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COLLABORATIVE LAW: THE FUTURE CORNERSTONE OF THE RESOLUTION PROCESS?

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I. WHAT IS COLLABORATIVE LAW?

Collaborative law was developed originally in the United States,[1] and more recently has received significant support from Irish family law practitioners. In essence its ultimate aim is not particularly novel – it seeks to encourage and facilitate the resolution of family law disputes without recourse to the adversarial courts system.[2] Recent court-based research has confirmed the long-held view that it is the exception rather than the rule that a family law dispute will reach the courtroom.[3] What is different about the practice of collaborative law is that the resolution of the dispute becomes the primary, if not the sole aim, of both parties who sign up to an "agreement to agree" the details of the dissolution. Perhaps just as importantly, collaborative lawyers are parties to this non-adversarial approach to the dispute, and commit to relinquish their involvement in the case in the event that the parties eventually proceed to court hearing. In terms

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[1] The practice of collaborative law was first advocated in 1990 by Stuart Webb, a family lawyer from Minnesota.

[2] The collaborative law process is described by Tesler as consisting of "… two parties and their respective lawyers who sign a binding stipulation defining the scope and sole purpose of the lawyers' representation: to help the parties engage in creative problem-solving aimed at reaching a negotiated agreement that meets the legitimate needs of both parties": Tesler, *Collaborative Law* (American Bar Association, 2001), p. 7.

[3] See generally reports published by the Courts Service entitled *Family Law Matters*, setting out the research and analysis of Carol Coulter. For example, Coulter examined the settlement rates on the South-Western Circuit noting the variability of those rates but including a 96% settlement rate in Limerick Circuit Court cases. See (2007) 1(3) *Family Law Matters* 46, 46-47. In "Inside the Family Courts", *Irish Times*, 7 March 2009, Coulter noted that more than 90% of family law cases in the Circuit Court are settled without going to a full hearing.

of approach and effect, the practice of collaborative law sits somewhere in the middle of the family law dispute-resolution continuum, with mediation at one extreme end and court-based judicial adjudication at the other. Undoubtedly, the practice of collaborative law incorporates aspects of both approaches; in essence it can be regarded as the organised and focussed practice of dissolution-negotiation in the shadow of the law. This commentary seeks to identify the role of collaborative law within the context of family law dispute resolution, and in this regard will consider the related issues of state intervention in the family sphere, and the role and importance of the governing laws which serve as a backdrop to the collaborative law process.

II. PRIVATE ORDERING VERSUS STATE INTERVENTION

Family law is often viewed as a unique mix of public and private law: the autonomy of the individual members and the family unit as a whole existing within the confines of state supervision and regulation. Many developed states have traditionally rejected the categorisation of marriage as a contract that could be avoided or determined by agreement, on the basis that only the state can dictate the rights, duties, obligations, and requirements of marriage.

> When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligations of which rest, not upon their agreement, but upon the general law of the State … They are of law, not [of] contract.[4]

Irish lawmakers, both legislative and judicial, have long asserted the importance of the state's capacity to retain ultimate control over the resolution of family disputes. The genesis of this need for control is perhaps easily identified, given the state's particular and stated responsibilities towards the family as expressed in Article 41 of the Constitution. This constitutional

[4] Per Appleton C.J. in *Adams v. Palmer,* quoted by the US Supreme Court in *Maynard v. Hill* (1888) 125 U.S. 190, at 211. This case confirmed that marriage is more than a contract.

protection applies not only to the family as a unit but also to the individual members of the family.[5] Although this conflicts with the notion and practice of private contract law and the capacity of individuals to freely and voluntarily enter into a binding contract, such state involvement is permitted and even encouraged in family law, given the underlying and inescapable issues of public policy that arise.[6] The relevant public policy issues concerning the courts in the context of marital disputes range from the enforcement of spousal and parental obligations to the state's capacity to enforce maintenance obligations to avoid a spouse transferring her dependency from the husband to the state, thereby becoming a charge on the state. In particular, the Irish courts have regarded themselves as responsible for the protection of vulnerable family members, recognising the imbalance of power that might often exist within a family unit.[7]

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[5] In *Murray v. Ireland* [1985] I.R. 532 the High Court, per Costello J., drew a distinction between the collective rights of the family as an institution and the co-existing rights of individual members of the family, such rights being recognised and exercisable by virtue of the individual's membership of the family unit. A similar position was taken by Denham J. in *Sinnott v. Minister for Education* [2001] 2 I.R. 545, 662, and by Keane C.J. in his dissenting judgment in *North Western Health Board v. HW* [2001] 3 I.R. 622, at 687. However, the veracity of this position is far from certain. In *Murray* at 537-538, Costello J qualified the position by stating that individuals within the family unit do not enjoy rights under Article 41 which are separate to those guaranteed to the family unit. Similarly in *L v. L* [1992] 2 I.R. 77, 108, Finlay C.J. stated that Article 41does not grant rights to any individual member of the family against other members of the family, but rather serves to protect the family from external forces.

[6] For example in the context of a marital breakdown dispute in *The State (Bouzagou) v. Station Sergeant, Fitzgibbon Street Garda Station* [1985] I.R. 426, Barrington J. noted that in the absence of an agreement between the husband and wife, the task of reconciling the rights of the individual members of the family was a matter for the courts to determine.

[7] State intervention in the regulation of the family and the protection of the rights of the vulnerable is most evident where there is evidence of parental failure in respect of the needs of the children. The matter received the studied attention of the Supreme Court in *North Western Health Board v. HW* [2001] 3 I.R. 622, where the limits on the state's right to intervene in the right of parental autonomy were recognised. In the context of marital disputes, the courts can, and have exercised their discretionary powers to provide substantially for the homemaker spouse who was financially dependent during the course of the marriage.

Notwithstanding this overriding supervisory role of the state, there is now an indisputable right for spouses to exercise substantial control over the terms of the dissolution of their marriage. The capacity of married parties to negotiate and be bound by a separation agreement reflects the more traditional non-interventionist approach of developed states in the private sphere of the family, preferring to allow parties to self-regulate their roles and responsibilities. The Irish judiciary have shown a growing willingness to acknowledge the capacity of parties to resolve financial and custodial disputes amongst themselves, and have embraced the practice of allowing disputing spouses, with the aid of counsel and/or mediators, to reach an agreement. Separation agreements and *inter parte* consents drawn up in lieu of a full court hearing typically receive significant support from the Irish courts, and are made orders of the court in the form they are presented.[8] Spousal agreements arising from the practice of collaborative law fit neatly alongside the more traditional separation agreement, which is likely to be grounded in already-issued judicial separation proceedings. However, this permissive approach to private ordering is only true to a point, and the Irish state has historically retained a residual supervisory role in respect of the resolution of issues between married parties. Whilst there now undoubtedly exists an inter-spousal freedom to privately agree the order of both marriage and marital breakdown, such freedom is always subject to the statutory and common law rights and obligations of both spouses.[9]

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[8] As supported by the research work of Carol Coulter, *Family Law Matters*, published by the Courts Service. Coulter traced the operations of the Dublin Circuit Family Court for the month of October 2006, noting that of the 161 cases concluded in that month, only 16 went to a full hearing of the court: see (2007) 1(1) *Family Law Matters* 22, 22-23. Even more significantly, in a similar study of the practices of the Cork Circuit Family Court, an analysis of the 48 divorce and judicial separation applications listed for resolution in the two week family law session in October 2005, all 48 cases were settled, and none necessitated a court hearing: see (2007) 1(2) *Family Law Matters* 34, 34-35.

[9] An interesting and oft-cited example of the statutory limits upon the capacity to contract is the decision of *HD v. PD* (Supreme Court, unreported, 8 May 1978), where the husband sought to avoid his statutory obligation to provide for his spouse after the breakdown of the marriage. Walsh J. emphatically confirmed that it was not within the respondent's legal capacity "to contract

Both the amendment to Article 41.3.2 º of the Constitution of Ireland, and the Family Law (Divorce) Act, 1996, require the court to be satisfied that proper provision has been made for both spouses and any children prior to granting a decree of divorce. Thus, irrespective of the fact of a negotiated agreement between the parties, the court must satisfy itself as to the achievement of this legal prerequisite. Similarly the Family Law (Divorce) Act, 1996, s. 20(3), requires the court in considering the issue of ancillary relief "to have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force", meaning that the fact and content of the separation agreement must be considered by the court, but will not necessarily be given effect to. Whilst the courts have shown a growing willingness not to revisit the content of more recently drafted separation agreements,[10] they retain the right to do so where justice and the constitutional requirement of proper provision so require. Finally, as regard the courts' view of private ordering, the issue of the enforceability of pre-nuptial agreements under Irish law has recently been considered,[11] and it has been suggested that they do not offend against the protection afforded to the institution of marriage, and are enforceable and capable of variation under existing Irish law. So it can be surmised that, whilst Irish lawmakers have shown a favourable disposition towards measures that facilitate *inter parte* negotiation and settlement, they will not be bound to enforce such agreements without examining and approving their content and effect.

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out of the Act by an Agreement made after the Act came into force or by an agreement entered into before the legislation was enacted". The court held that under the Family Law (Maintenance of Spouses and Children) Act, 1976, s. 5, a maintenance order can be made by the courts if a spouse has failed to provide "such maintenance as is proper in the circumstances".

[10] See the very trenchant views expressed in *WA v. MA* [2005] 1 I.R. 1, where Hardiman J regarded it as appropriate to give "very significant weight" to the terms of the separation agreement between the parties, and ultimately refused to order any further financial relief in favour of the applicant wife.

[11] The then Minster for Justice Equality and Law Reform, Michael McDowell, appointed a Study Group to study and report on the operation of the law since the introduction of divorce in 1996, taking into account constitutional requirements. The Study Group published its report in April 2007. See http://www.justice.ie/en/JELR/PrenupRpt.pdf/Files/PrenupRpt.pdf.

III. Is Irish Family Law Sufficiently Clear To Facilitate a Collaborative Approach?

In light of the distinct nature of the marital relationship, the varying sacrifices and contributions of the parties to the union, and the often unavoidable notion and practice of dependence, financial or otherwise, most Western jurisdictions have enacted legislation permitting and even encouraging some level of state intervention regarding asset distribution on marital breakdown. Parties do not seek a settlement in a rights vacuum. Where divorcing spouses show a willingness to negotiate the terms of their settlement, it is entirely useful if their respective legal rights and obligations are identifiable.

The success of any arbitration-based approach to dispute resolution will be influenced by the governing regulatory provisions within which it operates, even where there is no intention or preference by either party for reliance upon the more adversarial resolution options. Negotiations that are concluded between spouses are likely to be conducted with one eye on the likely outcome should that matter be adjudicated in the court. The negotiated resolution of the dispute might more easily be agreed against that established legal background; it might be easier for both sides to come to an agreement when it can be paralleled with the likely outcome had the matter come before a court.

This point serves to highlight a weakness at present in Irish family law, in that it is regulated and determined by extensive judicial discretion. Such discretion is often exercised in the context of a policy vacuum, no more so than in divorce cases. In drafting the legislation the lawmakers have failed to enunciate clearly the end goal or objective of state regulation and ordering of marital dissolution. In particular, it remains unclear what purpose Irish law seeks to achieve in dividing marital assets. In the absence of such defined or identifiable policy objectives, it is difficult for courts to be consistent in their judgments, thereby depriving the system of the element of predictability that is a crucial backdrop to negotiated settlements.

IV. LEGISLATIVE APPROACH TO COLLABORATIVE LAW

The merits of an approach to dispute resolution which establishes the main players as active participants in the process is one which has been encouraged by the Irish legislature in recent family law statutes. Although not expressly advocating or invoking the use of pure collaborative law practices, there has been a very deliberate legislative shift away from reliance upon court hearings, and a greater emphasis upon creating the environment and structures to encourage agreement-based resolution. Both the Family Law Act, 1995, and the Family Law (Divorce) Act, 1996, require the applicant's solicitor to discuss the possibility of counselling and/or mediation with the client, prior to issuing the judicial separation proceedings.[12] In this regard, the solicitor is required to furnish the applicant with a list of practitioners who might facilitate such counselling or mediation. Where reconciliation or mediated agreement do not represent viable options for the parties, the legislature has further mandated the advising solicitor to inform the client as to the possibility of negotiating the terms of the agreement by way of separation agreement. Thus, prior to issuing proceedings and involving the court in the process, the proposed applicant must be fully informed of all non-adversarial options available to facilitate the more amicable resolution of the difficulties.[13] An almost identical approach in the context of proposed divorce proceedings was adopted by the legislature in the Family Law (Divorce) Act, 1996.[14] More recently, the Circuit Court Rules Committee has, with the concurrence of the Minister for Justice Equality and Law Reform, by way of statutory instrument,[15] amended the court rules to establish a practice of case management meetings which seek to narrow the issues in dispute, thereby facilitating the negotiation of a settlement and/or isolating any contentious

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[12] Family Law Act, 1995, s. 5.

[13] The same obligation rests with the solicitor representing the respondent, and such advices and information must be furnished to the respondent prior to the filing of a defence to the proceedings – Family Law Act, 1995, s. 6.

[14] Family Law (Divorce) Act, 1996, ss. 6-7.

[15] Circuit Court Rules (Case Progression in Family Law Proceedings) (S.I. No. 358 of 2008).

issues. The case management meeting requires the attendance of the parties and/or their representatives and in practice can allow and facilitate *inter parte* talks with a view to resolution.

In the neighbouring jurisdiction of England and Wales, the Family Law Association of lawyers, now interestingly renamed "Resolution", has placed a significant emphasis on the role of mediation and negotiated settlements,[16] and its ADR committee has noted the development by specialist solicitors of "round table conference" options to achieve a negotiated resolution, including "mediation, early neutral evaluation and collaborative law" practices.[17] There is also evidence of strong judicial support for the collaborative law process, with applications for consent orders being fast-tracked through the court process where they are based on a collaborative negotiated agreement. In *S v. P (Settlement by Collaborative Law Process)*[18] Coleridge J., the President of the Family Division, in respect of a non-marital settlement arising from a collaborative law agreement, permitted the application for approval to be dealt with in the "urgent without notice applications list", in order to allow the parties to avoid the lengthier standard consent order process. He did so with a view to establishing a structure which might incentivise couples to "knuckle down and negotiate an agreed conclusion".[19] In this regard he was of the view that "every conceivable encouragement should be given to parties to negotiate by this method".[20]

Very recently, the EU has echoed this preference for a conciliation-based approach to the resolution of marital disputes with the enactment of Directive 2008/52/EC: "the Mediation

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[16] It has been documented that since the arrival of the practice of collaborative law to England in 2003, Resolution has trained 1200 of its 5000 members as collaborative lawyers. See further the commentary of Daldorph and Todd, "ADR Professional: Encouragement for Collaborative Law" (2009) 39 *Family Law* 71.

[17] Thorpe L.J., "Statutory Arbitration in Ancillary Relief" (2008) 38 *Family Law* 26, 27.

[18] [2008] 2 F.L.R. 2040.

[19] [2008] 2 F.L.R. 2040, 2042.

[20] [2008] 2 F.L.R. 2040, 2042.

Directive".[21] Although the aim of the Directive is to encourage reliance upon mediation generally, it represents a clear EU legislative confirmation of the value and importance of *inter parte* collaboration in family law disputes. The emphasis in the Directive is on cross-border mediation, and states its aim as being:

> to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.[22]

The recitals to the Directive seek to highlight the advantages of negotiation-based approaches to dispute resolution; for example, Recital Six notes that mediation is a "cost-effective and quick extra-judicial" means of dealing with the resolution of disputes, "through processes tailored to the needs of the parties". Further, it states that agreements that arise from mediation are more likely to be complied with, and "are more likely to preserve an amicable and sustainable relationship between the parties". Whether collaborative law can be regarded as a form of mediation is a matter of debate. While those who prefer to mediate without the presence of representation regard the practice of collaborative law with an "anti-lawyer feeling",[23] Hodson is of the view that collaborative law should be explicitly incorporated within the definition of Alternative Dispute Resolution.[24] Further, mediation as defined by the Directive shares many of the traits of the practice of collaborative law; the Directive's definition of mediation refers to the "structured process … whereby two or more parties to a dispute attempt … on a voluntary basis, to reach

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[21] *Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters* [2008] O.J. L136/3.
[22] Article 1.
[23] Hodson, "The EU Mediation Directive: The European Encouragement to Family Law ADR", [2008] *International Family Law* 209.
[24] Hodson (previous note).

an agreement on the settlement of their dispute".[25] However, what separates collaborative law from the mediation envisaged by the Directive is the requirement that the structure involve one facilitator of negotiations, with the parties not typically represented at those negotiation meetings. It is arguable that in creating too narrow a concept of mediation, the EU has lost an opportunity for the promotion of a general conciliatory approach to dispute resolution, capable of taking a variety of forms. Nonetheless, the Directive has been welcomed as a "much needed, very timely" impetus from the EU that should be "seized … as an opportunity to improve greatly the practice and use of family mediation".[26]

V. CONCLUSION

The peculiarities of family law disputes, particularly those involving once married parties, can often give rise to post-resolution circumstances which demand that the disputing parties maintain contact. Irrespective of whether financial independence is secured for one or both parties at the time of the dissolution of the marriage, circumstances can demand a lack of actual clean break in the relationship. This is most likely to occur where there are children of the union, with the custody and access arrangements necessitating this long-lasting *inter parte* contact. Given the survival of ties between the now divorced spouses, any resolution approach that encourages and facilitates a non-confrontational attitude to settlement is worthy of promotion. The collaborative law approach to the resolution of the dissolution of the marriage and the agreement of arrangements into the future is arguably a better starting point than courtroom adjudication, and is more likely to encourage civilised relations. Irish courts have displayed a willingness to be led by the content

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[25] Article 3 defines mediation as "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a member state".

[26] Hodson, "The EU Mediation Directive: The European Encouragement to Family Law ADR", [2008] *International Family Law* 209.

of negotiated settlements, particularly where those agreements substantially achieve the nebulous aims of fairness and justice between the parties. The favourable treatment of separation agreements, divorce consent agreements and potentially even pre-nuptial agreements, signal a recognition of the important role of negotiated settlements in the context of marital dispute resolution. The process of collaborative law represents a further means by which the otherwise contentious area of marital breakdown might be more amicably resolved. The necessary structures and training programmes for the use and promotion of collaborative law practices have been established by a significant number of Irish family law practitioners. It remains to be seen whether the Irish public and courts system adopt a favourable view of this means of negotiation.