particularly those around questions of informed consent and termination, see Christopher M. Fairman, *Growing Pains: Collaborative Law and the Challenge of Legal Ethics*, 30 Campbell Law Rev (2008); Public Law and Legal Theory Working Paper series #109, November 2007.

- ¹⁴ One interesting question, which this paper does not address, are the costs and benefits of the premium that collaborative law puts on “settlement”. It can be argued that the imposition of unusually high transaction costs on the choice of litigating or arbitrating, after a “failed” collaborative negotiation, puts inappropriate pressure on parties to settle, even in cases where settlement may not be the best outcome for one or both parties.
- ¹⁵ See Julie MacFarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* (June 2005)(Can.) available at <http://canada.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf>.
- ¹⁶ The study followed 16 collaborative cases in four cities (two Canadian and two in the US) with interviews over the course of about 15 months with the lawyers and the clients. At the end of the 15 months, about 62% of the cases had settled, almost 20% had withdrawn or were in litigation over the settlement terms, and another almost 20% were still negotiating. See section 2B of the Report.
- ¹⁷ *Ibid.*, p. 57–59.
- ¹⁸ *Ibid.*, Postscript.
- ¹⁹ IACP Collaborative Practice Survey Cumulative Data Results for 10/15/06-10/15/07, IACP website, www.collaborativepractice.com/analyzesurveys.asp.
- ²⁰ *Ibid.*, “Difficulty of Cases”.
- ²¹ This paper does not purport to compare settlement rates among the various processes as there is insufficient data to do so; nor would it necessarily be helpful given the many variables that would have to be measured in order to make the comparisons meaningful.
- ²² *Ibid.*, “Length of Time to Complete Case”.
- ²³ *Ibid.*, “Total Costs for Professionals”.
- ²⁴ *Ibid.*, Professionals’ Perspective of Professional Behaviour.
- ²⁵ The term “power imbalance” is not defined in the study results; it is not known if it was defined for the participants.
- ²⁶ FN 24 above, “Professionals’ Perspective of the Client/Family Dynamics”.
- ²⁷ *Ibid.*, “Complex or Difficult Substantive Issues”.
- ²⁸ The Boston Law Collaborative Study analyzed 199 divorce cases. “Kinder, Gentler Divorce Also Costs Less”, www.abajournal.com/weekly.
- ²⁹ The study information does not break down the 199 cases into sub-categories. <http://haslerlaw2.blogspot.com/2008/01/collaborative-divorce-new-article.html>.
- ³⁰ See the comprehensive review of empirical data from many mediation studies, in *Mediating and Negotiating Marital Conflicts*, Ellis and Stuckless. Mediation clients were found to be more satisfied with mediation than adversarial clients were with the process of lawyer negotiation, court hearings and trials. Settlement rates (between 40%–80%) were dependent upon many factors, the most significant being the degree to which the parties had been exposed to a lawyers and the court process before they started mediation. Chapter 8, p. 103–104 and 91.
- ³¹ “Recapturing and Renewing the vision of the Family Court”, (2007) A. Mamo, P. Jaffe , D. Chiodo;
- ³² *Ibid.*, p. 19.
- ³³ *Ibid.*, p. 34.
- ³⁴ *Ibid.*, p. 33–34.
- ³⁵ *Ibid.*, p. 9.
- ³⁶ See Ellis and Stuckless, *supra* note 30 at 91.
- ³⁷ For instance, threats to do something illegal, or unrelated to the issues in dispute, as opposed to the threat of litigation; or the use of emotional threats or bullying.
- ³⁸ Assuming that both collaborative lawyers have advised their clients of the merits of their respective legal positions, the collaborative process denies the mother appropriate negotiation leverage by not allowing her to make a credible threat of litigation as a means of achieving a legally appropriate outcome.
- ³⁹ Although the specific requirements of the process vary from one jurisdiction to other, the emphasis on interest-based negotiation alone is emphasized in every Participation Agreement. The Association of Collaborative Family Lawyers of Calgary, for example, has issued protocols that

require its members to encourage their clients from even developing their own positions before “all facts have been mutually collected and all options generated and mutually explored” “Avoid positions” is one of the ground rules of the agreement.

The Process Guidelines of the Collaborative Law Network define the goal as “achieving mutually acceptable and beneficial outcomes for both parties,” meaning a party is not permitted to seek an outcome that is better for himself or herself than it might be for the other. The “Negotiation” section of the Calgary Participation Agreement requires the parties and their lawyers to “take a reasoned approach . . . Where our interests differ, each of us will use our best efforts to create proposals which meet the fundamental needs of all parties and, if necessary, to compromise . . .” . This wording is common in Participation Agreements.

⁴⁰ Clause 25 of the standard Participation Agreement of the Collaborative Law Network should be particularly troubling for lawyers. It considers “failing to participate in the *spirit* of the Collaborative Family Law process” to be “Abuse” of the process justifying termination by a lawyer. It is suggested that a lawyer advising a client about this process has a duty, based on the opinion from the American Bar Association’s Ethics Committee (FN 9) to inform is or her client that the other lawyer could, unilaterally, impose on him or her the consequences of termination for a breach of an unclear and undefined provision of the Agreement.

⁴¹ For instance, the Collaborative Law Network’s standard Participation Agreement has a section entitled “Limitations of the Collaborative Process” which does not discuss any of the risks raised in this paper. It only describes the formal litigation procedural rights being waived by the process. It is questionable that this clause provides enough information to meet the standard of “informed consent.”

⁴² Although collaborative lawyers are likely to be well aware of the impact of violence and abuse on separating spouses, the process does not require both parties to be separately screened for power imbalances and abuse. It is suggested that collaborative lawyers would be better able to screen out inappropriate cases if both parties were separately screened by the same person, as is standard procedure for mediations conducted by accredited family mediators. See www.oafm.ca.

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RECENT CASES

Complete summaries of these and other cases may be found in the "Recent Cases" tab division in Volume 1 of the Guide (see paragraph references below).

Adoptive Mothers Not Discriminated Against

● ● ● **Federal** ● ● ● In a recent case the Federal Court of Appeal dismissed an adoptive mother's application to review a decision that denied her 15 weeks of maternity benefits on top of 35 weeks of parental benefits.

The applicant and her husband adopted two infant children. For each child, the applicant applied to the Employment Insurance Commission for maternity and parental benefits pursuant to the *Employment Insurance Act* ("the Act"). She was granted the 35 weeks of parental benefits but was denied the additional 15 weeks of maternity benefits that biological mothers can receive. A Board of Referees dismissed the applicant's appeal, and an Umpire dismissed her appeal from the Board's decision. The Umpire dismissed the applicant's constitutional challenge that the maternity provisions of the Act contravened section 15 of the *Canadian Charter of Rights and Freedoms* ("the Charter"). The applicant brought an application for judicial review of the Umpire's decision.

Writing for the Court of Appeal, Justice Nadon dismissed the appeal. The provisions at issue did not infringe subsection 15(1) of the Charter. Justice Nadon agreed with the conclusions reached by the Ontario Court of Appeal in *Schafer v. Canada (Attorney General)* (1997), 149 D.L.R. (4th) 705 and by the British Columbia Court of Appeal in *B.C. Government and Service Employees' Union v. British Columbia (Public Service Employee Relations Committee)* (2002), 216 D.L.R. (4th) 322. In *Schafer*, the Ontario Court of Appeal held that compensating biological mothers for loss of work by reason of their pregnancy and childbirth could not constitute discrimination, as biological mothers suffered health and stress problems that were different than those suffered by adoptive mothers. The Ontario Court of Appeal rejected the argument that a maternity benefit of 15 weeks exceeded the physiological needs of most biological mothers, holding that it was far from obvious that 15 weeks of maternity benefits were not justified. The British Columbia Court of Appeal endorsed the reasons in *Schafer* when it decided that the granting of leave benefits to an adoptive mother for a period of time that was less than the period she would have been entitled to had she been a biological mother did not infringe the employee's rights under a collective agreement.

Notwithstanding his agreement with the reasons in *Schafer* and *B.C. Government and Service Employees' Union*, Justice Nadon went on to apply the section 15 test set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. Justice Nadon accepted

that the legislation imposed a differential treatment between biological mothers and adoptive mothers. However, the differential treatment did not have a purpose that was discriminatory within the meaning of the equality guarantee in section 15. After determining that the purpose of the maternity benefits provision was to support the mother's recovery from pregnancy and childbirth, Justice Nadon applied the four factors from *Law* to determine whether the legislation was discriminatory. He concluded, first of all, that adoptive mothers had not historically suffered disadvantage, stereotyping, prejudice, or vulnerability. Second, a period of 15 weeks of maternity benefits was not unreasonable, as it was impossible to set a length of maternity leave that would meet the physiological needs of all women. Third, maternity benefits have an ameliorative purpose that is entirely consistent with subsection 15(1) of the Charter, and the exclusion of adoptive mothers from those benefits does not in any way undermine the equality guarantee in that section. Finally, Justice Nadon concluded that when the legislation is considered in its entire context, it cannot be said that Parliament has demeaned adoptive mothers or cast any doubt on their worthiness as human beings. The interests of adoptive mothers were considered and accommodated by Parliament when it enacted the parental benefits provisions. In granting maternity benefits to birth mothers, Parliament rightly recognized that pregnancy and childbirth justified the granting of particular benefits by reason of the physical and psychological consequences of pregnancy.

Tomasson v. Canada (Attorney General), ¶26,304

Passage of Time Not a Material Change in Circumstances

● ● ● **Saskatchewan** ● ● ● In a recent case the Saskatchewan Court of Appeal found that the mere passage of time and an increased maturity of a child does not constitute a material change in circumstances for the purposes of varying child support.

The parties separated prior to their child's birth in 1997. When the child was almost four years old, the parties entered into an agreement, incorporated into the divorce judgment, which provided for joint custody of the child, with the mother having primary care of the child and the father having access every Wednesday evening plus every second weekend and a share of holidays. When the child was about seven years old, the parties agreed to extend Wednesday evening access into an overnight. The father brought an application to vary the parenting arrangement such that the parties would share equally in parenting the child on a seven-day rotation. The chambers judge concluded that the child's growing maturity constituted a material change in circumstances and varied the agreement to extend the father's weekend access to Monday morning. She also varied the order to reflect the parties' agreement that the child would spend common dismissal days from school with the father. The mother appealed.

Writing for the Court of Appeal, Justice Smith allowed the appeal, finding that the chambers judge had erred in holding that there had been a material change in circumstances as required by subsection 17(5) of the *Divorce Act*. The mere passage of time and increased maturity of the child did not, in and of itself, constitute a material change in circumstances. Were it otherwise, there would be an automatic right to seek variation of custody orders on a regular basis every few years, which was clearly contrary to established law. Justice Smith referred in particular to the Supreme Court of Canada's decision in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, in which the Court held that change alone was not enough to establish a material change in circumstances. The change must have altered the child's needs or the ability of the parents to meet those needs in some fundamental way, and should represent a distinct departure from what the court could reasonably have anticipated in making the previous order.

Justice Smith held that the chambers judge's finding that there had been a material change in circumstances was based only on the child's increased maturity, and was not related in any way to the child's specific needs and circumstances, or to an inference that the arrangement in place was not adequately meeting the child's needs. Justice Smith noted that there was virtually no evidence filed to suggest that the child's needs were not being met and that it was clear that the father simply wanted to spend more time with the child and play a larger role in parenting her. The question of the connection between the change and the needs and circumstances of the child had not been addressed by the chambers judge, and there was no finding that the child's needs were not being met under the existing order.

Gray v. Wieggers, ¶26,305

Revocation of Election Under *Family Law Act* Allowed

● ● ● **Ontario** ● ● ● In the June 22, 2007 case of *lasenza v. lasenza Estate*, the Ontario Superior Court of Justice set aside a spousal election under the *Family Law Act*, where the deceased's widow had misunderstood what would form part of the estate.

The applicant came to Canada in 1990 from the Philippines. She married her husband (the deceased) in 1995 and he died in 2003. Following her husband's death, the applicant sought advice regarding her legal and financial position. The will divided the deceased's estate into three equal shares for the applicant and the deceased's two adult sons. However, the applicant's solicitor was concerned that two major assets of the estate appeared to have been transferred to one of the sons and it was unclear whether they would be available for distribution under the will. The applicant's lawyer asked for but did not receive a commitment from the estate solicitor that the two assets would be distributed as estate assets. Conse-

quently, the applicant's lawyer advised the applicant to file an election under subsection 6(1) of the *Family Law Act* ("FLA") for an equalization of net family property in lieu of receiving her entitlement under the will. The applicant relied entirely on her lawyer's advice and filed the election. The estate ultimately determined that the two assets would pass under the will. The estate was worth about \$650,000. However, an equalization of net family property would actually result in the applicant receiving nothing (and, in fact, owing money to the estate). The applicant brought an application for an order setting aside or declaring of no force and effect the election she had made under subsection 6(1) of the FLA.

The application was granted. Justice Hackland held that the Court was entitled to exercise its discretion to set aside the election filed by the applicant and declare her entitlement to her bequest under the will. In contrast to the revocation of deemed elections, there is no general right of revocation for actual elections under the FLA. Allowing for revocation of actual elections would prejudice the interests of third parties who relied on the election and would stand as a roadblock to the timely administration of estates. However, the courts have a residual discretion to authorize a revocation of a subsection 6(1) election in restrictive circumstances where the interests of justice and the balance of interests of the parties clearly warrant it. In exercising their discretion, courts should consider whether the election was filed as a result of a material mistake of fact or law made in good faith, whether there was any responsibility or culpability on the part of effected parties, whether the notice to seek revocation was given in a timely way, whether the estate had been distributed, and whether the election would result in an injustice to the surviving spouse in all the circumstances.

The applicant had made out an appropriate case for a declaration that her subsection 6(1) election was of no force and effect. At the time the election was made, there was a material misunderstanding or lack of knowledge as to what would form part of the estate. The estate and the two sons bore some responsibility for that problem. The applicant's lawyer asked for and was consistently refused any commitment by the estate to include the significant assets in the estate for distribution. The transfer of the assets to the deceased's son had the potential to prejudice the applicant's entitlement under the will. Furthermore, the applicant's intention to challenge her subsection 6(1) election was given in a sufficiently timely way to avoid prejudice to the other beneficiaries under the will. The estate had not been distributed, and there would not be any prejudice to the sons resulting from the declaration that the election was of no force and effect. Finally, Justice Hackland noted, the remedial nature of the FLA must be kept in mind. The intended benefits of a subsection 6(1) election would be completely lost if the applicant were required to adhere to the election, as she would receive nothing.

Pregnancy Not a Material Change in Circumstances

• • • **Alberta** • • • In a recent case the Alberta Court of Appeal found that the father's new wife's pregnancy did not constitute a material change in circumstances for the purposes of varying child support.

The parties separated in September 2004, executed formal minutes of settlement in May 2006, and divorced in June 2006. They had two children. The minutes of settlement and divorce judgment gave the mother day-to-day care and control of the children, with specified access to the father. At the time of both the minutes of settlement and the divorce judgment, the father knew that he would be remarrying and had stated that there was a "definite possibility" that he and his new wife would have children. The father remarried in October 2006. In April 2007, when his new wife was expecting a child, the father applied to vary the divorce judgment to give the parties shared parenting of their children. The chambers judge found that the new wife's pregnancy was a material change in circumstances, stating that while parties may contemplate having children, the ability to do so must be considered a change. While he did not grant the father's application for shared custody, he did order increased access for the father. The mother appealed the finding that there had been a material change in circumstances.

Writing for the Court of Appeal, Justice Rowbotham allowed the appeal, finding that the chambers judge had erred in finding that there had been a material change in circumstances. Subsection 17(5) of the *Divorce Act* requires that a court be satisfied that there has been a change in the condition, means, needs, or other circumstances of the child before varying a court order. The test for variation, as set out by the Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, requires that there be a change in the condition, means, needs, or circumstances of the child and/or the ability of the parents to meet the needs of the child, which materially affects the child and was not foreseen or could not have been reasonably contemplated by the judge who made the initial order. In this case, Justice Rowbotham concluded the chambers judge erred in finding that the pregnancy of the husband's new wife was neither foreseen nor contemplated. The father had testified at the examination on his affidavit that he and his new wife discussed having children and that this was "definitely possible". The pregnancy was contemplated at the time of both the minutes of settlement and the divorce judgment, and the father's application was brought less than a year after the entry of the divorce judgment.

LEGISLATIVE UPDATE

The CANADIAN FAMILY LAW GUIDE has been updated to reflect the following legislative changes:

New Brunswick

S.N.B. 2007, c. 20, *An Act to Amend the Family Services Act*, formerly Bill 45, amending the *Family Services Act*, *An Act to Amend the Family Services Act, 1995*, and *An Act to Amend the Family Services Act, 1997*, came into force on February 1, 2008.

S.N.B. 2005, c. S.15-5, the *Support Enforcement Act*, formerly Bill 48, amending the *Family Services Act*, the *Interjurisdictional Support Orders Act*, the *Judicature Act*, and *An Act to Amend the Family Services Act, 1991*, came into force on February 11, 2008.

Newfoundland and Labrador

Bill 7, the *Personal Health and Information Act*, amending the *Child and Youth Advocate Act*, received first reading on March 19, 2008.

Ontario

Bill 33, *An Act to Amend the Children's Law Reform Act*, amending the *Children's Law Reform Act*, received first reading on March 17, 2008.

Bill 37, the *Child and Pornography Reporting Act, 2008*, amending the *Child and Family Services Act*, received first reading on March 18, 2008.

Northwest Territories

S.N.W.T. 2007, c. 5, *An Act to Amend the Child and Family Services Act*, formerly Bill 5, amending the *Child and Family Services Act*, came into force on January 1, 2008.

Nunavut

S.Nu. 2006, c. 18, the *Family Abuse Intervention Act*, formerly Bill 16, and Regulation 006-2008 under the *Family Abuse Intervention Act*, came into force on March 1, 2008.

Yukon

Bill 50, the *Child and Family Services Act*, amending the *Change of Name Act*, the *Children's Act*, the *Intercountry Adoption (Hague Convention) Act*, the *Interjurisdictional Support Orders Act*, and the *Family Property and Support Act*, received first reading on March 26, 2008.

Bill 51, the *International Child Abduction (Hague Convention) Act*, amending the *Children's Act*, received first reading on March 26, 2008.

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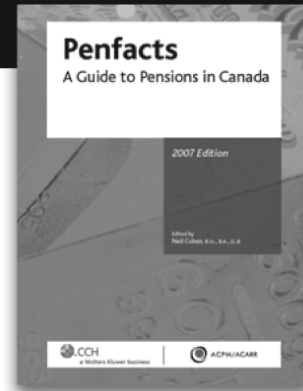
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